IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 23 OF 2015

Db Shapriya & Co. Ltd ..... **PLAINTIFF**

Versus

Gulf Concrete & Cement Products Co. Ltd ..... **DEFENDANT**

JUDGMENT

26/11/2018 & 12/02/2019

SEHEL, J.

The present judgment arose from a contract of sale for ready mix concrete (pre-mix concrete) grade 25Mpa for construction of the raft foundation/basement floor.

It is not in dispute that the plaintiff and the defendant entered into the agreement for the defendant to supply the plaintiff on 27th February, 2013 with a pre-mixed concrete of grade 35Mpa for the construction of lift shafts and columns, and grade 25Mpa to be supplied on the 9th March, 2013 and 10th March, 2013 for

construction of the raft foundation/basement floor for a total cost of Tshs. 148,079,200. It is also not in dispute that the defendant supplied to the plaintiff the said pre-mixed concrete. It is alleged by the plaintiff that the raft foundation was abandoned and another one was put on top of it. The reason advanced by the plaintiff for abandonment was due to defective concrete in that the defendant did not supply grade 25Mpa while the defendant argues that it was due to poor workmanship. Hence the present suit was filed by the plaintiff claiming for:

1. Payment of Tshs. 446,740,604/= being cost of materials, plant, labour, supervision and equipment charges, redesign/quality checking charges and miscellaneous expenses incurred by the plaintiff due to failed concrete supplied by the defendant to the plaintiff;

2. Interest at the commercial rate of 22% on item 1 above from March, 2013 until the date of the Judgment;

3. Interest at Court's rate of 12% on decretal sum from the date of Judgment until payment in full;

4. General damages;

5. Costs; and

6. Any other relief the Court may deem fit and just to grant.

And the defendant, by way of counter-claim, claims for:

1. Payment of Tanzania Shillings Sixty Million Seven Hundred and Twelve Thousands (Tshs. 60,712,000/=) being the balance payment for the premix concrete supplied to the defendant;

2. Payment of accrued interest at the rate of 31% on (1) above as from March, 2013 the date when the amount became due to the date of Judgment;

3. Interest at Court rate of 12% on the sum in (2) above from date of Judgment until payment in full;

4. Costs of the counter claim; and

5. Any other relief as the Court may deem fit and just to grant.

At the hearing of the suit, five issues were framed for the parties to prove. The issues framed are:

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 re-designing of the raft foundation was caused by either the poor quality of 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.

The plaintiff in trying to establish its case caused a total of five witnesses to appear for cross examination as required by rule 56 (1)

of the of the High Court (Commercial Division) Procedure Rules GN 250 of 2012 (hereinafter referred to as "the Rules"). The witnesses paraded by the plaintiff for cross examination are Sathish **Arvind Babu (PW1)** the Project Manager; **Jawazi Issa (PW2)** the Quality Control Engineer of the plaintiff working at Yara Site; **Amir Mpallanhasha Sheizah (PW3)** a Site Foreman of the Plaintiff; **Alfred Clemence (PW4)** Civil and Structural Engineer working with Norplan (T) Ltd; and **Dipak Kotak (PW5)** the Executive Director of the plaintiff.

The Plaintiff also in terms of rule 49 (2) of the Rules filed witness statement of **Michael Julius Semkiwa (PW6)** the employee of the University of Dar es Salaam. However, this witness failed to appear for cross examination as required by rule 56 (1) of the Rules. Rule 56 (2) of the Rules provides that where the witness fails to appear for cross examination and the Court is satisfied that there are exceptional reasons for his failure to appear, in terms of sub rule (3) the witness statement can be admitted with a lesser weight. Therefore, pursuant to sub rule 3 to rule 56 of the Rules the witness statement of **Michael Julius Semkiwa (PW6)** was admitted with a lesser weight.

The testimony of PW1 pursuant to his witness statement was essentially that he negotiated supply arrangement for pre-mix concrete from the defendant who gave them an offer by email dated 9th February, 2013 for supply of the concrete for foundation which was specified to be grade 25 and the defendant accepted to the supply. He said the first part of the foundation concrete 38m3 which is a deeper part portion was supplied and casted on 27th February, 2013 and the second and main part of the foundation concrete (459m3) was supplied and casted starting night of 9th March, 2014 and finished on 10th March, 2014. It was his testimony that all necessary sample cubes were prepared in accordance to standard procedures for both pours of concrete and sent to Yara Site Laboratory for testing. PW1 said the testing machine at Yara site was calibrated by Tanzania Bureau of Standards (TBS). It was his testimony that seven days test result for the first portion of the foundation concrete did not achieve the recommended strength and that the defendant was duly informed but the defendant replied that the concrete cube samples were not correctly made.

PW1 said results of main foundation concrete casted on 9th and 10th March, 2014 also did not meet the recommended strength at 15 and 28 days. He said 15 days result was 18N/mm2 as against the recommended strength of 22.5N/mm2 and the 28 days result was 13N/mm2 as against the recommended strength of above 25N/mm2. PW1 further testified that the 28 days result was 23N/mm2 against the recommended strength of above 25N/mm2. He said further tests conducted by various laboratories as instructed by the consultant, that is conducted by Dar es Salaam Institute of Technology (DIT) on 9th May, 2013 and University of Dar es Salaam (UDSM) on 22nd May, 2013 were submitted to Norplan for their analysis and recommendation and that Norplan submitted its report on 17th September, 201 where it recommended for corrective action. He said he submitted an estimate of Tshs. 446,740,604 to the management to execute the corrective actions. PW1 tendered and were admitted:

1. His temporary professional Certificate of Registration as Exhibit P1;

2. Certificates in the name of D.B. Shapriya and Company Limited as Class One contractors in Civil Works; Building Contractors; Mechanical Contractors; and Electrical Contractors as Exhibit P2;

3. Email dated 9th February, 2013 making an offer for the supply as Exhibit P3;

4. Certificate of calibration by TBS as Exhibit P4;

5. Email dated 13th March, 2013 together with Yara Site Laboratory results dated 13th March, 2013 as Exhibit P5;

6. An email dated 6th April, 2013 that forwarded the 28 days results on concrete cube comprehensive strength test report as Exhibit P6;

7. Various comprehensive Test results done by UDSM as Exhibit P7;

8. A final assessment report prepared by Norplan Exhibit P8;

9. Demand letter dated 29th November, 2013 Exhibit P9;

10. Structural Drawings dated July, 2014 Exhibit P10.

During his cross examination, he admitted that the plaintiff ordered two grades of concrete. The first concrete was 35 Mpa grade supplied on 27th February, 2013 for lift foundation that covered lift base only. The second concrete grade 25 Mpa was supplied on 9th and 10th March, 2013 for raft foundation. He also through cross examination tendered and admitted:

1. Revised Architectural Drawings dated January, 2014 Exhibit D1;

2. Architectural Drawings approved in 2009 Exhibit D2;

3. Engineering Structural Drawings approved in 2009 Exhibit D3.

PW2 said amongst his duties were to test the concrete cube samples collected from Yara Site and from Ansak project. It was his testimony that he received from Ansak site two cube samples of the concrete casted on 27th February, 2013 for seven days test and five cubes of the concrete casted on 10th March, 2013 for 15 and 28 days test. He said he tested the cubes by using a concrete cube crushing

machine of 1300kN capacity SL No. C020P103/AB/001 manufactured by Matest S.P.A Treviolo, Italy and calibrated by TBS on 1st February, 2013. It was his testimony that both test results failed the required standard.

In his cross examination, he clarified further that he used BS 1881in conducting his tests and that he took two cube samples while the British Standard requires for three cube samples. He also explained that the cubes were brought at the site by the supervisor from Ansak site.

PW3 in his witness statement stated that amongst his duties were to receive pre-mix concrete and direct where to be casted, instruct his masons who are well trained and experienced to cast concrete cubes for testing under his supervision, to make sure that all procedures of casting of concrete, compaction, and curing of concrete at site have been followed as well as procedures of making test cube and curing before sending for testing. It was the testimony of PW3 that the concrete sample cubes prepared in presence of the defendant's supervisor failed the test.

In his cross examination he clarified that the procedure they use in casting cubes for tests is in the ratio of 4, 4, 4 cubes whereby amongst the fours, two for seven (7) days and two for twenty eight (28) days tests. He said he was the supervisor of the raft foundation and staircases.

PW4 stated that as per his agreement with the plaintiff, he had to conduct comprehensive strength test at the rate of two sets of three samples per set for each day's pour or for every 100m3 of concrete poured or for every 200m2 of area for slabs or walls, whichever is greater. It was his testimony that testing for set one three samples were to be done at 7 days, test for set two of three samples was to be done at 28 days. He said on different dates between 28th March and 9th April, 2013 he received test results from the plaintiff for seven days and 28 days tests in which the results were not good. It was his opinion that as there could be several reasons for such failure including mishandling of cubes, PW4 ordered for more tests results to be carried out to verify the strength of concrete already in place. He said the proposed test was core testing on the

floor slab and rebound hammer test on column as it was difficult to take cores on columns. It was PW4's testimony that he personally witnessed rebound hammer test performed by NHBRA and core test done by the University of Dar es Salaam but he did not witness the core test results from Yara Laboratory & C-Labs and Dar es Salaam Institute of Technology.

PW4 further stated that since there were various sets of results from different laboratories, he had to refer to testing standards especially for core samples to see if each of the involved laboratories took, prepared and tested the samples according to standards which are British Standard codes (BS) namely; BS 6089; BS 12504; and BS 12390. He said the elements which are questionable are the raft foundation which was designed to be constructed using grade 25 concrete with compressive strength of 25N/mm2 and the basement columns and walls whose strength was supposed to be grade 35 with 35N/mm2.

PW4 after assessing the results, he observed that the concrete strength was lower than grade 25 with 25N/mm2 for raft slab and

grade 35, with 35N/mm2 for columns and walls. Following such observation, PW4 said he advised his client to demolish the elements or reduce the number of floors as per obtained strength. It was his testimony that since the client wanted the same number of floors then he advised re-construction of 950mm thick raft on top of the abandoned foundation. This witness tendered and were admitted:

1. British Standard BS 6089 Exhibit P11;

2. British Standard BS 12504-1 Exhibit P12;

3. British Standard BS 12390-1 Exhibit P13.

In his cross examination he said he is the one who designed the Ansak Project in 2013, that is, Exhibit P10 which was approved in 2009. When asked about Exhibit D3, he said he does not know it and it is not his drawings and that he has never seen it before. He explained that he used Exhibit D1 to change his structural drawings and he insisted that he has never changed the architectural drawings, he only changed the structural drawings.

The testimony of PW5 was as testified by PW1. Of particular importance on his testimony is that PW5 confirmed that their commercial contracts manager had a meeting with the defendant on 9th November, 2013 to reach amicable settlement on the issue of corrective measures. He said that as there was no response from the defendant another letter no. AK/CCM/SS/SC 2 dated 29th November, 2013 was issued to the defendant indicating an estimate cost of Tshs. 446,740,604/= for executing the corrective actions. He said that the defendant on 4th December, 2013 acknowledged receipt of their letters dated 25th and 29th November, 2013. He tendered and were admitted a letter dated 4th December, 2013 Exhibit P14; demand notice dated 12th December, 2013 exhibit P15; and letter dated 24th December, 2013 exhibit P16.

During cross examination he confirmed that he did made amendments to the project after the raft foundation failed. He said they had to do a redesign as the costs for demolition was too high. He said the redesign was done by Norplan.

The defendant's case speaking through **Ibrahim Khan (DW3)** raised a defense of negligence on part of the plaintiff's employees. DW3 accepted that the defendant manufactured the pre-mix concrete of grades 35Mpa and 25Mpa and supplied the same to the plaintiff. DW3 explained the process of manufacturing that the process uses special formula to prepare various grades of pre-mixed concrete and that the said process is approved by the Tanzania Bureau of Standards (TBS) as valid and reliable method of producing various grades or pre-mix concrete. It was also the testimony of DW3 that he voluntarily attended the plaintiff's site on 10th March, 2013 and observed that the concrete was being improperly handled and casted by the plaintiff's employees, without supervision from experienced construction foreman, engineer or quality control expert. DW3 explained that on 13th March, 2013 he sent an email to explain the way the casting of the cubes was performed was not proper.

DW3 acknowledged that he was notified by the plaintiff on the failed test results issued by Yara Laboratory & C-Lab but he said they

did not agree with the results. He said having not been satisfied with the results from Yara Laboratory & C-Lab, on 7th May, 2013 they invited DIT and National Housing and Building Research Agency (NHBRA) to conduct core cutting and re-bound tests. DW3 said both results passed as such they proved that the raft foundation and the class of concrete supplied did not have any problem. He said after the plaintiff received their results, on 14th March, 2013 they were invited in the meeting and were informed that all results are with their consultant who is responsible in the supervision of the project.

DW3 in his testimony complained that on 23rd and 24th May, 2013 the plaintiff invited UDSM to cut and test the core without involving them. It was his testimony that out of Tshs. 148,079,200 being total costs of pre-mix concrete supplied to the plaintiff, only Tshs. 87,376,200 was paid leaving a balance of Tshs. 60,712,000 unpaid. He said on several occasions, the defendant reminded the plaintiff but in vain. This witness tendered: an email dated 13th March, 2013 admitted as Exhibit D5; A demand notice dated 12th December, 2013 as Exhibit D6.

In his cross examination he insisted that the grade supplied matched the order because they use mixed machine specifically designed for that purpose and tested by TBS.

In defending the tests results done by the defendants, the defendant paraded **Charles James (DW1),** a test technician from Dar es Salaam Institute of Technology (DIT) who explained that he received instructions from the defendant to conduct core test of the raft foundation at the plaintiff's site. He said he went to the site together with his colleagues from DIT namely: Raphael Erasto, Jonas Matei, and Yasini Limia and took sample by cutting core concrete in the presence of a representative from Structural Engineer M/S Norplan and Mr. Frank Massawe plant operator from the defendant. He explained that the sample was taken to their laboratory and tested in the presence of all parties. He explained on how the test was conducted. He said the comprehensive strength of the core concrete put the strength of the core from the raft foundation at an average strength of 28.5Mpa which is more than the required

strength of 25Mpa. He said the tests results revealed that the raft foundation achieved the required strength of 25Mpa.

In his cross examination, he agreed that the consultant, Norplan has a final say in result testing because he was a consultant.

The defendant also caused **Moses M. Ruhomela**, Civil Engineer working with NHBRA as assistant research officer (DW2) to appear for cross examination. DW2 explained that he received instructions from the defendant to conduct quality assessment of existing building by non-destructive test particularly rebound hammer test of basement floor slabs, basement columns, and concrete for lift shaft at the plaintiff's site. He said he went to the site with other experts from NHBRA namely: Emmanuel Msilu and Frank J. Ngalama and took sample by carrying destructive test, particularly rebound hammer test by using the instrument known as digital concrete rebound hammer in the presence of two representatives from the defendant namely Ibrahim Khan (DW3), Frank F. Massawe and Eng. Fredrick from Norplan. He explained that the rebound tests done revealed that basement concrete floor slab:- range of concrete strength was

found to be 27-34N/mm2 and estimated concrete strength was found to be 30N/mm2; basement floor columns:- range of concrete strength was found to be 25-33N/mm2 and estimated concrete strength was found to be 30N/mm2;and concrete for lift walls:- range of concrete strength was found to be 15-32N/mm2 and estimated concrete strength was found to be 25N/mm2. In summary, DW2 said the results show that the columns are not strong enough to withstand the loadings from the buildings. He tendered the report from NHBRA as Exhibit D4.

DW2 when asked in cross examination as to whether he did testing on raft foundation, he replied that he did not do.

Having received the evidences from the plaintiff and defendant, the respective counsels owed duty to file final submissions to which they duly fulfilled. I will consider their submissions in my judgment.

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

The learned counsel for the plaintiff argued that by virtue of Section 15 of the Sales of Goods Act Cap. 214 the defendant was under obligation to supply the plaintiff with the goods ordered according to its description. Further in reliance to Section 120 of the Evidence Act, Cap. 6 the counsel contended that the defendant breached its fiduciary duty. He said the plaintiff having ordered the goods from the defendant on specific description then relied on the skills and capacity of the defendant as provided for under Section 16 (a) and (c) of the Sale of Goods Act, Cap. 214.

The counsel for the defendant, on his part, built his case upon the testimonies of DW3 and PW4. He contended that the testimony of DW3 on the accuracy of the process used by the defendant in manufacturing the pre-mix concrete and TBS's approval was never challenged by the plaintiff. The counsel reminded the court that DW3 witnessed the mishandling of concrete mix by the plaintiff's employees in casting the concrete. In arguing that the pre-mix of grade 25mpa has no problem, the learned counsel said DW3 testified that on 10th and 12th April, 2013 the plaintiff made additional

orders of the concrete for construction of retention walls and stairs at a time they had already received alleged test results indicating that 25Mpa was of poor quality.

As may be gleaned from the submissions of counsels it is clear that generally speaking both parties acknowledged that the plaintiff and the defendant entered into the agreement for the defendant to supply the plaintiff on 27th February, 2013 with a pre-mixed concrete of grade 35Mpa for the construction of lift shafts and columns, and grade 25Mpa to be supplied on the 9th March, 2013 and 10th March, 2013 for construction of the raft foundation/basement floor. The dispute between the parties relates to the latter grade of concrete pre-mix ordered for specific works that is for construction of raft foundation/basement. The dispute does not involve the materials for building lift shafts, or stairs, or walls and/or columns as the learned counsel for the defendant is trying to suggest that the concrete had no problem because there was an additional orders for construction of retention walls and stairs. The plaintiff complaint is limited to premix concrete for construction of

raft foundation/basement and not walls and/or stairs. The plaintiff is complaining that the premix supplied did not correspond to the description.

The law regarding a contract of sale by description as provided under Section 15 of the Sale of Goods Act, Cap. 214 reads:-

> *S.15 "Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description; and if the sale is by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description"*

Consequently, in a sale by description, there is an implied term of the contract that the goods should correspond with the description. The principle of this was as stated in **Myers Vs Brent Cross Service Co.** [1933] ALL ER at pp 13 where Du Parcq, J said:

> *"....a person contracting to do work and supply materials warrants that the materials which he uses will be of good*

quality and reasonably fit for the purpose for which he is using them, unless the circumstances of the contract are such as to exclude any such warranty."

Though the requirement that goods should correspond with their description is treated strictly but it should be kept in mind that not every statement about the goods amounts to the description of them within the ambit of Section 15. For instance in **Reardon Smith Line Ltd Vs Hansen-Tangen** [1929] 1 WLR 989 where a charter party described the ship to be chartered as **"called Yard no. 354 at Osaka"**, Osaka being the name of the yard responsible for building it; but in fact the building was subcontracted to another yard, Oshima, because the Osaka yard could not handle a size of the tank-ship ordered. It was held that the words were merely labeling the vessel and they did not form part of the description.

Furthermore, if a buyer tells the seller that he requires goods for a particular purpose, then the seller, unless he expressly guarded himself, is taken to have accepted the responsibility by making sure that the goods to be supplied answer the description and fit for that

particular purpose. **Section 16(a) & (c) of the Sale of Goods Act, Cap 214** provides:-

S. 16. Subject to the provisions of this Act and any other written law in that behalf, there is no implied conditions as to the quantity or fitness for any particular purpose of goods supplied under a contract of sale, except as follows –

(a) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill of judgment and the goods are of description which it is in the course of the seller's business to supply (whether he is manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose...;

(b) ...

(c) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade;

(d) ...

Applying the above position of the law to matter at hand, it is not disputed by the defendant and it was testified by PW1and DW3 that the defendant was instructed to supply a particular pre-mix concrete for a particular purpose that is to supply 25Mpa concrete for construction of the raft foundation/basement floor. It was also testified by PW3 that the defendant supplied the pre-mix concrete on the dates ordered but it is the case for the plaintiff through the testimony of PW2 that the concrete after being casted failed the required standard. The testimony of PW2 is supported by the testimony of PW4 who conducted analysis on various tests and came to conclusion that the strength of the supplied concrete was below grade 25Mpa. The testimony of DW2 also supports the plaintiff's case. DW2 stated that the range of the strength for basement concrete floor was found to be 27-34N/mm2 and not 25

as ordered by the plaintiff. From these facts, it is deduced that the concrete supplied did not conform to its description. The issue as to whether the concrete was fit for its purpose will be considered when dealing with issue number four. As such issue number one is partly answered in the affirmative in that the concrete mix supplied by the defendant was contrary to the 25 Mpa grade as agreed in the contract for supply between the parties. This issue takes me now to issue number two.

Issue number two reads: **whether the raft foundation was indeed abandoned and re-designed**.

The learned counsel for the plaintiff argued that the evidence tendered especially through the testimonies of **PW1**, **PW4** & **PW5** proves that the raft foundation was abandoned and had to be redesigned due to poor quality of the supplied concrete mix. The counsel further exhibited that even the defendant does not dispute that the raft foundation was abandoned and said no evidence was brought to counter the argument that there was a redesigning of the building.

The learned counsel for the defendant combined issues number two with issue number three and in essence his submissions based largely on the Architectural Drawings of 2008 (Exhibit D2); Revised Architectural Drawings of 2014 (Exhibit D1); and (Engineering / Structural Drawings of 2009 (Exhibit D3) by arguing that the resign was done long before the report issued by PW3 for redesign was prepared and submitted to the plaintiff. The learned counsel further tried to discredit Exhibit P8 on the grounds that it was prepared by the consultant who was engaged and paid by the plaintiff and that the said report was prepared and issued after the abandonment was done as revealed by the drawings. He did not advert himself on the issue of whether or not there was any abandonment.

Be as it may, going by the pleadings and through the testimony of PW1 who tendered Exhibit P8, there is clear evidence that the raft foundation was abandoned. Further PW4 who conducted analysis on four test results said the analysis revealed that the concrete did not achieve the intended strength to be able to carry the load and therefore the client was advised to demolish the elements or reduce

the number of floors but the client insisted. PW4 therefore advised the client to reconstruct 950mm thick raft on top of the abandoned foundation. Also the witness for the defendant, DW2 said the results of the tests conducted by NHBRA show that the columns are not strong enough to withstand the loadings from the buildings. With these clear testimonies coming from both the plaintiff and defendant it is evident that the raft foundation was abandoned. The next question is what the reason for its removal was. I have to land to issue number three.

Issue number three: If the answer in issue (2) is in the affirmative, then **whether the abandonment and re-designing of the raft foundation was caused by either the poor quality of the supplied concrete or the poor workmanship of the columns and lift walls before demolition**.

The reason for abandonment as contended by the counsel for the plaintiff was due to poor quality of supplied concrete while the counsel for the defendant argued that it was not due to alleged

poor quality of concrete mix. The plaintiff's submissions on this issue have drawn strength from Exhibit P8 and testimony of PW4.

The defendant in disputing the issue of poor quality, tried to associate the reason for abandonment with drawings of the building that the abandonment was done long before the defendant supplied the concrete pre-mix. With due respect to the counsel's submissions, the defendant in its pleadings raised no issue regarding drawings. All it complained was about contractor's negligence due to poor workmanship on casting and compaction of the columns for basement and lift walls. Submissions made by the counsels are not evidence. This was so held in the case of **Registered Trustees of the Archdiocese of Dar es Salaam Vs the Chairman Bunju Village Government and 11 Others**, Civil Appeal No. 147 of 2006 (Unreported) Court of Appeal of Tanzanian:

> *".....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."

I thus disregard the submissions on the drawings made from the bar which are not based or backed by pleadings and evidence.

The learned advocate for the defendant also discredited Exhibit P8 by arguing that it was biased as it was prepared by the person who was employed and paid by the plaintiff. I do not subscribe to such an intelligent argument concerning ExhibitP8 and the testimony of PW4. Though I agree that Norplan prepared Exhibit P8 and that Norplan was the project Engineer/ Consultant but in construction industry there are three separate parties, namely: the employer or project owner who engages both the contractor to construct the project and the consultant to supervise the contractor and advise the employer.

Norplan in the matter at hand was working as a consultant to the project. He was an expert. Its obligation was to advise the employer. In the course of its duties as testified by PW4 the consultant had to conduct "at the rate of two (2) sets of three (3)

samples per set for each day's pour or for every 100m3 of concrete poured or for every 200m2 of area for slabs or walls. Also testing for set one (1) three samples were to be done at seven (7) days, test for set two (2) of three (3) samples was to be done at 28 days." PW4 further said the test results conducted on 28th March, and 19th April, 2013 were found to be not good, he therefore ordered for more tests to be conducted. He said upon receipt of various test results, analysis was conducted and it was found that the concrete strength was lower than grade 25 with 25N/mm2 for raft slab and grade 35, with 35N/mm2 for columns and walls as exhibited by Exhibit P8.

It follows then that what the Consultant did was exactly what it was contracted to do. Norplan had no interest to serve to the matter at hand. Norplan was doing its work of supervising the plaintiff on behalf of the project owner. Therefore it is wrong to argue that Norplan was bias. Having stated so let me come back to the issue of reason for abandonment. From the evidences it seems that the reason for abandonment was due to the advice given by the Consultant as shown under Exhibit P8.

Exhibit P8 is a final assessment report issued by Norplan, an expert in the construction works. The report analyzed various test results submitted to Norplan. Therefore, in order to fully appreciate the correctness of the report, I have to turn to issue number four.

Whether the various tests conducted on the quality of cube, raft core, columns and lift walls were/are reliable

The learned counsel for the plaintiff in convincing the court that the tests are reliable, argued that the report by Norplan (Exhibit P8) was prepared based on international standards called BS 6089, BS 12504 and BS 132390 and that even the tests conducted by the defendant failed. He further said the report issued by PW4 combined all the tests results done by the parties including the ones done by the defendant. Therefore to him the plaintiff has discharged its duty as required by Section 110 of the Evidence Act, Cap.6.

The learned counsel for the defendant attacked the results conducted by the plaintiff by arguing that the tests were conducted

without involving the defendant while the best industry practice as per BS 6089 requires all parties to be present. He therefore concluded that Exhibit P5 on cube tests done by Yara Laboratory & C-Lab; and exhibit P7 on core tests done by UDSM are biased as such unreliable.

Part of the discussion on this issue was covered under issue number two and three. However, suffice to state here that there were various results derived from the tests conducted by Yara Laboratory & C-Lab; DIT; NBHRA; and UDSM. DIT and NBHRA tests were commissioned by the defendant while the tests conducted by UDSM and Yara Laboratory & C Lab were commissioned by the plaintiff.

The tests conducted by the plaintiff are the ones which the defendant complained that they were done in absence of the defendant thus not reliable. I have scrutinized Exhibit P5 and noted that it is only signed by the representative from the plaintiff. Neither the consultant nor the defendant signed Exhibit P5. As correctly submitted by the

counsel for the defendant, the Clause 4.2 of the British Standards (BS 6089) which the plaintiff said it used in assessing the results stipulates:

> "***Acceptance of test data:*** *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."*

From the above standard, it is "**desirable**" to involve all parties in the process of taking tests for data analysis. The reason behind this requirement is to obviate subsequent hassle over the interpretation of the core test results as it has happened in the matter at hand. I will therefore disregard the test results conducted by Yara Laboratory & C-Lab because it did not involve all parties and in any event it was not considered by PW4 in his report (Exhibit P8).

Regarding Exhibit P7, it is the testimony of PW4 that he had to order for further tests to be carried out on the concrete after observing that the results from Yara Laboratory & C- Lab were not

good. This witness said he personally witnessed the core test done by UDSM and NBHRA. His testimony is also supported by DW3 who said that on 23rd and 24th May, 2013 the plaintiff invited UDSM to cut and test the core.

Upon receipt of the results, PW4 made a thorough analysis on test results obtained from UDSM and NBHRA by using British Standards codes BS 6089(Exhibit P11), BS 12504 (Exhibit P12) and BS 132390 (Exhibit P13) and made its conclusion. His conclusions as per Exhibit P8 were:

"a) The concrete strength obtained for the raft is low and cannot be used for the foundation of the building. It should therefore not be considered in the analysis;

b) Analysis made on the structure sitting on this foundation confirm that we need to have raft of 950mm deep reinforced with 25mm diameter bars spaced at 150mm top and bottom. The concrete shall be again grade 25 with 25N/mm2 strength at 28 days. The remaining portion of raft slab to be casted and

reinforced as it was in the original design so that the slab bellow the new slab will be of the same stiffness throughout.

c) The existing column reinforcement should be maintained to take advantage of the connection to the existing foundation for the improved stability.

d) An additional shear requirement on the interface of the two foundations is being assessed to see if they are needed."

It is pertinent to emphasize here that PW4 was a consultant of the project whose duty was to supervise the contractor, (the plaintiff) and advice his 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. In the criminal case of **Hilda Abel V Republic** [1983] T.L.R 246 whose principle can as well be applied in this matter, it was held that courts are not bound to accept medical expert's evidence if there are good reasons for not doing so. I do not see good reasons for not accepting the expertise opinion of PW4. I say so because after I have gone through Exhibit P8. I note that PW4 has

candidly analyzed the test results by using the approved British standards Codes of BS 6089, BS 12504 and BS 132390. Consequently, I fully rely upon ~~of~~ the report issued by PW4 that the test results of UDSM and DIT that showed the concrete strength for raft is low are reliable. In the event, issue number four is answered in the affirmative.

Finally is the issue on relief. I have held herein that the plaintiff abandoned the basement floor due to poor concrete strength supplied by the defendant, therefore judgment is hereby entered in favour of the plaintiff and it is hereby decreed as follows:

1. The defendant shall immediately pay the plaintiff Tshs. 446,740,604/= being cost of materials, plant, labour, supervision and equipment charges, redesign/quality checking charges and miscellaneous expenses incurred by the plaintiff due to failed concrete supplied by the defendant.

2. The defendant shall pay the plaintiff interest at the commercial rate prevailing in 2013 per annum on Tshs.

446,740,604/= from March, 2013 until the date of the Judgment;

3. The defendant shall pay the plaintiff interest at Court's rate of 7% per annum on decretal sum from the date of Judgment until payment in full; and

4. The defendant shall pay the plaintiff costs of the suit.

For avoidance of doubt the prayer for general damages is declined since interest awarded suffice to cover the loss suffered by the plaintiff. Consequently counter claim is dismissed.

It is so ordered.

DATED at Dar es Salaam this 12th day of February, 2019.

B.M.A Sehel

JUDGE