IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 117 OF 2015

JV TANGERM CONSTRUCTION CO. LTD &
TECHNOCOMBINE CONSTRUCTION LTD
(A JOINT VENTURE).....PLAINTIFF

VERSUS

TANZANIA PORTS AUTHORITY.....1st DEFENDANT
ATTORNEY GENERAL.....2nd DEFENDANT

JUDGMENT

4th April, & 4th July, 2022

ISMAIL, J;

These proceedings have been instituted by a Joint Venture constituted by two construction companies, namely: JV Tangerm Construction Co. Ltd & Technocombine Construction Ltd., (herein the Plaintiff). The defendants are the Tanzania Ports Authority and the Attorney General (1st and 2nd Defendants, respectively). At the heart of this *litis contestatio* is the allegation, by the plaintiff, that the 1st defendant has reneged on its undertaking in contracts for design and construction of container stacking yards in Dar es Salaam and Tanga Ports.

Deducing from the hefty pleadings, the plaintiff was the winner of two tenders which were floated for design and execution of container staking yards in Tanga and Dar es Salaam. The first contract was executed on 09th day of September, 2009, between the parties, and it was for design and construction of container stacking Yard at Zambia Yard, Tanga Port (herein "the First Contract"). The consideration for this contractual undertaking was TZS. 3,723,634,289.74, inclusive of Value Added Tax (VAT). The agreed project duration was 9 months. The record indicates that, on 21st September, 2011, the said contract was varied to incorporate some technological changes in construction methodology and execution of works. The change saw a shift from consoled, agreed earlier on, to lean concrete base. This attracted a cost escalation of TZS. 836, 122,328.30, thereby bringing the total cost to TZS. 4,710,258,637.37, exclusive of VAT.

On 10th December, 2009, the plaintiff and the 1st defendant entered into a second contract. This was for design and construction of the container stacking yards at Dar es Salaam Port (herein "the Second Contract"). The contract touched on twin projects which bore a combined contract price of TZS. 7,709,625, 310. 34, inclusive of VAT. One limb of the project was Ex-AMI Yard which carried 61% of the contract sum; while the second was an Ex-Copper Yard the constituted 39% of the total

project. This project was assigned a time frame of nine (9) months. Like its sister project, this too was subjected to some variations that were intended to factor in technological changes. The changes were introduced through an Addendum signed in July, 2011. Change of design shot the cost of the project to TZS. 9,094,937,747.20, exclusive VAT.

It has been alleged by the plaintiff that before executing its contractual obligations, it submitted to the 1st defendant Performance Bonds, followed by mobilization of machinery, plant & equipment, and labour, requisite for executing their duties in all sites. On the other hand, the 1st defendant is said to have issued advance payments to the plaintiff for both agreements, at 100% against the performance bonds issued by the plaintiff.

The plaintiff's further contention is that both of the contractual obligations were substantially executed. In the case of the Tanga Port (First Contract), works were fully executed and handed over to the 1st defendant. With regards to the second contract, the contention by the plaintiff is that only part of the entire project site was handed *i.e.* Ex-AMI Yard, whilst the Ex-Copper Yard was not handed over by the 1st defendant. In the plaintiff's reckoning, the Dar es Salaam Port Agreement's execution success was 61% only. The plaintiff's further contention is that the decision not to handover the project came at a time

when mobilization for the project had factored in the Ex-Copper Yard and, as a result, the plaintiff incurred losses arising out of the costs of mobilization and idleness of the mobilized resources.

In general, the plaintiff imputes breach of contract, allegedly manifesting itself in several forms.

One, in respect of both contracts, that the 1st defendant unilaterally changed the design and construction methodology in the Construction Agreements from Consolid to Lean Concrete, despite the fact that the plaintiffs bid offered a specific methodology whose design and construction methodology was accepted by the defendant.

Two, in respect of the second contract (Dar es salaam Port agreement), the allegation is that the defendant effected partial handing over of the project sites, leaving out 39% (Ex- Copper Yard) of the project. This was done while mobilization, done by the plaintiff, was in relation to the entirety of the project.

Three, in respect of the second contract, that there was a denial by the 1st defendant to handover Ex-Copper Yard. The plaintiff alleges that the denial caused a prolonged suspension of works such that it was impossible for the plaintiff to continue with execution of the project. To mitigate escalation of costs in the project, the plaintiff allegedly issued a Notice of Termination of the Dar es Salaam Port Agreement. The decision

to sever the contractual relationship took more than a year for the 1st defendant to reply to the plaintiff on the subject. The 1st defendant's procrastination in responding to the plaintiff's intention allegedly inflicted loss on the plaintiff as termination would only take effect upon response by the 1st respondent.

Four, in respect of the second contract, the 1st defendant allegedly delayed a takeover of the completed portion of the Ex -AMI site for more than 5 months.

Five, in respect of both contracts, the 1st defendant is alleged to have delayed payment of most of the certified amounts in the Construction Agreements.

Six, in respect of both contracts, the 1st defendant, in a dual contractual role as the Project Manager and Client, allegedly refused and ignored to settle Final Accounts Claim in respect of the Construction Agreements. As a result of the alleged delay, the plaintiff was unable to completely dis-engage from the 1st defendant by refusing to allow payment of outstanding sums and demobilization.

The plaintiff's further complaint is that, on account of the instances of the breach, the 1st defendant acted negligently in the performance of the contract. Delays in approving change of technology from Consolid to Lean Concrete and execution of the addendum for more than two years

have been cited as some of such instances. The plaintiff contended that these delays came even as the plaintiff sent several warning letters and notices, warning of undesirable consequences of the decried delays. Negligence is also imputed from the 1st defendant's deafening silence after learning of the existence of the notice of termination of the Dar es Salaam Port Agreement.

In consequence of all this, a claim of special damages has been lodged, to the tune of TZS. 10,621,540,800.00, exclusive of VAT, while TZS.815,183,460.00, exclusive of VAT, is a claim constituting damages, allegedly arising from idle time for plant & equipment and labour which were mobilized for Ex-Copper site.

There is a further claim of TZS. 12,909,120,000.00 VAT exclusive and TZS. 794,682,000.00 VAT exclusive being costs for idle time for plant & equipment and labour respectively at 100% after completion of Ex- AMI yard up to the date of termination of Dar es Salaam Port. Another sum of TZS. 241,479,819.00 allegedly arises from office overheads incurred during the prolonged suspension period in the Dar es Salaam Project, while TZS. 18,414,428,905.87 is said to have been guzzled from the time the variations were issued to the time of approval and actual implementation of the Dar es Salaam Port project. Lastly, the plaintiff claims the sum amounting to TZS. 850,065,304.47. The contention is that

this sum constitutes a loss of profit from works in respect of Ex- Copper Yard.

Overall, the complete list of remedies sought against the defendants is as follows:

(i) Declaration that the 1st Defendant breached the Construction Agreements entered between itself and the Plaintiff for construction of Container Stacking Yards at Dar es salaam and Tanga Ports executed on 10th December 2009 and 9th September 2009, respectively.

(ii) Payment of TZS. 45,283,366,725.23 (VAT excl) as an outstanding payment for measured works executed with variations.

(iii)Payment of TZS. 22,094,643,816.84 (VAT excl) as financial charges (interests) on the outstanding amounts as per Dar es Salaam Port agreement from 26th October, 2013 to 10th August, 2015.

(iv) Payment of TZS. 10, 502,536,208.71 (VAT excl) as pleaded in paragraph 5 of plaint reflected in the correspondences made between the parties of 4th August 2009 (a letter by the 1st defendant) and that of 6th August 2009 (a reply thereof by the plaintiff). Under paragraph 3, the amount is described as an outstanding payment for measured works executed with variations.

(v) Payment of TZS. 11,303,408,924.84 (VAT excl) as financial charges (interests) as per the Tanga Port Agreement from 9th March,

2011 to 10th August, 2015.

(vi) Payment of TZS. 838,713,750 (VAT excl) as expenses incurred during mobilization in erecting and holding the plaintiff's plant, equipment and machinery at Dar es salaam Port in anticipation of recovering the same from the main project.

(vii) Payment of interest on amounts in (i), (ii), (iii), (iv), (v) and (vi) at Commercial Bank rate from 11th August 2015 to the date of Judgment of the Honourable Court.

(viii) Payment of interest on the decretal sum at the court rate from the date of Judgment to full payment by the Defendant.

(ix) Payment of general damages as may be assessed by the Honourable Court.

(x) Costs of this suit.

(xi) *Any other order(s) and reliefs) may this Honorable Court deem it and just to grant.*

The plaintiff's claims are ferociously disputed by the defendants. Considering these claims wild and unsupportable, the defendants put the plaintiff to strict proof of the allegations of negligence; breach of contract; delays in issuing approvals; delays in effecting payments allegedly due to the plaintiff; and all resultant losses, costs and other associated claims.

As they denied any wrong doing in respect of the allegations levelled by the plaintiff, the defendants conceded that there were variations of the original contracts. However, the defendants contend that, what is considered to be mutually accepted variations were proposed through prior notices, meaning that the plaintiff was kept abreast of the proposed changes.

With respect to mobilization, the argument by the defendants is that such mobilization would be considered to be necessary and meriting if they were in respect of the sites that the 1st defendant had given access to, namely; Ex-Zambia Yard at Tanga Port and Ex-AMI Site at Dar es Salaam Port. The defendants further contended that, if mobilization was done in respect of Ex-Copper Yard, which is denied, then that was done at the plaintiff's peril and without any bearing on what the 1st defendant agreed with the plaintiff.

On why the Ex-Copper Yard was not handed over to the plaintiff, the defendants' argument is that a prior notice was given on why access was not possible at the time, and that alternative arrangements were put in place with the plaintiff's nod. Regarding the notice of termination of contract, the defendants were adamant that issuance of the notice conformed to the requirements of the contract, and that the plaintiff was

given an opportunity to institute follow-up measures that included exhausting available remedies.

Regarding refusal or failure to settle claims arising from the final account, the defendants' position is that all justifiable claims due to the plaintiff were settled. Subsequent thereto, the defendants contended, the plaintiff has been required to de-mobilize its equipment, machinery and plants but to no avail.

In view of the foregoing, the defendants considered the prayers speculative, frivolous, and vexatious, and an abuse of court process. They prayed that the same be dismissed in entirety with costs.

Hearing of the trial proceedings pitted Messrs Messrs Michael Ngalo and Semi Malimi, learned advocates both of whose services were enlisted by the plaintiff, against a team of State Counsel, led by Mr. Gabriel Malata (Solicitor General), Ms. Leticia Mutaki, and Ms. Koku Kazaura, all learned Principal State Attorneys. They were assisted by Mr. Benson Hosea, Esther Matulie, Mwantumu Sele and Felix Chakila, learned Senior State Attorneys. These learned Attorneys ably represented the defendants.

Three witnesses, namely: Messrs Perez Solomon Jacob (PW1), Wilbard Kassian (PW2) and Harold Anange Nahumu (PW3), testified in support of the plaintiffs' case. In the course of their testimony, PW1 and PW2 tendered a total of 112 Exhibits. On the other hand, Abdallah

Othman Mwinyi (DW1) featured as the defendants' sole witness. Only one exhibit was tendered and admitted in the course of the defence hearing. This is primarily because the rest of the documents they intended to tender had already been tendered by the plaintiff's witnesses. All of those testimonies were admitted by the Court.

Significantly, the witnesses' testimony was preceded by the filing of the witness statements consistent with the provisions of rule 48 (2) of the High Court (Commercial Division) Procedure Rules, 2012, GN. No. 250 of 2012. These statements constituted the witnesses' testimony in chief.

At the commencement of the proceedings issues were drawn to guide the conduct of the proceedings. These issues were drawn separately for each of the two contracts *i.e.* Tanga Port Agreement (First Contract); and Dar es Salaam Port Project. The drawn issues are:

A. Tanga Port Agreement (the First Contract)

(1) Whether the Joint Venture between TANGERM Construction and TECNO Combine Limited was/is duly in existence;

(2) Whether the 1st Defendant breached the Agreement as alleged;

(3) Whether the 1st defendant effected variations to the Agreement as alleged;

(4) Whether the 1st defendant paid the plaintiff all the claims legally entitled;

(5) Whether the plaintiff suffered damages as alleged; and

(6) To what reliefs are parties entitled.

B. Dar es Salaam Port Agreement (the Second Contract)

(1) Whether the 1st defendant breached the agreement as alleged;

(2) Whether the 1st defendant effected variations to the agreement as alleged;

(3) If the above issue is answered in the affirmative, to what extent such variations were affected and if the plaintiff consented to it;

(4) Whether the plaintiff mobilized equipment/machinery and labour in respect of Ex -copper site;

(5) Whether the plaintiff's equipment/machinery and labour remained idle as alleged;

(6) If the above issue is answered affirmative, whether the plaintiff is entitled to compensation thereof;

(7) Whether there was termination of the agreement by the plaintiff.

(8) Whether the Joint Venture between TANGERM Construction and TECNO Combine Limited was/is duly in existence;

(9) If the above issue is answered in affirmative, when termination took effect;

(10) Whether the defendant paid all the plaintiff's claims;

(11) Whether the plaintiff suffered damages as alleged;

(12) Whether the plaintiff is entitled to recover Tshs. 838, 713,750.00 for alleged reclamation/upgrading of piece of land; and

(13) What reliefs are parties entitled.

These issues will be disposed of in the sequence they are drawn and consistent with the chronology adopted by counsel. Whenever necessary, there will be a combination of issues from two contracts, provided that they touch on the same area of divergence by the parties.

The 1st and 8th issues are intended to resolve the legal status of the plaintiff and its capacity to contract, and the question is ***Whether the Joint Venture between TANGERM Construction and TECNO Combine Limited was/is duly in existence.***

The contention by the defendants, as bravely posited by Mr. Changá, is that, under Exhibit P3 and P5, the two companies that formed the Joint Venture (plaintiff) had not intended that they should create a legal personality. His reasoning was that, Clause 8.1 of Exhibit P5, clearly pointed to that fact. In his fortified view, the plaintiff is a non-existent formation which carries no status that would give it some power to enter into a contract and sue on it. It follows, in his view, that there is no case capable of being adjudicated upon. To bolster his argument, he cited the case of ***Simon Kichere Chacha v. Aveline M. Kilawe,*** CAT-Civil Appeal No. 160 of 2018 (TZCA) and ***Unilever Tanzania Ltd vs. Benedict***

Mkasa t/a Bema Enterprises, CAT-Civil Appeal No. 41 of 2009 (TZCA) (All unreported), in both of which the Court of Appeal of Tanzania held that parties are bound by the agreements they freely enter into. Learned counsel contended that, in terms of section 11(2) of the Law of Contract Act, Cap 345 R.E 2019, the plaintiff lacks *locus standi* to institute the case. This is in view of the fact that the agreement on which the suit is founded on a contract executed by a person who is not competent to contract.

The contention by the defendants is starkly contested by the plaintiff's position, which is to the effect that existence of the joint venture is legal, pursuant to Exhibit P1. Learned counsel for the plaintiff took the view that, upon registration of the joint venture agreement on 15th February, 2008, consistent with sections 6, 7 and 8 of the Business Names (Registration) Act, Cap. 213 R.E. 2019, the parties became an entity. This registration is subsisting and valid until and unless it is de-registered in terms of section 20 (1) of Cap. 213. The plaintiff's advocate fortified his argument by invoking exhibit P2, through which the plaintiff registered as a taxpayer, another confirmation that the plaintiff was a duly constituted party. The learned counsel went on to submit that, the plaintiff's joint venture, whose sole purpose of its formation was to undertake construction work, was duly registered and accredited by the Contractors' Registration Board (CRB) on 3rd September, 2009, as evidenced by Exhibit

P26. It was further contended that by virtue of clause 3 of the Joint Venture (Exhibit P5 collectively), dissolution of the entity would come upon completion of the project and receipt of all proceeds of the project; or upon issuance of a court order at the unanimous instance of the parties.

I have scrupulously reviewed the contending arguments in respect of these twin issues. What comes as an amazement to me is the way counsel have broken a sweat for what I consider to be straight forward issue. This is essentially so because this argument surfaced as a preliminary point of objection which was settled in the plaintiff's favour. The Court took the view that this was not a valid point which would settle the contest in the defendants' favour.

But even if the said argument had not been overruled by the Court, the question is whether this is a valid point that would determine the fate of the instant proceedings. My unflustered answer to this question is in the negative, and here is my piece of mind on the matter. ***One***, nowhere in the law – neither in the law of contract nor in any other piece of legislation - has it been provided, and the defendants have not cited any authority, to substantiate the contention that a party to the contract must necessarily be a body corporate duly registered, and holding a certificate of incorporation.

Two, the process that picked the plaintiff as the best evaluated bidder ought to have inquired into the plaintiff's legal existence with a view to making a finding on its suitability or otherwise. This would be the basis for qualifying or not qualifying it. The fact that the selection went ahead means that the plaintiff met the criteria, including its legal and corporate existence, if indeed the same was a precondition. It is foolhardy, in my view, that this issue should surface at the post contract implementation stage, when the plaintiff has implemented its part of the bargain. It is nothing short of a *malafide* conduct on the part of the defendants to question the status of a party they have associated with for all this long.

Three, glancing at Exhibit P5, it comes out clearly that the two companies that formed the joint venture had a clear plan on the kind of entity they intended to form. This is evident from Clause 8.1 of the Joint Venture Agreement which stipulates as follows:

> *"8.1* ***The parties are a joint venture*** *for the sole purpose of joint performing the works under joint and several liabilities,* ***without thereby forming a corporation or any other legal entity."*** [Emphasis added]

Clearly, the parties never intended that the entity be a corporation or a legal entity that would last beyond the activity that brought them together. The phrase: "*The parties are a joint venture*" and "*without thereby forming a corporation or any other legal entity*", conveys an obvious message that the parties meant to form a joint venture and not a corporation (a company) or any other business association.

It should be noted that section 2 of the legislation under which the Joint Venture was registered i.e. Cap 213, defines business name to mean "*name or style under which any business is carried on, whether in partnership or otherwise.*" This is a recognition of formations registered under the said law, not only on their business style but also on their legal existence.

Besides all this, and as submitted the counsel for the plaintiff, the plaintiff (joint venture) registered its name with all relevant authorities such as the Business Registration and Licencing Agency (BRELA); Contractors' Registration Board (CRB, as evidenced from the contents of Exhibit P1; which is the Certificate of Registration by BRELA bearing Reg. No. 178057; and Exhibit P 26 which is a letter by CRB to the plaintiff (Joint Venture). There is also Exhibit P2 (TIN and VAT Registration Certificates); together with Exhibits P3 and P5 (the contracts). This revelation casts away the two cases of ***Simon Kichere Chacha v. Aveline M. Kilawe***

(supra) and ***Unilever Tanzania Ltd*** (supra), cited by counsel for the defendants for being distinguishable in the circumstances of the case. Consequently, the 1st issue in respect of the Tanga Port Agreement and 8th issue as to Dar es Salaam Port agreement are disposed affirmatively.

The 3rd issue relating to the Tanga Project Agreement tallies with the 2nd issue on the Dar es Salaam Port Agreement. It is in respect of ***whether the 1st defendant effected variations to the agreements as alleged***.

The view held by the learned advocate for the plaintiff is that there were variations to both of the contracts. With regards to the Tanga Port Agreement, the testimony adduced by PW1, Eng. Perez Jacob is that, during the execution of the said agreement, the 1st defendant effected a number of variations to the works. The changes were in scope and technology that moved from the use of **consolid** to **lean** concrete. He testified that these changes were reflected in Exhibit P3, Addendum No. 1. The plaintiff has also referred to paragraph 13 (c) of the Defendants' Written Statement of Defence.

Regarding scope of work, the plaintiff submitted that there were a series of instructions issued by the 1st defendant. The instructions moved the plaintiff to take on additional works which were not envisioned by the parties when the contracts were signed on 9th September, 2009 and 10th

October, 2009. In terms of PW1's testimony, these variations were evidenced by Exhibit P24, a letter by the plaintiff, confirming verbal site instructions issued by the 1st defendant. The plaintiff further submitted that, issuance of and the carrying out of additional instructions is evidenced by Exhibits P98, P100, P101, P102, P103, P104, P105, P106, P107 & P108, all of which were site instructions issued to the plaintiff. The counsel then concluded, in respect of Tanga Port Agreement, that the changes factored in the addendum were not the only variations ordered by the 1st defendant. Instead, there were others which were communicated through a series of exchanges by the parties.

With regards to the Dar es Salaam Port Agreement, the learned counsel for the plaintiff amplified what PW1 testified during trial. The plaintiff's contention is that this project too, was not spared of numerous changes effected at the instance of the 1st defendant. PW1 stated that, while major changes, necessitated by methodological or technological changes were factored in the Addendum to the main agreement (Exhibit P5), there were several other changes, by way of additional works which were carried out at the behest of the 1st defendant. The plaintiff's contention is that variations factored in Exhibit P5 were as a result of change in technology and method.

The defendants admitted that there were changes introduced through the addendum. In their submission, the defendants argued that such instructions were communicated through Exhibit P28 and that such variations trace their legitimacy to Clause 13.1 of the FIDIC Conditions (Exhibit P6) which provides, *inter alia,* as follows:-

> *"Variations may be initiated by the Engineer at any time prior to issuing the Taking over Certificate for the Works, either by an instruction or by a request for a contractor to submit a proposal. A variation shall not comprise the omission of any work which is to be carried out by others. The contractor shall execute and be bound by each variation, unless...."*

It was submitted, in conclusion, that the FIDIC conditions empowered the 1st defendant to vary the agreement and that the plaintiff was bound to comply. The defence counsel argued, however, that in terms of clause 13.3 of the conditions (Exhibit P6), the 1st defendant was obliged to fully consult the plaintiff on the cost implication of such variation, and the length of time that would be involved. In this case, however, that was not done. The learned attorney relied on Exhibit P96, a letter from plaintiff to the 1st defendant, confirming receipt of the letter which approved additional costs due to change of design.

As for the Tanga project, learned attorney's take is that, whilst the defendants had no qualms on the technological changes effected by the 1st defendant vide the addendum (Exhibit P3), he was valiantly opposed to variations alleged to have been effected by the plaintiff subsequent to or outside the scope enshrined in the addendum.

The view held by the defendants is that the plaintiff produced no proof, in court, of works performed as variations to the main contract. The defendants further contend that the plaintiff's argument on this point is based on Exhibits P97-108, hand written instructions, and Exhibit 24, a letter confirming verbal site instructions and submission of its related financial cost estimation for approval. However, the defendants argue, the said site instructions were never confirmed by the plaintiff, and that the related financial cost estimates were never submitted for approval by the 1st defendant. Such failure, in the defendants' view, means that the site instructions and the variations that went along with them were not approved.

Regarding Exhibit P24, the defendants' argument is that the same makes reference to verbal site instructions issued at site meeting held on 13th May, 2011 and 18th June, 2011, in respect of which the plaintiff did not tender any minutes. Learned counsel for the defendants holds the view that such minutes would substantiate the plaintiff's allegations that

such instructions were indeed issued. The defendants' stance is that the combined effect of the testimony of PW3 and DW1, both of whom testified to the effect that variations can only be valid instructions if the same are consented to or approved, and provide for description of the costs associated thereto. The defendants contended that, in their absence, the Court has nothing to rely on.

A similar stance is held with respect to Dar es Salaam Port Agreement. The view held by the defendants' counsel is that, with the exception of variations that arose from the change of technology to lean concrete, and was validated by addendum (Exhibit P5), the rest of the alleged variations, arising from site instructions, lacked the necessary prerequisite for their consideration. They allegedly lacked the 1st defendant's consent. As such, the plaintiff could not rely on them.

The defendants have raised yet another procedural issue on the variation. In their view, operationalization of variations must be preceded by provision of a description or a breakdown of the cost component. This is submitted to the employer, in this case the 1st defendant, and, upon consent by the latter's tender board, the same is reduced into writing and what comes out is an addendum. Upon signing, the same becomes the basis for performance and claim of remuneration.

Amidst this fact, there are other practical realities which are outlined as follows:

First, that, in both contracts, there were variations which were informed by the change of technology from Consolid to Lean concrete. These changes were acknowledged and formalized through Exhibit P3 and P5.

Second, under "Part F" of both of the main contracts *i.e.* Exhibit P3 and P5, there is an undertaking by the parties to be bound by the general conditions of the contract comprised of the "Conditions of Contract for Plant and Design-Build" 1st edition 1999, published by the *Federation Internationale des Ingenieurs-Conceils* (FIDIC), which is Exhibit P6. This means that the FIDIC conditions were part of the parties' rights and obligations under both contracts.

With this understanding in mind, the elementary principle of law which is to the fact that parties are bound by the agreement they freely enter, comes in handy. It is a principle that has been accentuated by the Courts in many a decision. In ***Simon Kichere Chacha v. Aveline M. Kilawe*** *(supra)*, the upper Bench had this to say at page 8 that:-

> *"It is settled law that parties are bound by the agreements they freely entered into and this is the cardinal principal of law of contract. That is, there should*

be a sanctity of the contract as lucidly stated in ***Abualy Alibhai Azizi vs. Bhatia Brothers Ltd [2000] T.L.R 288*** *at page 289 thus:- "The principle of sanctity of contract is consistently reluctant to admit excuses for non-performance where there is no incapacity, no fraud (actual or constructive) or misrepresentation and no principle of public policy prohibiting enforcement."*

The foregoing position is supported by yet another of the Superior Court's decisions. This was in ***Unilever Tanzania Ltd v. Benedict Mkasa t/a Bema Enterprises*** CAT-Civil Appeal No. 41 of 2009 (unreported), wherein it was held at page 16 as hereunder:

"Strictly speaking under our laws, once parties have freely agreed on their contractual clauses, it would not be open for the Courts to change those clauses which parties have agreed between themselves. It was up to the parties concerned to renegotiate and to freely rectify clauses which parties find to be onerous. It is not the role of the Courts to re-draft clauses in agreements but to enforce those clauses where parties are in dispute."

The principle distilled from the quoted excerpts is that the parties hereto were and are still bound by the FIDIC Conditions. With regards to variations and adjustments, the relevant provision is Clause 13, the contents of which I consider apt to reproduce, as hereunder:

"Variation and Adjustments

13.1 *Variations may be initiated by the Engineer at any time prior to issuing the Taking-Over Certificate for the Works, either by an instruction or by a request for the Contractor to submit a proposal. A variation shall not comprise the omission of any work which is to be carried out by others.*

The Contractors shall execute and be bound by each variation, unless the Contractor promptly gives notice to the Engineer stating (with supporting particulars) that (i) the contractor cannot readily obtain the Goods required for the variation (ii) it will reduce the safety or suitability of the works, or (iii) it will have an adverse impact on the achievement of the Schedule of guarantees. Upon receiving this notice, the Engineer shall cancel, confirm or vary the instruction.

13.2 *The Contractor may, at any time, submit to the Engineer a written proposal which (in the Contractor's opinion) will, if adopted, (i) accelerate completion (ii) reduce the cost to the employer of executing, maintaining or operating the works, (iii) improve the efficiency or value to the employer of the completed works or (iv) otherwise be of benefit to the employer.*

The proposal shall be prepared at the cost of the Contractor and shall include the items listed in sub-clause 13.3 (Variation Procedure).

13.3 *If the engineer request a proposal, prior to instructing a variation, the contractor shall respond in writing as soon as practicable, either by giving reasons why he cannot comply (if this is the case) or by submitting:-*

(a) a description of the proposed design and/or work to be performed and a programme for its execution.

(b) The contractor's proposal for any necessary modifications to the programme according to sub clause 8.3 (Programme) and to the Time for completion, and

(c) the contractor's proposal for adjustment to the Contract Price.

The Engineer shall, as soon as practicable after receiving such proposal (under sub-clause 13.2 [Value Engineering] or otherwise) respond with approval, disapproval or comments. The Contractor shall not delay any work whilst awaiting a response.

Each instruction to execute a variation, with any requirements for the recording of costs, shall be issued by the engineer to the contractor, who shall acknowledge receipt.

Upon instructing or approving a variation, the Engineer shall proceed in accordance with sub-clause 3.5 [Determinations] to agree or determine adjustments to the Contract Price and the Schedule of payments. These adjustments shall include reasonable profit, and shall take account of the Contractor's submissions under sub-clause 13.2 [Value Engineering] if applicable."

What comes out of this is that the carrying out of verbal instructions as part of the variation requires an adherence to the process enshrined in the cited provisions of the rules. Going by the testimony adduced by the parties, the obvious fact is that the instructions that bred the variations contested by the 1st defendant did not get past the procedural steps set out in the FIDC conditions. Evidence adduced by PW3 and DW1 point to the fact that it is not evident if the verbal instructions got an approval of the 1st defendant consistent with the FIDIC conditions. The obvious conclusion, in the circumstances, would be that Exhibits P97 through to P108, bring no value to the plaintiff's claim because they militate against what the FIDIC conditions dictate. In the words of the counsel for the defendants, as long as the parties are bound by the terms of the contract they freely entered, anything else and outside the said agreements is of no consequence. This essentially casts away Exhibits P97-P108.

While this contention creates reasonable plausibility which upholds the legal position as it currently obtains, and may be the basis for dismissing the plaintiff's claims on the variations, it should not escape the parties' minds that the following are not in dispute:

1. That the site instructions were given by Engineer Swai, the Project Manager, and Engineer Daudi, the Site Engineer. The duo

was the 1st defendant's eye and ear on the ground, whose mandate at the site constituted the execution of duties cast upon them by the 1st defendant. He was an actor who operated at the behest of the 1st defendant and on its behalf. According to DW1, these instructions "were ours, and were instructions to the Contractor. These were "a new assignment";

2. That there was also a confirmation of verbal instructions (Exhibit P24). The confirmation had a cost build up to the tune of TZS. 225,130,200/-;
3. The 1st defendant has not seriously disputed that, though the procedure in the FIDIC conditions was given a wide berth, the instructions were carried out by the plaintiff. In cross-examination, DW1 was of the opinion that if the works were done then they varied the contract. PW1, PW2 and PW3 have testified to the effect that the variations contained in the site instructions were carried out.

With uncontroverted reality that FIDIC conditions were not applied in dealing with site instructions and; amidst the admission that the site instructions were issued by the 1st defendant's own 'proxies', and the testimony that such instructions constituted a variation that changed the scope of work that was duly executed, the issue is whether plaintiff's claim

on the variation should be crossed off the list of claims. In my considered view, the answer to this question is in the negative. My view is predicated on the fact that the established legal position is that, even where no formal agreement has been executed by the parties, exchange of correspondences between the parties on the subject matter, or both or one of the parties' conduct is enough to infer the existence of a legal obligation which qualifies as a contract and in respect of which parties may be bound. This takes into consideration the fact that, under section 2 (1) (d) of Cap. 345, an act done at the desire of a party to the contract constitutes a consideration that must be rewarded by the person in whose benefit such act was done. The cited provisions states as hereunder:

> *"When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise."*

The statutory position in the foregoing excerpt was subjected to a judicial interpretation in the case of ***Prismo Universal Italiana S.R.I v. Termoctank (T) Limited*** [2008] T.L.R. 403. The Court (Massati, J as he then was) was confronted with a similar issue which required it to pronounce itself on the status of the undertakings which were done in reliance on the exchange of communications between the parties. The

view taken by the Court is that a contract need not be in writing, and can be inferred from a series of correspondences and the conduct of the parties. It held:

> *"On the other hand, the Court of Appeal of Tanzania, in* ***Raymond Martin v. Coral Cove Limited*** *(supra) accepted the proposition that exchange of letters and the conduct of the parties could form a contract even though no formal contract has been concluded."*

In drawing the conclusion that the parties' correspondences and their actions constituted a legally binding contract between the parties, the Court remarked as follows:

> *"So I am certain in my mind that in law, subject to statutory exceptions, a contract need not be in writing and can be inferred from a series of letters or telegrams or faxes (or correspondence) or by the conduct of the parties."*

It is edifying, that the subscription by the learned Judge (as he then was) was partly informed by the commentaries he extracted from a book titled ***Chitty on Contracts***, 29th edition Vol. 1 at p. 134 Para 2-026, in which it is stated:

> *"Where parties carry on lengthy negotiations it may be hard to say exactly when an offer has been made and*

accepted. As negotiations progress, each party may make concessions or new demands and the parties may in the end disagree as to whether they had ever agreed at all. The court must then look at the whole correspondence and decide whether, on its true construction the parties had agreed on the same and decide whether, on its true construction the parties had agreed on the same terms. If so there was a contract even though both parties, or one of them, had reservations not expressed in the correspondence, the court will be particularly anxious to hold that continuing negotiations have resulted in a contract where the performance which was the subject matter of the negotiations has actually been rendered.in one such case a building sub contract was held to have come into existence, even though agreement had not been reached when the work was begun, because during its progress, outstanding matters were resolved by further negotiations, and this contract may then be given retrospective effect to cover work done before the final agreement was reached."

Having concluded that, and, notwithstanding the fact that the site instructions were not implemented in conformity with the FIDIC conditions, the clear position is that the same were implemented and that they constituted the parties' undertaking by conduct. The follow up question then is: is the plaintiff entitled to compensation for the additional works performed? My hastened answer to this question is that the plaintiff

is entitled to payments for the additional works performed pursuant to instructions given through Exhibits P97-P108. My position is premised on the legal position set by the Court in (Hon. Mwambegele, J., as he then was), in ***M/S Tax Plan Associates Ltd v. M/S Tanzania American International Development Corporation 2000*** [2015] TLR 506. The learned brother held as follows at p. 516:

> *"It is a trite principle under the law contract that a party who performs his part of bargain or contract as the case may be, is entitled to compensation to the extent of such performance where the other party benefitted and accepted such performance and there was no agreement that the same would be performed gratuitously – see section 70 of the Law of Contract Act [Cap 345 R.E. 2002]. Therefore, if the Defendant wished to dispute the amount claimed, concrete evidence as to actual services rendered and the amount that was supposed to be or was being claimed in the normal course of business and according to their usage, was crucial...."*

It is noteworthy, that Section 70, on which the cited decision was predicated stipulates as hereunder:

> *"Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the*

former in respect of, or to restore, the thing so done or delivered: Provided that, no compensation shall be made in any case in which the person sought to be charged had no opportunity of accepting or rejecting the benefit."

Gathering from the testimony adduced by the parties, it is clear that whatever services that were rendered by the plaintiff, consistent with Exhibits P97 to P108, such services were obligations under the contracts, and they were not intended that they shouldbe rendered gratuitously. Or, at the very least, there is no evidence to the effect that the 1st defendant had the opportunity of accepting or rejecting the benefit that arose from the plaintiff's services rendered in both of the projects.

It is my humble and considered view that the 1st defendant constructively (or impliedly) acceded to the performance of works that came through site instructions issued by the 1st defendant's employees.

Related to this is the question: ***If the above issue is answered in the affirmative, to what extent such variations were effected and if the plaintiff consented to them.*** In my considered view, work has been cut down significantly. This is in view of the resolution of the just concluded issue. My take in respect of this issue is that, since the conclusion is that the 1st defendant's site instructions were variations and, therefore, part of Exhibits P3 and P5 and; since Exhibit P24 confirms that

the plaintiff acceded to the 1st defendant's request for execution of additional duties, the logical inference is that the variations were consented to by the plaintiff. The testimony of PW1, PW2, PW3 and that of DW1 all confirm this fact. The divergence appears to reside in alleged procedural missteps that came with non-compliance with FIDIC conditions. Since these have been resolved in the plaintiff's favour, and, in view of DW1's admission that the confirmation (under Exhibit P24) had a cost build-up of TZS. 225,130,200/-, the answer to the raised issue is in the affirmative.

The 2nd issue on the Tanga Port Agreement and 1st issue on the Dar es Salaam Port Agreement (to be addressed together) call upon the Court determine as to ***Whether the 1st defendant breached the agreements as alleged***. The contention by the plaintiff, which is amplified by its counsel, has brought up a number of incidences of what is considered to be a breach of the agreements. With respect to the Tanga Port Agreement, the alleged breach resides in the following:

One, 1st defendant unilateral change of design and construction methodology agreed upon. This was done, notwithstanding the fact that the plaintiff's bid offered specific methodology whose design and construction model was accepted by the 1st defendant. Learned counsel for the plaintiff admit, in so many words, that the 1st defendant reserved

the right to change or vary terms of the agreement. Their argument, however, is that such variation ought to have involved the plaintiff, and the costs involved ought to have been mutually agreed by the parties. The argument by the plaintiff is that, in this case, costs of the variation were never discussed and agreed upon. Instead, the same were included in the addendum (Exhibit P29) without involving the plaintiff in the process through which the same were calculated and arrived at. Simply stated, in the defendants' view, this was a one sided affair. In the plaintiff's view, this was an infraction of Clause 3.5 of the FIDIC Conditions. (Exhibit P6).

Two, delay in approving the change of technology. The plaintiff contends that it took almost two years to execute the addendum. This was in total disregard of the essence of having the project completed within the targeted time frame.

Three, delay in effecting payment of the certified amounts (in relation to Exhibits P42 – P57) which, according to item 37 of the contract (Exhibit P3), were to be paid out within 14 days from the date of the 1st defendant's receipt of the interim payment certificates.

Four, the 1st defendant ignored to settle the Final Accounts claims in respect of the agreement. Picking from the testimony of PW1 and PW2, the contention is that, on 9/03/2012, the plaintiff submitted the invoice to

the 1st defendant, as per the requirement under Clause 14.10 of the FIDIC (Exhibit P6). However, these accounts were never determined by the 1st defendant. Counsel for the plaintiff made reference to the testimony of DW1 who allegedly admitted that claims were submitted (vide Exhibit P65, a letter by plaintiff to the 1st defendant in respect of submission of statement at completion of work) but they were not determined. It was then submitted that the 1st defendant committed itself to carry out final accounts vide clause 14.10 of the FIDIC Conditions. This is what bestows a responsibility on the 1st defendant. The plaintiff's counsel have supported their contention by citing the Court of Appeal of Tanzania's decision in ***Parvis Gulamali Fazal v. National Housing Corporation***, CAT-Civil Appeal No. 166 of 2018 (unreported), which held to the effect that a party is estopped by the doctrine of estoppel from turning around on what it had agreed and committed itself to do.

The view held by the defendants' counsel is that the 1st defendant committed no breach. Their denial is grounded on the following arguments:

One, none of the plaintiff's witness statements states that the 1st defendant unilaterally changed the construction methodology. On the contrary, all of them convey the message that both parties had agreed to the said changes and signed the addendum 1 (Exhibit P3). It was further

submitted by the learned attorneys that, being the employer, the 1st defendant was entitled to effect the changes. The view taken by the learned counsel is that PW1 and PW2 admitted, during cross-examination, that it was within the 1st defendant's mandate to make changes to the original concept and plan. The defendants' conclusion in this respect is that the plaintiff has failed to prove its claim consistent with the provisions of sections 110, 112 and 115 of Evidence Act. In view thereof, they argued, the claim should be dismissed.

Two, in respect of claim that the 1st defendant had failed to settle the final accounts, it was submitted that the total claim as stated in paragraph 18 of PW1's witness statement was TZS. 21,805,945,133.55 (VAT Exclusive). That, the said amount was not particularized and there was no proof of its accrual. Learned counsel for the defendants took the view that the testimony of PW2 is clear on the fact that a meeting was held between the parties and that the plaintiff's claims were deliberated on. It is the counsel's further argument that, upon presentation of Exhibit P65 - a letter that submitted the statement at completion with a value of TZS. 5,360,135,966.15 - the 1st defendant replied through a letter dated 24th April, 2012 (Exhibit P31), asking the plaintiff to supply the 1st defendant with supporting documents but to no avail. The defendants held the view that in the case of claims of specific damages, the

requirement is that the same must be specifically pleaded and strictly proved and that the plaintiff has failed in this respect. On this, learned counsel cited the case of ***AMI Tanzania Ltd vs. Prosper Joseph Msele***, CAT-Civil Appeal No. 159 of 2020 (unreported). The defendants implored the Court not to allow the plaintiff to unjustly enrich itself. The Court was also urged to take note of DW1's testimony which is to the effect that the contract value of Tanga Port agreement was TZS. 4.7 billion, but the plaintiff was paid TZS. 6.2 billion, and that the difference in prices was unaccounted for.

Three, on allegations of delayed payments of certified amount, learned State Attorneys' submission is that the 1st defendant delayed in effecting payment of certified amounts in the interim certificates, hence the plaintiff's claims for payment of TZS. 320,410,037.58 as interest. They contended that the plaintiff relied on Exhibits P43-57 which are interim certificates; and part of Exhibit 58, a document titled "Design and Construction of Zambia Yard-Tanga Port", interest on delayed payment certificates. It was further contended that there are specific damages but neither the plaint nor testimony by plaintiff's witnesses gave material facts which would lay the basis upon which the claim for delayed payments, by the plaintiff, rests. They, then, cited two decisions which provide for the requirement to particularize the facts. These are: ***Telecom Ltd v.***

Petrofuel T. Ltd, CAT-Civil Appeal No. 69 of 2014, [2019] TZCA 176; (06 February 2019) and ***National Insurance Corporation T. Ltd & Another v. China Civil Engineering Construction Corporation,*** CAT-Civil Appeal No. 119 of 2004 [2010] TZCA 4; (25 March 2010) (both unreported).

Regarding the payment certificates *i.e.* Exhibit P44, which is an interim payment certificate for payment of TZS. 461,488,755.35, the argument by the defendants is that, the same does not show when it was received by the 1st defendant. This applies to Exhibit P45, as well, which does not show when the same was received by the 1st defendant, while Exhibit P58 has no back up evidence to substantiate the payment. It, too, lacks the date on which the said certificate was certified for payment. The date would establish the exact date on which calculation of interest on delay began. The rest of the certificates, the learned State Attorneys contended, fell short of stating when the same were received by the 1st defendant, and the date on which the certificates were certified for payments. This is so, because the certified amounts are at variance with those stated in the applications.

The defendants' further contention is that the time frame set for payment of interim certificates is 56 days of the engineer's receipt of the statement and supporting documents. This is in terms Clause 14.7 of the

Special Conditions of Contract, and not 14 days as contended by plaintiff. The defendants' counsel submitted that, the fact that the plaintiff failed to prove if and when the application for interim payment certificate was received by the 1st defendant, means that it is not entitled to such payment. In the learned attorneys' view, such failure constituted an inability to prove existence of the alleged breach.

I have unfleetingly reviewed the rival submissions on this issue. In the case of the Tanga Project, signing of the addendum was necessitated by the need to address changes that were informed by the alteration of the technological methodology. This required that the drawings be revisited with a view to factoring in the desired changes. It is an allowable practice under Clause 13.1 of the FIDIC Conditions (Exhibit P6). The plaintiff has admitted, through the testimony of PW1 and PW2, that FIDIC conditions were part of the covenants that guided their contractual relations in both of the projects. They also admitted that the variation was acceded to through the signing of the Addendum, though the signing took longer than anticipated. PW1 was especially quoted as saying during cross examination, as follows:

> *"Clause 14 (1) gives the right to the Engineer to initiate the variation at any time. This means the employer has such powers. The Tanga project was implemented without any hitches."*

Since the variation of the main contract traces its legitimacy from the FIDIC Conditions and the plaintiff appended its signature - signifying acceptance of the extension of scope of their engagement - it cannot be said that such variation, a mutually agreed undertaking, was an act of breach of contract. It would amount to a breach if it violated the basic tenets of their contractual engagements, or if it was unilaterally introduced.

PW1 has admitted that the contract sum for the Tanga project, including the additional works introduced through the Addendum was paid. This explains why the aggregate sum paid for this project far exceeds the original contract sum. It defies logic that a party would put pen to paper on a contract and bolt out later, alleging that the terms he accepted were actually a breach of the original undertaking. In my unflustered view, breach of contract would arise if terms of the main contract had been rendered incapable of implementation through the 1st defendant's unilateral actions or commitment of an action which was not consented to by the plaintiff. This is not the case here and I reject the plaintiff's contention out of hand.

The plaintiff's other qualms arise from the contention that, whereas the 1st defendant called for and received plaintiff's input on the methodological changes, no input was solicited with respect to the cost

component of the methodological changes. This, in the plaintiff's view, amounts to a breach of Clause 3.5 of the FIDIC Conditions. The plaintiff's contention takes me the pleadings filed by the plaintiff. Leafing through the pleadings and the testimony of PW1, PW2 and PW3, I find nothing in relation to this limb of the alleged breach. This means that the contention did not constitute the plaintiff's case whose foundation is the averments in the pleadings. It compels me to align my position with the trite law, which is to the effect that proceedings and a decision bred therefrom must come from what has been pleaded, and so goes the parlance that ***"parties are bound to their own pleadings."*** (See: ***James Funke Gwagilo v. Attorney General*** [2004] T.L.R 161; ***Astepro Investment Co Ltd v. Jawiga Company Ltd***, CAT-Civil Appeal No. 8 of 2015; ***Peter Ng'homango v. Attorney General,*** CAT-Civil Appeal No. 214 of 2011 and ***Scan TAN Tours Ltd v. Catholic Diocese of Mbulu,*** CAT-Civil Appeal No. 78 of 2012 (all unreported).

Guided by the above principle, I take the view that pronouncing myself on the contention is fraught with dangers of condemning the defendants without affording them the right to be heard on this lately introduced contention. I choose to make no finding on it.

The contention that there were delays in executing the Addendum was testified on by PW2, who stated that, following the technological

variations introduced at the instance of the defendant on 7th November, 2009, execution thereof was enormously delayed until 21st September, 2011. This was despite the plaintiff's reminder through formal communication dated 13th August, 2010. I have taken time to scrupulously read the content of paragraph 14 (b) of the plaint in which the alleged breach is pleaded. I also glanced through the entirety of DW1's testimony. Nothing justifies the 1st defendant's procrastination that left the plaintiff in limbo for close to a decade.

My take on this is, in the absence of any technical justification for the delay, there can be no other conclusion than that the 1st defendant's inaction constituted a breach of contract. I settle this narrow question in the affirmative.

The other area of serious contention between the parties relates to the alleged breach that arises from delays in effecting payments the demand of which was done through Interim Payments Certificates (Exhibit P42-57). The basis for the plaintiff's contention is the terms of Exhibit P3, which it contends it required that such payments be made within 14 days of presentation of each of the interim certificates. Going by the testimony of PW1, the interest on delayed payment worked out to TZS. 320, 410,037.58. This contention has been valiantly scoffed by the defendants. The contention is that, in the absence of the dates on which the

certificates were issued and served on the 1st defendant, a breach cannot be ascertained.

I am aware that the plaintiff's contention on the 14-day 'rule' on payment stems from Clause 37 (1) of the Contract Data which states as follows:

> *"Payment Interim Certificates on account of progress of work approved by the Engineer and certified by employer in the following manner:-*
>
> *(a) Within fourteen days from presentation of each interim certificate."*

Going by the cited Clause, payment of the sums raised in the Payment Interim Certificates was to be preceded by approval of the works done and prices of the corresponding claims. This is done by the Engineer, followed by certification by the employer. What is most crucial in the payment process is the presentation of the said certificates, done within fourteen days. The controversy surrounding this issue is whether evidence exists to show that the plaintiff submitted the said certificates and, if yes, when? The defendants' contention is that this is not evident. I cannot agree more with the defendants' argument.

My reading of the Written Statement of Defence, particularly paragraph 13 (d), and the testimony of DW1 – the defendants' sole witness – convinces me to hold that breach would only be ascertained if

evidence was led to prove that such invoices were issued on certain dates, and that, counting from the dates, honouring thereof took longer than 14 days that the plaintiff contends are stipulated in Exhibit P3. As it is now, it is difficult to say, with any semblance of mathematical precision, if the alleged delay ever happened and, if it did, whether that constitutes a breach of contract.

Proof of this assertion constituted an obligation of a party that alleged existence of such assertion i.e. the plaintiff. This is an obligation placed on the party's shoulders by the provisions of section 110 (1) and (2) of the Evidence Act, Cap 6 R.E. 2019, which stipulates as follows:

> *"110.-(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*
> *(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."*

See: ***Abdul Karim Haji v. Raymond Nchimbi Alois & Another***, CAT-Civil Appeal No. 99 of 2014; and ***Pauline Samson Ndawavya v. Theresia Thomas Madaha***, CAT-Civil Appeal No. 45 of 2017 (both unreported). In the latter, the apex Court took an inspiration from the commentaries by Sarkar on Sarkar's Laws of Evidence, 18th

Edn., ***M.C. Sarkar, S.C. Sarkar and P.C. Sarkar***, published by *Lexis Nexis (at p.* 1896), from which the following observation was extracted:

> ***"... the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof.*** *It is ancient rule founded on consideration of good sense and should not be departed from without strong reason .... Until such burden is discharged the other party is not required to be called upon to prove his case.* ***The Court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such a conclusion, he cannot proceed on the basis of weakness of the other party..."*** [Emphasis added].

In my considered view, the plaintiff's contention that its counterpart delayed in processing payment in respect of the interim payment certificates remains nothing better than an unascertained contention which is lacking in any material basis for its reliance. The afore going position is extracted from what obtains in Clause 14 (1) of the FIDIC conditions which provides as follows:

> *"The Employer shall pay the contractor:*
>
> *(a) N/A*

(b) the amount certified in each Interim Payment Certificate within 56 days after the Engineer receives the Statement and supporting documents; and

(c) N/A"

While there is an apparent variance in time frames for payment of the Interim Payment Certificates, the unanimous message that serves as a common denominator in both situations, is that the date of submission of the said certificates remains a crucial component in ascertaining timeliness or otherwise of the payment. It is from that component that the allegation of breach may be imputed of inferred.

In consequence, I hold the view that this item of the allegations is answered in the negative.

The plaintiff has also decried the 1st defendant's delays (or failure) to effect payment of the sum amounting to TZS. 21,805,945,133.55 (VAT Exclusive). This sum is an aggregate of TZS. 10,502,536,208.71, and TZS. 11,303,408,924.84. Whereas the latter is allegedly an accrued interest, compounded monthly (for the Tanga Port Project alone), from 9th March, 2012 to 10th August, 2015; the former is allegedly made up of the following components:

(a) Extension of time with costs;

(b) Measured works not paid;

(c) Interest on delayed payments on certified amounts; and

(d) Material escalation costs, claims emanating from as Built Drawing.

The defendants' basis for their disputation is that these claims constitute specific damage that require specific proof and the plaintiff has not proved that. There is also a contention that queries raised through Exhibit P31 were not addressed, as the said letter went unanswered. The defendants have also laughed off at the claim of interest on the delays, terming it devoid of any merit.

Regarding the principal claim of TZS. 10,502,536,208.71, the plaintiff's contention is that this constitutes an aggregate that arises from the components itemized above. The bottom-line in this case is that these are principal claims referred in Exhibit P65 as "financial statement at completion claim." The plaintiff has not given a breakdown that gives value of each of the constituent items. Absence of the build-up items is what has attracted the defendants' ire and the complaint that these specific damages which have not been specifically proved. The discussion on specific damages and the principles that govern its grant is a subject which will feature in due course. For now, the relevant question for determination relates to the legitimacy of these claims and the quantum raised by the plaintiff.

The plaintiff's submission appears to be the sole basis for the claim of the sum. My contention is based on the fact that what ought to constitute the basis for the legitimacy of the claim, that is Exhibit P65, quotes a figure that is slightly above a half of the what the plaintiff contends to be the sum due and unsatisfied.

The defendants have rightly argued that the plaintiff's claim was duly responded to vide Exhibit 31, through which the plaintiff was called upon to furnish supporting documents for the claim, but to no avail. The view held by the defendants is that absence of any proof on the accrual of the sum owing amounts to an unjust enrichment, as the trite position requires that such claims must be specifically proved, they being specific damages. This is where the defendants take the view that the decision in ***AMI Tanzania Limited*** holds the sway.

While it is generally accepted that the existence of the claim, in both amounts, is on the line, there is no denying that the payment arising out of the Final Payment Certificate has not been settled. The defendants merely raised queries on their legitimacy, but they do not dispute the fact that payment of the sum quoted in the Final Payment Certificate or any other sum, if any, was made as part of or all of the financial statement at completion claim. It is noted that the 1st defendant issued a raft of demands (Exhibit P31) which it intended that they be met by the plaintiff.

These demands sound highly plausible and are aimed at impeaching the figures submitted and their legitimacy. Nonetheless, I consider them to have gone far overboard, if not in excess of what Clause 14.10 of the FIDIC Conditions provide. The said Clause has laid down the requirements of what should be included in the Statement at Completion. For ease of reference, it provides as follows:

> *"Within 84 days after receiving the Taking-Over Certificate for the Works, the Contractor shall submit to the Engineer six copies of a Statement at completion with supporting documents, in accordance with Sub-Clause 14.3 [Application for Interim Payment Certificates], showing:*
>
> *(a) the value of all work done in accordance with the Contract up to the date stated in the Taking-Over Certificate for the Works,*
>
> *(b) any further sums which the Contractor considers to be due, and*
>
> *(c) an estimate of any other amounts which the Contractor considers will become due to him under the Contract. Estimated amounts shall be shown separately in the Statement at completion.*
>
> *The Engineer shall then certify in accordance with Sub-Clause 14.6 [Issue of Interim Payment Certificates]."*

Leafing through Exhibit P65, it comes out that the attachments accompanying the Statement at Completion carry with it, all necessary information envisioned in Clause 14.10 cited above. It was needless, in my considered view, for the 1st defendant to demand information that is in excess of what constitutes a Statement at Completion as known in the FIDIC Conditions. If the 1st defendant felt that some or all of the information submitted has shortfalls on its veracity, the appropriate recourse was to point them out and come up with what would be considered as the accurate position. In the absence of any contrary view, the logical assumption and conclusion is that the plaintiff has fulfilled its part of the bargain, and that the 1st defendant's failure to honour the claim is a blatant defiance. It also implies that the plaintiff's contention that it amounted to breach of contract is overwhelmingly sensible.

The defendants have contended that the claims raised by the plaintiff are specific damages whose proof must be specific as well. This contention reflects the correct position with respect to specific damages, and I feel constrained to subscribe to it. Numerous decision have accentuated this position, including: ***Hosia Lalata v. Zumbe Mwasote*** [1980] TLR 154; ***Zuberi Augustino v. Anicet Mugabe*** [1992] TLR 173; ***Director Moshi Municipal Council v. Stalenard Mnest & Another***, CAT-Civil Appeal No. 246 of 2017; and ***Stanbic Bank Tanzania Limited***

v. Abercrombie & Kent (T) Limited, CAT-Civil Appeal No. 21 of 2001 (both unreported). In the case of ***Director Moshi Municipal Council v. Stalenard Mnest & Another*** (supra), the Court of Appeal of Tanzania underlined the fact that *"Once such claim is neither pleaded specifically nor strictly proven, it fails."* The superior Bench further held:

> *"There would be no point of requiring such a claim to be specifically pleaded and strictly proven if, upon failure to establish it, the claimant would still be awarded a reduced quantum of special damages as was the case in the instant appeal. The trial tribunal had no discretion to do so."*

My unflustered view in respect of the foregoing is that the Exhibit P65 and attachments thereto are what constitutes a specific proof, and I consider them as having done enough to demonstrate that indeed the 1st defendant owed the plaintiff for services rendered.

The defendants have contended that a project which would otherwise fetch TZS. 4.7 billion had its contract price risen to a whopping TZS. 6.2 billion. By and large, this contention mirrors what DW1 testified in defence. He stated that all the just claims were duly paid to the plaintiff, save for those that lacked supporting documents craved vide Exhibit P31. He was economical with facts which justified the request made for being furnished with further and better particulars, besides those that are stipulated in Clause 14.10 of the FIDIC Conditions.

I must admit that, by any standard, the increment in the contract price is nothing short of humongous, and far exceeds what was originally agreed as the project's contract price. There is no denying, however, that what 'bloated' the contract price is the variations which were implemented at the instance of the 1st defendant. Inevitably, these variations had to take a toll on and guzzled the resources astronomically. The price escalation would not, in any case, deny the plaintiff of its just and fair recompense for any additional obligations performed or restitution for any damage suffered following the 1st defendant's acts of reneging on its contractual obligation.

In consequence of the foregoing, I hold that the claim of TZS. 5,360,135,966.15 and not TZS. 10,502,536,208.71, serves as a legitimate quantum payable to the plaintiff and I order that it be paid.

Claims of interest on delayed payments, which constitute a defaulting party's obligation under the contract, are dependent on proof that a claim for payment of the sum raised in the final account was lodged, and that, following such claim, the defaulting party - in this case the 1st defendant - failed to take heed of the claim. What constitutes a claim by the plaintiff is Exhibit P65, a letter dated 9th March, 2012, which is a Submission of Statement at completion. The Submission was for both of the projects i.e. Container Stacking Yard at Zambia Yard at Tanga Port,

and AMI and Copper Yards at Dar es Salaam Port. The joint sum raised in respect of both projects is TZS. 5,360,135,966.15. This sum was computed on basis of a completed yard area of 18,101 square metres. It is the foundation of the plaintiff's claim for the compound interest.

As stated earlier on, submission of the Statement at Completion is done pursuant to the provisions of Clauses 14.10 and 14.11 of the FIDIC Conditions. The submission triggered the 1st defendant's obligation under Clause 14.7, for payment of the certified amount in the Final Payment Certificate within 56 days of receipt of the Payment Certificate; and under Clause 14.8, for payment of financing charges compounded monthly on the unpaid amount during the period of delay. From this contractual viewpoint three issues emerge. ***One***, whether the interest claim is based on the Final Payment Certificate or the Statement at Completion; and ***two***, whether there was a delay.

On whether the claim is based on the Final Payment Certificate, my hastened answer is in the negative. This answer is premised on Exhibit P65 that quoted the completion claim at TZS. 5,360,135,966.15. This sum is substantially at variance with TZS. 10,502,536,208.71 from which the amount constituting the interest is derived. In my considered view, computation of interest ought to have been based on the sum quoted in

the Statement of Completion. That would cut down the claimed interest sum massively, from what it is now to less than half of the said sum.

Regarding the question on whether there was a delay, the answer is yes. The affirmative response is predicated on a couple of grounds:

One, PW1 and PW2's testimony that up until the filing of the suit and to the date of testifying in Court, the sum raised in the Statement at Completion had not been settled by the 1st defendant. This is irrespective of the reason or justification for non-payment;

Two, that Exhibit P31 raised issues which attest to the fact that the 1st defendant was not ready to settle the claim and that further and better particulars were requested to enable the 1st defendant consider honouring the obligation; and

Three, DW1's admission during cross examination that the 1st defendant contested the payment of the final account and that such contestation was expressed in paragraph 4 of Exhibit P31. DW1 also testified to the effect that the project came to a complete end when the 1st defendant returned all original documents which were deposited during the projects commencement. This is in terms of Exhibit P34 that came 13 months after service of the notice of termination of contract (Exhibit P62) dated 5th November, 2012.

With this obvious conclusion, with respect to the delay, the next crucial question is whether the compounded charges are legitimate and reflective of what is due to the plaintiff. No semblance of any computation or formula has been provided to justify the figure of TZS. 11,303,408,924.84. In any case, the same is premised on a sum that does not reflect the price of the final measurements of 18,101 square metres for both projects, quoted in Exhibit P65. In my considered view, and amidst the opacity of the formula used, the farthest the plaintiff would stretch its claim is by basing on the sum of TZS. 5,360,135,966.15 that has not been contested by the 1st defendant. This would work out to TZS. 5,768,876,258.99.

On the reliefs sought with respect to the Tanga Port project, the same have been dealt in each of the heads under which they individually fell. The general list of reliefs prayed and granted will be enumerated in the course of this decision.

Regarding the Dar es Salaam Port Project, most of the issues mirror those that are complained about in the sister project at the Tanga Port, save for the allegation of failure to hand over the ex-Copper Yard.

The first relates to the unilateral change of design and construction methodology through Addendum No. 1 to Exhibit P5. The contention is that, to the extent that the plaintiff was not involved, then the said

changes were nothing but a breach of contract. Besides the Addendum, there were several other variations that came as Site Instructions issued by the Engineer, and these constitute Exhibit P28. The contention by the plaintiff is that, while the 1st defendant was entitled to effect changes to the contract by introducing a new methodology and such other changes, the plaintiff who ought to have been involved was never involved ahead of the said changes. This would, in the plaintiff's view, avail the plaintiff with an opportunity to reflect on the cost and time implication of the said changes. The plaintiff cited Exhibit P96 as a classic example of an escalation in costs and completion time. It was the plaintiff's contention that Clauses 13.3 and 3.5 of Exhibit P6 were flouted.

The defendants hold a divergent view on this contention. The contention is that the changes were agreed upon through the execution of the Addendum (Exhibit P5) that factored in additional costs that came with the change of scope and methodology. These costs were fully paid by the 1st defendant.

I fully subscribe to the defendants' contention. As was the case for variations in the Tanga Port project, the changes introduced by the 1st defendant were eventually factored in the Addendum that was executed by the parties. Noting that these variations, including those that were introduced through Site Instructions, had the effect of escalating cost of

the project and completion period, the plaintiff was allowed to enlarge completion time. As the plaintiff complained about the variations, it did not indicate that there were any outstanding claims which arose out of the variations and were yet to be settled. The only complaint seems that payment of invoices for these assignments was unduly delayed.

The above position compels me to hold the view that the question as to whether the 1st defendant effected any variations is answered in the affirmative, as is the question on whether such variations were consented to by the plaintiff. The only effect that the project brought about is the delay in completion but all of this was taken care of.

The other instance of breach of contract, as alleged by the plaintiff, relates to the 1st defendant's failure to hand over one of the sites (Ex-Copper Site).

It is not in dispute that vide Exhibit P5, the plaintiff was contracted to design and construct a container staking yards at the Dar es Salaam Port. The Letter of Award which forms part of Exhibit P5 reads in part as follows:

> *"Tanzania Ports Authority [TPA] after considering your tender carefully has accepted your offer and hereby awards you the contract for the Design and Construction of the Container Stacking Yard at ex-Ami yard and ex-Copper yard areas in the Port of Dar es Salaam...."*

This position is further confirmed by the plaintiff's reply to the Letter of Award, dated 21st October, 2009, which acknowledged the subject matter of the award as Container Stacking Yards at ex-Ami and ex-Copper yards. The Contract Data part of the Agreement (Exhibit P5) gives the same expression under Clause 1.1.

It is also unanimous that handing over of the site excluded ex-Copper yard. The explanation given is gathered from the Minutes of the Site Meeting No. 1, held on 22nd February, 2010. Item 8.2. provides an update on the site access, and it was reported as follows;

> *"The Contractor was handed over site for Ex AMI area only. It was agreed that, the area on Ex Copper yard would be handed over in due course considering the port operating conditions."*

The contention by the plaintiff is that despite the 1st defendant's 'change of heart' by offering ex-Revenue as an alternative to ex-Copper and, in spite of the plaintiff offer not to charge anything extra, the said site was not handed over, and that the plaintiff was denied access, contrary to Clause 2.1 of the FIDIC Conditions (part of Exhibit P6). In the plaintiff's view, the breach lies in the 1st defendant's failure to observe Item 1.1. of the Contract Data (part of Exhibit P5) that requires that all sites be handed over within 21 days.

The defendants' rebuttal argument is that the plaintiff was amenable to the change and was called upon to submit drawings for approval by the 1st defendant's engineer which it never did up until the date on which the contract was terminated at the plaintiff's instance. Nothing constituted a breach, the defendants argued.

There is no denying that, for reasons stated by the 1st defendant, handing over of the ex-Copper site was impossible, hence the decision to swap it with ex-Revenue site. This change was communicated through a letter dated 10th May, 2011. It was acceded to by the plaintiff, vide a letter dated 21st December, 2011 (both Exhibit P13). While the lapse of seven months from the date of first communication to the plaintiff's response is not explained out, it is clear that the change was consented to and, apparently, the plaintiff carried out all the instructions that were issued through that letter. After this communication, nothing came out, to prove that the handing over was done. The contention by the defendants is that drawings were being awaited and that the same were never delivered up until the plaintiff served a termination notice. This contention is at variance with what is stated by DW1 who, in paragraph 13 of his witness statement is quoted as submitting as follow:

> *"That, after successful joint inspection and Partial taking - Over of the Ex-Ami site, the Defendant requested the Plaintiff to present its initial Account for consideration and*

payment, while the Defendant as ascertaining the Plaintiff's claim for payment and handing over the substitute site (Ex-Revenue) the Plaintiff issued simultaneously a Notice of Suspension and a Notice of Termination of the Contract for Design and Construction of the Container Staking Yards at Dar es Salaam Port; both dated 05/11/2012 without giving room to the Defendant for any negotiations."

Whether the reason was failure to furnish drawings or submission of initial accounts, the fact remains that the ex-Revenue site which was meant to be a substitute was not handed over. The defendants are blaming the plaintiff for acting swiftly in terminating the contract before either furnishing the requested information or without giving room for negotiations. Be that as it may, the uncontested fact is that termination came close to 11 months from the date the plaintiff confirmed taking over the new site and upon submission of the information that the defendants requested. This means that site handing over was delayed for a whopping 11 months, way beyond the 21 days set out for handing over a site under Exhibit P5.

From all this, the clear message is that handling of this obligation was shrouded in clear disregard of the 1st defendant's obligations under the contract and, as rightly contended by the plaintiff's counsel, such

conduct was an affront to the provisions of section 37 (1) and (2) of Cap. 345 which obligates the parties to perform their respective promises unless excused by law. The cited provision introduces the doctrine of sanctity of contract that has also been submitted on by Mr. Malimi, learned counsel for the plaintiff, who cited the decision of ***Abualy Alibhai Azizi v. Bhatia Brothers Ltd*** [2000] TLR 288. It was underscored at page 289, as follows:

> *"The principle of sanctity of contract is consistently reluctant to admit excuses for non-performance where there is no incapacity, no fraud (actual or constructive) or misrepresentation, and no principle of public policy prohibiting enforcement."*

In the absence of any form of fraud, misrepresentation, incapacity or illegality, the 1st defendant's non-performance of its undertaking under Exhibit P5, and subsequent undertakings was nothing short of an excuse for non-performance of such undertakings. It was a clear breach of the principle of sanctity of contract and I am constrained to resolve this question in the plaintiff's favour.

The next issue for determination is whether the plaintiff mobilized equipment/machinery and labour in respect of Ex-Copper site.

The plaintiff relies on the testimony of PW1 and PW2 to contend that equipment, machinery and labour were mobilized consistent with what was listed in the bidding document (part of Exhibit P5). These witnesses testified that mobilization done by the plaintiff was for the entire project, and that it began with procurement of Performance Security/Bond which was required by the 1st defendant prior to signing of the Agreement. The Plaintiff's contention is that the Performance Bonds Nos. PB 0081/2009 and PB 0732/2010 were issued by Century Insurance Co. Ltd, and they involved the sum of TZS. 653,360,382.24 each, as 10% of the value of the contract sum before the Addendum.

The plaintiff further argued that, when the 1st defendant effected an advance payment, it did that for the entire project, factoring in the Ex-Copper yard. This explains why the sum of TZS. 1,541,930,502.09 constituted 20% of the contract sum. Scoffing at DW1's argument that mobilization is only done for a handed over site, the plaintiff has held the view that the Agreement does not demand that mobilization be done upon being handed over the site. The plaintiff contended further that deduction of the advance sum included 39% of the project that covered the Ex-Copper project though it was effected on the 61% that was handed over. It was further argued that no site would be handed over without mobilizing, ready to commence work. This is why 21 days were provided

for site hand over, and that advance payment is given to facilitate mobilization. It was stressed that labour, plant and equipment were mobilized for the entire project under the Agreement. This, it was argued, was reflected in Exhibit P61 which shows labour, plant, equipment and machinery and machinery on site as at 21st February, 2011. The plaintiff relied on DW1's testimony which was to the effect that plant and machinery were on site, and that these would be deployed for the performance of the whole contract. It was the plaintiff's conclusion that, the fact that at no point in time did the 1st defendant raise the argument that the plaintiff never mobilized for Ex-Copper site, serves to cement the view that mobilization was not done.

The view taken by the defendants is that mobilization is done after the site hand over. The fact that Ex-Copper was never handed over means that no mobilization was done. On this, the defendants relied on the testimony of DW1, PW1, PW2, PW3 and Exhibit P30 whose item 8.2 indicated that handing over was only restricted to the Ex AMI site.

The defendants further argued that mobilized workforce and equipment would be evidenced by progress reports which are produced under Clause 4.21 (a) to (h) of Exhibit P6. In this case, none was shown to have existed on site. The defendants wondered why the Ex-Ami project

took in excess of three years to complete instead of nine months, if mobilization was done for Ex-Copper as well.

Mobilization is an essential part in the implementation of a construction project and this would entail unleashing labour and equipment necessary for carrying out the contractual obligation. Simply defined, *"mobilization is the series of actions required to bring a contractors' people, equipment and materials to the work site."* (www.azurewebsites.net). Thus, whilst a checklist of mobilization activities would differ depending on the contractual undertaking by the parties, as stipulated in their respective contracts; and the nature and size of the construction site, the generally accepted fact is that mobilization would only touch on labour resources, equipment and materials deployed to the construction site. In this case, there is no qualm that necessary resources were mobilized for implementation of the Ex-AMI project. Where the parties lock horns is on the alleged mobilization for the site which was never handed over.

It is a known fact that up until 22nd February, 2010, when the parties met for the 1st Site Meeting, only Ex-AMI site had been handed over, and the explanation given was that the Ex-Copper site would be handed over in due course. A clearer picture was painted through Exhibit P13 in which the plaintiff was informed that Ex-Revenue site would be handed over

instead of Ex-Copper yard. The contention raised by the plaintiff is that mobilization was not limited to equipment and labour. It also involved matters such as securing Performance Bonds. This contention sounds sweet but, in my humble view, it lacks the necessary plausibility for consideration. The known fact within the construction industry is that this is one of the items falling under what is known as administrative mobilization costs. They, in essence, create eligibility of the contractor to perform their contractual obligation.

In an article titled: Construction Mobilization – How to manage Mobilization Costs, published on 24th April, 2019, Alex Benarroche, a legal practitioner in Levelset, a US-based Law Firm (*www.levelset.com*), opined as follows:

> *"What we'll call "administrative" mobilization costs are things that take time and money, but might not be tied directly to the actual performance of work. These costs include things like licensing, obtaining payment bonds, and securing permits; which all have real costs and take up a lot of time. Even back office and project planning activities such as overhead costs, creating a project schedule, trade sequencing, and even finalizing plans or having them reviewed – they all require time and funds, too."*

Taking cognizance of the fact that mobilization costs will always be there and are factored in the overall cost of the project, the learned author took the view that it is the construction-related mobilization that matters the most. The learned author argued:

> *"All of the activities described above relate to the construction industry,* ***but there are mobilization activities that more closely relate to the actual work that will be performed. Things like transportation, fuel, equipment, rental, initial materials, tools*** *.... Also, some site prep activities, setting up site office trailers, etc. will take place before the first progress payment rolls in."* [Emphasis is added]

The foregoing excerpt casts away things like Performance Bonds, Bank Guarantees and other licensing issues as part of mobilization activities envisioned by the parties.

With respect to equipment, labour and materials, I am not persuaded, one bit, by the plaintiff's contention that mobilization was considered for the entire project, meaning that deployment of the resources covered the entire project. The reason as to why this contention is a hard sale is that no mobilization would precede hand over of the site. Taking possession of and access to the site is what informs the level of resource allocation for the project. In our case, the plaintiff acknowledges

that there was no site handing over for Ex-Copper Yard, meaning that resource mobilization would only entail activities relating to the site that was handed over. The testimony of DW1 pointed to the same fact. He in fact, went further and stated that no equipment or labour were spotted at the Ex-Copper yard that we all know was hosting other activities that prevented the 1st defendant from availing it to the plaintiff.

PW1 testified in relation to this issue by contending that mobilization was done in anticipation. He was, however, at pains to give account of the size of the labour complement deployed at the site. He was also unable to tender any semblance of contracts of employment which would prove that such employees existed and whether they are members of any pension fund. Further to that, PW1 admitted that a contractual obligation existed for the plaintiff to prepare and submit progress reports in which data on idle labour, machinery, plant and equipment would be highlighted. In this case, whatever that was submitted to the 1st defendant did not give any credible detail of the mobilization status with respect to the Ex-Copper.

It is in view of the foregoing, that the contention that mobilization was done ahead of the handing-over of the site and it included the entire project is, in my considered view, lacking in any material sense and the issue is answered in the negative.

Closely linked to the foregoing, is the issue as to whether the Plaintiff is entitled to compensation. The plaintiff's claim under this head arises from failure to hand over the Ex-Copper site and non-confirmation of the notice of termination of the Agreement. With regards to failure to allow access to the site, the claim for compensation is based on Clause 2.1 of the FIDIC Conditions which relates to right to access. The plaintiff's argument is that compensation is due to the plaintiff, covering the period between 22nd February, 2010 and 8th October, 2013, when the notice of termination (Exhibit P 11) was issued. In this respect, the contention is that the plaintiff incurred costs in hiring equipment, machinery and labour and payment of remuneration to the employees at the rate set out in the Daily Work rates for Labour and Machinery Items A & C (Exhibit P5). These claims were allegedly notified to the 1st defendant through Exhibits P28, P62, P80, P81, P84, P85 and P90, and that the 1st defendant was aware of the idleness of the mobilized resources.

The defendants are strongly opposed to the claim. The contention is that the plaintiff has not proved his claims to the standard required by law. Relying on Exhibit P62 and the testimony of DW1, the defendants contended that termination of contract was exercised by the plaintiff under Clause 16.2 of Exhibit P6, and that such termination becomes effective immediately on service of the notice.

As hinted earlier on, the claims under this head are dependent on the answer in the preceding issue. The Court's finding in respect of the said issue is that the alleged mobilization for the Ex-Copper site was not evident. It was virtually impossible, given the fact that no handing-over of the site was effected by the 1st defendant. This rules out any claim that is connected to this contention. But even assuming that the said alleged mobilization was done, or that there was uncertainty and delay in responding to the notice of termination which delayed de-mobilization, I still contend that the claim for damages would have little or no chance of success, in the absence of the following:

(i) Evidence that the said machinery, equipment and labour were hired and the cost incurred for the hire;

(ii) Contracts of employment or engagement of labour or human resource allegedly deployed at the site; and

(iii) Absence of payment vouchers, salary slips or any other document that would evidence that money changed hands to remunerate the employees engaged for the Ex-Copper yard.

Significance of adduction of evidence of all of the items constituting the appellant's claims arises from the fact that these claims constitute

specific damages whose proof must also be specific (See: ***Zuberi Augustino v. Anicet Mugabe*** (supra)).

It is my finding that the issue on whether the plaintiff is entitled to the payment arising from this item is answered in the negative.

The parties are also haggling over whether, pursuant to the notice of termination issued by the plaintiff, there was termination of the Agreement.

The plaintiff has made reference to Exhibit P62, the plaintiff's notice of termination, issued on 5th November, 2012, and the 1st defendant's letter (Exhibit P11) in which the plaintiff's notice of termination was accepted, 11 months after receipt of the notice of termination. While maintaining that termination was effected, the plaintiff's follow up question is on the effective date of the termination. The plaintiff acknowledges that termination, effected under Clause 16.2 of Exhibit P6, may take effect almost immediately. In its view, however, termination under Clause 16.2 (f) does not embody the immediacy of other provisions of the FIDIC Conditions.

The plaintiff's contention, as testified by PW1 and PW2, is that movements within the port are controlled and subject to the 1st defendants' authorization, imposed under Exhibit P39. The plaintiff further argued that without approval or confirmation of the 1st defendant, it would

be difficult to move out of the site. The plaintiff further contended that disengagement of the plaintiff from the 1st defendant required observance of Clause 16.4 of the FIDIC Conditions which sets out a chronology of events that come subsequent to the issuance of a notice of termination. Since the events came after service of Exhibit P11, dated 8th October, 2013, the plaintiff asserts the Agreement between the plaintiff and the 1st defendant subsisted until the date on which Exhibit P11 was issued and served on the plaintiff.

The defendants find nothing untoward in this respect. The argument is that termination of the contract was on account of the prolonged suspension of the project which, when triggered, it renders the contract terminated immediately. The defendants further argued that what follows after the termination is the application of Clause 16.3 of Exhibit P6 which calls for ceasing of further works and removal of the contractor's equipment from the site. The defendants argue that the plaintiff's inaction is what delayed removal of the equipment from the site.

There is no denying that termination of the contract - at the instance of the plaintiff - was a result of prolonged suspension of 39% of the project. This is the part that touches the Ex-Copper project which, as widely discussed above, was not handed over. This fact is clearly gathered from Exhibit P62, and by the plaintiff's own admission, the provision

applied is Clause 16.2 (f) of Exhibit P6. Under this clause, the length of the notice prior to termination is 14 days. However, the contractor is allowed to terminate the contract immediately, if the termination falls under item (f) or (g). As stated earlier on, the instant case falls under item (f) in respect of which termination takes effect immediately.

The plaintiff cited Exhibits P11, P33 and P34 to contend that termination came into effect when the 1st defendant responded to the notice of termination, and compliance with the requirements of Clause 16.4.

In my considered view, this contention is specious. Firstly because under item (f), such termination is not conditioned on the notice being accepted by the employer. It means that termination becomes complete and operational against the parties once it is established that the notice of termination was duly served on the employer. In this case, there is no dispute that Exhibit P62 was duly served on the 1st defendant, and on the date on which the said letter was written by the plaintiff. Secondly, activities performed by the parties through Exhibits P33 and P34 were post-termination undertakings which are essentially a compliance with the provisions of Clause 16.4. They were necessary, not in terms of gauging the date on which termination took effect, but for an orderly closure and making sure that the plaintiff's withdrawal from the site went along with

the 1st defendant's obligation of ensuring that its part of the bargain is fulfilled. This can be best elucidated by the words:

"After a notice of termination under Sub-Clause 16.2..." that precede what the employer needs to do. It is my take that activities under Clause 16.4 of Exhibit P6 are part of the winding up or withdrawal from the project subsequent to severing of the contractual ties. These would take days or weeks, if not months, depending on the nature of the project. Tying termination to these activities, or the day on which the 1st defendant responded to the letter of termination would have the impact of elongating the termination beyond the time frame envisioned by the parties.

It is my fortified contention that termination of the contract became effective on 5th November, 2012, the date on which Exhibit P62 was issued and served on the 1st defendant. This settles the issue in the defendants' favour.

The next other issue is whether the 1st defendant paid all of the plaintiff's claims. In the plaintiff's own submission, these claims emanate from the contention of breach of contract, allegedly committed by the 1st defendant when the latter failed to pay claims arising out of execution of the Agreement. I will address these claims in the sequence they have been submitted on.

The first head is on item (a): the measured works not paid for. These are submitted on as follows:

(i) Approved and applied variations of the work

Under this, the contention by the plaintiff is that, with respect to Ex-AMI, the sums of TZS. 6,385,688.08 and TZS. 10,700,625.00 are owing. These claims find their legitimacy from Exhibit P59 and they relate to designing of the document. The argument by the plaintiff is that these assignments are contractual and are factored in Exhibit P5 and are in line with Clause 14.10 (b) of Exhibit P6.

There is no evidence that these sums were paid or disputed by the 1st defendant when they were raised by the plaintiff. In the absence of any evidence of illegitimacy in their accrual, I accede to the prayer and order that the same be paid to the plaintiff.

(ii) Works done on Ex-Revenue site

There is also a claim for works allegedly done pursuant to Exhibits P13 and P88 which involved carrying out tests on the subgrade, and that the 1st defendant was informed of this undertaking vide a letter dated 21st December, 2011. The plaintiff contended that DW1 attested to this fact during his testimony. The plaintiff took the view that these assignments should be treated as part of the site instructions. To fortify its position,

the plaintiff cited section 70 of Cap. 345 and held that the carrying out of the said assignment had the anticipation of payment after the 1st defendant's undertaking on the Ex-Revenue site. The quantum claimed is TZS.130,113,174.15, set out in item A8 of Exhibit P59.

It is gathered that indulgence of the plaintiff in the activities relating to Ex-Revenue site was triggered by the 1st defendant, through Exhibits P13 and P88, in which the plaintiff was requested to execute works on the said site at no extra cost. This proposal was accepted by the plaintiff, vide part of Exhibit P13. Based on Exhibit P59, there is every reason to believe that these works were executed and their values were established. The 1st defendant has not denied that these works were executed. There are no qualms on the quantum raised for payment, either.

I take the view that the ***"at no extra cost"*** condition was accepted in anticipation that the said site would serve as an alternative to the Ex-Copper site that had since been exorcised from the project. In view of the fact that the inclusion of the Ex-Revenue site in the project fell through, extra efforts exerted by the plaintiff in respect of the Ex-Revenue site ought to be and must be recompensed. Consequently, the sum of TZS. 130,113,174.15 prayed under this head is granted. As stated by the plaintiff, it was not intended that these works be executed gratuitously.

(b) Loss of profit for not handing over Ex-Copper site

Under this, the contention is that 39% of the original contract sum for the Dar es Salaam Port project was lost as a result of non-handing over. The sum constitutes loss of profit under Clause 2.1 of the FIDIC Conditions. It works out to TZS. 850,065,281.77, extracted from the total contract sum of TZS. 3,400,261,217.

I must state, here and now, that the underlying general principle is that a contractor is entitled to a recompense for loss of profit arising out of prolongation of the contract; or on account of the profit that the contractor could earn during extended period by being unable to deploy resources and manpower in some other project due to such prolongation or the contractor's failure to execute the work due to breach of terms and conditions of the contract (See: Article by Anand Pratap Singh: Loss of Profit in Commercial Contract). This position sprouted from the principle enunciated in the old English case of ***Robinson v. Harman*** (1848) 1 Ex 850, in which it was held that the plaintiff is to be placed at the same position as he would have been, had the contract been performed by the defendant.

The general principle stated above is not without any conditions precedent. Key among them is that existence or assumption of such loss must be proved by contractor. Thus, in ***Bharat Coking Coal Ltd v. L K Ahuja*** (1984) 4 SSC 59, it was held that, in the absence of any proof of

loss of profit or possibility of alternate use, compensation for loss of profit cannot be provided. The Supreme Court of India held at para 24, as follows:

> *"It is not unusual for the contractors to claim loss of profit arising out of diminution in turn over on account of delay in the matter of completion of work. What he should establish in such a situation is that had he received the amount due under the contract, he could have utilized the same for some other business in which he could have earned profit. Unless such a plea is raised and established, claim for loss of profits could not have been granted. In this case, no such material is available on record. In the absence of any evidence, the arbitrator could not have awarded the same."*

As stated earlier on, the plaintiff's claim is hinged on Clause 2.1 of the FIDIC Conditions. This clause talks about right of access that the contractor must be given by the employer, and the contention by the plaintiff is that such access was denied when the 1st defendant refused to hand over the Ex-Copper site. The sum of TZS. 850,065,281.77 claimed by the plaintiff is based on the contention that labour, plant, machinery and equipment were deployed to the site and stayed idle for the entirety of 939 days. In my considered view, the claim is premised on grounds which are shaky, making it lacking in material basis. Here is why:

(i) That, as held earlier on, the question of mobilization and deployment of labour and equipment to Ex-Copper site was not evident as no semblance of evidence was adduced to that effect. Absence of such evidence means that establishment of the number of such deployment is also a question that is yet to be resolved;

(ii) That, even assuming that there was mobilization and deployment of resources distinctly for Ex-Copper site, it is not a matter of certainty that the project's completion, or idleness of such would necessarily last for 939 days. This also considers the fact that the workload of the site was only 39% of the entire project;

(iii) That the cost of each of the items has not been strictly proved by stating how the figures were arrived at and, if any was paid, that such payment was receipted to match the sum claimed in this matter;

(iv) That, discerning from the authority cited above, the plaintiff's claim of loss of profit would have plausibility and be acceded to if the plaintiff was able to establish that the amount that would be scooped from the Ex-Copper site would be utilized for some other business which could have

earned profit. In the instant case, such plea has been raised but not established.

It is my conclusion that the Court has not been treated to any evidence that can support the plaintiff's claim for compensation for loss of profit.

(c) Compensation for idle plant, equipment and labour

On this, the argument is that 39% of the labour and equipment were kept idle owing to failure to hand over the Ex-Copper site, and then 100% after the Ex-Ami site had been completed and handed over. The plaintiff contended that it incurred costs in maintaining and keeping idle plant, equipment and labour. The plaintiff submitted that this claims falls under items A3.1, A3.2, A3.3 and A3.4 of Exhibit P59. The plaintiff further argued that Progress Report (Exhibit P61) justifies this contention.

My hastened position in this respect mirrors my finding in the preceding claim (in paragraph (b) above). Exhibit P59, relied upon by the plaintiff contains workings prepared by the plaintiff and they are expertly worked upon. What is glaringly missing is the testimony that supports the workings. In this case, and working on the assumption there was deployment of such resources, the expectation is that the plaintiff would provide evidence of pay outs made to cover the expenses incurred in maintaining the idle resources. Sadly, again, this has been a big miss,

leaving the case light and lacking the cutting edge necessary for moving the Court to grant it. I decline the invitation.

(d) Claim on Office overhead costs

The plaintiff claims TZS. 241,479,819.00 as office overhead costs for Ex-Copper site as at 26th October, 2013, and that the claim in respect thereof was submitted as part of the final Account (Exhibit P89). The plaintiff's argument is that these costs are 39% of the total costs and they relate to the site which was never handed over but were factored as part of the Bill of Quantities (Exhibit P5), plus an addition of 40% multiplied by 15%.

Black's Law Dictionary, Bryan A. Garner, 8th Edn., p. 1136, defines Overhead costs to mean:

> *"Business expenses (such as rent, utilities, or support salaries) that cannot be allocated to a particular product or service; fixed or ordinary, operating costs – Also termed Administration expense; Office expense."*

In construction, overhead costs would include the cost of sub-contractors, machinery, equipment, insurances, office staff, office supplies, vehicles and other costs that may be incurred indirectly. These may be administrative or manufacturing. Regarding the types of overheads, an article on *https://corporatefinanceinstitute.com* has

clustered overhead costs in several types. These are: fixed overheads; variable overheads; and semi-variable overheads.

The plaintiff has not stated under which type of the overheads the claim falls, if indeed any existed. What I gather from the earlier submission is that these relate to part of the costs incurred in procuring and maintaining the mobilized resources. While there may be costs incurred by the plaintiff, I maintain my earlier position that such costs would not be incurred in respect of a site that was not handed over. My position is given credence where it is understood, as was held in other issues, that mobilization would only be done upon gaining access to the site. It would not be comprehensible that costs under this category would be incurred even where no operations were in existence. I accordingly reject this claim out of hand.

(e) Claim of interest on delay of payment of certified payments

This claim is premised on Item 37 (1) (a) of the Contract Data (Exhibit P5), and the plaintiff's contention is that, whilst payment of certified sums was to be done within 14 days from the date of submission, these payments were delayed. In this case, the plaintiff contends, certificates (Exhibits P66 to P79) were issued but their settlement was delayed, attracting interest pursuant to Clause 14.8 of the FIDIC Conditions, and Item 4.8 of the Contract Data (Exhibit P5). The alleged

interest rate applicable was 3%, plus the rate of interest applied by commercial banks (Exhibits P9 and P91). The sum claimed is pegged on delays exceeding 56 days and it amounts to TZS. 86,814,546.54 as at 28th October, 2013 (as per Exhibit P89).

Under this claim, the plaintiff's contention, which was abandoned midway through the submission is that accrual of this claim is pegged on a 14-day payment period. However, the computation was based on the 56-day payment period that we held that it is what is provided for under the FIDIC Conditions.

The plaintiff has demonstrated that payment of the sums raised through Interim Payment certificates was delayed beyond 56 days set out for settlement. This attracted interest whose accrual has not been disputed by the 1st defendant, and I have no reason not to agree with the plaintiff that this interest component is due and should be paid to the plaintiff. It is so held.

(f) Claim related to Separation Membrane

The plaintiff contends that it laid a separation membrane covering 22,358 square metres for the Ex-AMI site, consistent with the Bill of Quantities (Exhibit P5), and that the cost of this work is TZS. 181,099,800.00. The sum was allegedly submitted in the Final Account. The plaintiff relied on the Court order in Misc. Commercial Application No.

44 of 2021. It submitted that the 1st defendant did not object to this fact and that, since this was not intended to be a gratuitous indulgence then, under section 70 of Cap. 345, this sum is payable.

The plaintiff urged the Court to be inspired by the decision of the Court of Appeal of Tanzania in ***Mexon's Investment Limited v. DRTC Trading Company Limited***, CAT-Civil Appeal No. 91 of 2019 (unreported), and hold that the 1st defendant is liable to pay for the cost of laying the separation membrane.

The issue of laying a separation membrane was not envisioned in the Agreement, meaning that it was not part of the package. However, in the course of determining an application which was filed by the plaintiff (Misc. Commercial Application No. 144 of 2021), the defendants conceded that indeed the same was laid, albeit with a contention that execution of this duty was not done consistent with the norms set in the Agreement. For ease of reference the order, issued on 21st October, 2021, reads as follows:

> *"1. N/A*
>
> *2. That the 1st respondent acknowledges that the separation membrane was built on the site. Issues of authorization to build it will be resolved in the cause of trial of the main suit."*

In the instant proceedings, including the defendants' submission, this issue was not considered.

The fact that this was neither included in the Agreement nor was it factored in the Addendum to the said Agreement brings the logical conclusion that the same would not be paid as part of the payments effected under the Agreement. It is also rational to take the view that the 1st defendant's sustained denial that the said membrane was laid is a testimony that payment would not be done for work that is contested. Consequently, I agree that this claim is justified and that the sum is due to the plaintiff, and the 1st defendant is obligated to pay. I order that the sum of TZS. 181,099,800.00 be paid to the plaintiff.

(g) Claim for difference between consoled and lean concrete

The plaintiff's contention is that change of methodology from Consoled to Lean Concrete brought up some additional costs which were not approved. Its case is backed up by Exhibits P96 and P18, letters which show that the parties never agreed on the cost of implementing the new methodology. The plaintiff's argument is that there is a sum of TZS. 840,000,000.00, which was allegedly omitted and that the advice by the engineer is that the matter should be brought for Final Account determination. The plaintiff contends that the cost of executing the

project through lean concrete was far higher than the amount approved by the 1st defendant.

In justifying the claim, the plaintiff argued that the sum arises from delays in implementing the new methodology which takes more time and that, in this case, 118 more days were spent on the work. In the plaintiff's contention, the sum of TZS. 840,000,000.00 constitutes the cost of delay for 168 days.

As unanimously held by counsel for the parties, change of methodology came midway through the project implementation. Inevitably, this called for the execution of an Addendum which came up with a new cost. This additional cost was, to my knowledge, settled by the 1st defendant. This is why the claim under this head is solely for what the plaintiff contends that there was a delay.

The nagging issue here is whether the plaintiff's claim is meritorious.

It is true that this claim features as one of the items in Exhibit P59. It was also raised in Exhibit 89, the Final Account of the Contract as part of response to the query raised by the 1st defendant through Exhibit P31. While the plaintiff contends that the raising of this claim was in pursuance of Clause 14.10 (b) of the FIDIC Conditions, the formula applied in order to arrive at the said figure remains a mystery. It remains unclear, if the

figures raised tally with what is contended to be the corresponding time that the plaintiff spent on working on the lean concrete.

In other words, the manner in which the said sum allegedly accrued and if the quantum is a commensurate recompense for time allegedly lost is a factual contention that has not been proved. Unproved, as well, is the contention that the delays totaled 118 days. In my considered view, the burden of proving that the plaintiff earned this sum rests on its shoulders, and I take the view that this burden has not been discharged. I am constrained not to grant this claim.

(h) Claims under Extension of time for Completion with costs

That plaintiff argues that on two occasions extensions were given, one for 228 days and the other for 365 days, to complete the works (Exhibits P10 and P32). The plaintiff submitted that Clause 8.4 of the FIDIC Conditions allowed application for extension of time for completion of works. The plaintiff contends that the extensions were allowed with costs (Exhibit P64).

Applying calculations set out in Exhibit P59, the plaintiff urged the Court to accede to the prayer for costs for 376 days.

The plaintiff's contention is that extensions sought and granted vide Exhibits P10 and P32 were consistent with Clause 8.4 of the FIDIC

Conditions. This provision allows the granting of extension whenever the same is requested. The basis for extensions sought is contained in Exhibit P32. Exhibits P10 and P32 are a testimony that the 1st defendant was convinced by reasons given for the extension, hence its decision to grant them.

There is no dispute that extensions were granted because works were not completed within time, owing to this or that reason. None of the extensions were of the plaintiff's making and reasons for extension were considered to be plausible and acceptable. The aggregate number of days delayed are 376. In terms of Clause 20.1 of the FIDIC Conditions, extensions must be paid for if they subsequently cause inconvenience such as escalation of the contract period.

The cost for the alleged delays is analyzed in Exhibit P59 the total of which is TZS. 17,283,920,000.00. These constitute labour and plant & equipment. What cannot be verified is whether the humongous sums quoted in Exhibit P59 constitute a legitimate claim arising out of the delays cited above. In my humble view, the sum is mightily outrageous and are a mere simulation which cannot be the given requisite credence. Besides not being backed up by any evidence of procurement of the said labour, plant and equipment, the computation has included the Ex-Copper project which was never handed over.

In consequence, I drastically reduce the sum prayed for and substitute it with a global figure of TZS. 2,500,000,000.00 to cater for the loss allegedly suffered as a result of the delays in the completion of the project.

The decision to award the said sum is predicated on the fact that, though the said damages have not been specifically proved, the claim falls in the realm of claims in respect of an award may be given, even where proof is not specific. This is in view of the decision of the upper Bench in ***Zuberi Augustino v. Anicet Mugabe*** (supra), wherein it was held as follows:

> *"It is trite law, and we need not cite any authority, that special damages must be specifically pleaded and proved. Cost of repair was pleaded but not proved. The respondent merely stated it to be Shs. 500,000/=. However, the learned trial judge was satisfied that the engine of the bus was completely blown off and is in fact beyond repair. It is a notorious fact that prices are rising in astronomic proportions and that the amount pleaded cannot even buy a reconditioned engine. So though repair costs have not been specifically proved we allow the amount pleaded. Then as already said, non-use was not all pleaded. However, it was not disputed that the appellant was using the bus for passenger trips between Mwanza town and Kisesa and the engine was damaged in that process.* ***He definitely got some advantage***

which he should not be left to benefit from his wrongful acts. *We agree with Mr. Magongo that the respondent intended to sell the bus. But that could not preclude him from putting it into use."* [Emphasis supplied]

See also: ***Farid Mohamed Sherally v. Suleiman M. Suleiman & Another,*** HC-Consolidated Civil Appeals Nos. 13 and 15 of 2021 (unreported).

(i) Claim in respect of Final Account

The plaintiff asserts that the requirement for submission of Final Account is set under Clause 14.10 of the FIDIC Conditions and that, pursuant to issuance of a notice of termination, the plaintiff issued the Final Account (Exhibit P89) but the 1st defendant never worked on it. This, the plaintiff submitted, caused the institution of the instant matter, claiming TZS. 67,378,010,541.93 (VAT exclusive). The sum constitutes the total claim under the Agreement. The constituent claims under this are TZS. 45,283,366,725.13 (principal claim) and accrued interest amounting to TZS. 22,094,643,816.79.

The plaintiff submitted that this sum attracts interest of 25% for delays in settlement and that the interest is based on Exhibit P9.

It is a contractual obligation, under Clause 14.10 of the FIDIC Conditions, that any sums due to the contractor be raised in the Statement at completion and settled upon certification consistent with Clause 14.6. The plaintiff's contention is that Exhibit P89 was not acted upon by the 1st defendant. This is what brought up a claim of TZS. 67,378,010,541.93, exclusive of VAT, but factoring in interest that accounts for about a third i.e. TZS. 22,094,643,816.79.

Leafing through these claims it comes out the claim constituting the Final Account is an aggregation of various claims under different heads whose computations and breakdown are contained in Exhibit P59. Noting that these claims have been and will be dealt in each individual head, I find that making a broad finding on them may be a recipe for confusion, as some of these claims have been acceded to while others have either been rejected or reviewed downwards. I will choose to skip this item.

Next, is the determination of the issue as to whether the plaintiff suffered damage as alleged. The plaintiff has singled out four areas that are considered to have faced the brunt of the 1st defendant's acts of breach, as follows:

(a) Unilateral change of construction work methodology

The plaintiff's claim is that the change of methodology was a one sided affair, and that works performed pursuant to this change were not

paid for. The plaintiff contends that the final costs of the lean concrete were never agreed upon by the parties. The plaintiff further argues that execution of these works came at a cost as labour and equipment had to be overworked for 181 days. These amounts are particularized in Item A6 2 of Exhibit P59.

(b) Delays in signing the Addendum No. 1 following change of methodology.

The contention here is that, after a decision had been made to change the methodology to lean concrete, the inclusion of the change and eventual signing of the Addendum took a whopping 286 days, during which the plaintiff kept on notifying the defendant of the consequences of such delays. The plaintiff argued further that the delay added more costs to the plaintiff in maintaining labour, equipment and/or machinery, and other overheads. It is why an extension of time was sought as per Exhibits P32 and P64. The plaintiff argued that during the period, the mobilized resources could not be put to any gainful activities. On this, the plaintiff relied on Exhibits P61 and P39.

(c) Breach due to failure to hand over the Ex-Copper site

The plaintiff's allegation is that, as a result of the 1st defendant's failure to hand over the Ex-Copper site, damage was inflicted in the following ways:

(i) Costs of the idle labour and equipment mobilized for the site;

(ii) Loss of profit that would be made had the plaintiff executed the project or if the mobilized resources were used elsewhere;

(iii) Portion of the overhead costs which would be filled by works at the Ex-Copper site; and

(iv) Costs incurred in carrying out preliminary works for Ex-Revenue site which was never handed over.

(d) Refusal or neglect to confirm termination of the Agreement and refusal or neglect to reply to communications sent by the plaintiff.

The plaintiff argued, through PW1 and PW2, that it took a year for the notice of termination to be responded to, thereby causing loss to the plaintiff, as determination of the Final Account was dependent on the effectiveness of the notice of termination. The plaintiff's further submission is that the delay caused damage that came with the idleness of the resources on the site.

The plaintiff has also decried the delay in determining the Final Account. With respect to the Ex-AMI project, this took more than a year, contrary to Clause 14.10 of the FIDIC Conditions which

provide that such determination must be made within 84 days of the takeover of the completed project. This constituted a breach that allegedly entitles the plaintiff to a claim of interest on the Final Account payment.

The defendants' rebuttal was general across the board. They denied that there was any breach of contract for the Dar es Salaam Port Project, in terms of the change of methodology; delays in signing Addendum 1; failure to hand over the Ex-Copper site; and refusal or neglect to confirm termination.

As I move to address the plaintiff's complaint in this issue, it is apt to state that, in law, damage may be defined to mean the loss caused by a person to another or to his property, either with the design of injuring him; with negligence and carelessness; or by inevitable accident. It may also include loss which someone has sustained, and the gain which he has failed to make. In our case, the alleged damage emanates from what the plaintiff contends to be a series of acts of breach of the Agreement.

Items (a) and (c) of the instances of breach of contract have been extensively covered and disposed of in the course of determination of other issues earlier on. I will choose to skip them here.

Regarding item (b), the plaintiff's contention is correct. Formalization of the change which was directed by the 1st defendant was

done after a long wait that took 286 days. During this period, numerous reminders were sent to the 1st defendant but to no avail. The view held by the defendants is that the work that came with change of the new methodology did not hamper progress of the works at the site.

Assuming that this contention is correct, which is highly doubtful, the plaintiff had a right to a timely commitment which would tie it and its resources, including time, to the additional responsibility that came with change of methodology. It cannot be said that the 1st defendant had the luxury of time of choosing when to address issues that had a bearing on the rights of other parties such as the plaintiff. There can never be any other explanation of what this became of. It is simply an abhorrent conduct that constitutes a wanton breach of contract, a damage that entitles the plaintiff to a relief.

Moving on to item (d) my analysis begins with putting the record straight. I do so by reproducing the provisions of Clause 14.10 of the FIDIC Conditions on which the contention of delay in determining the Final Account is predicated. The said clause stipulates:

> *"Within 84 days after receiving the Taking-Over Certificate for the Works, the Contractor shall submit to the Engineer six copies of a Statement of completion with supporting documents, in accordance with Sub-Clause*

14.3 [Application for Interim Payment Certificates], showing:

(a) the value of all work done in accordance with the Contract up to the date stated in the Taking-Over Certificate for the Works,

(b) any further sums which the Contractor considers to be due, and

(c) an estimate of any other amounts which the Contractor considers will become due to him under the Contract. Estimated amounts shall be shown separately in this Statement at completion.

The Engineer shall then certify in accordance with Sub-Clause 14.6 [Issue of Interim Payment Certificates]."

Deducing from the quoted provision, the clear fact is that the 84-day period set out under the said provision is for the Contractor, in this case the plaintiff, to submit to the Engineer (1st defendant) a Statement of completion. Determination of the Statement and processing of the Final payment Certificate is done under the provisions of Clause 14.13 of the FIDIC Conditions, and the time frame set out for that is 28 days after receipt of the Final Statement.

The above position notwithstanding, my finding is that subsequent to termination and after the 1st defendant belatedly responded to the termination, the plaintiff submitted the Statement at completion and

claims were submitted. Besides replying to the said statement and directing the plaintiff to submit further and better particulars, there is no evidence that after re-submission of clarification through Exhibit P59, payment constituting the Final Account was effected, or that such payment, if any, was effected after 28 days that are stated in the Agreement. In my view, the delays were so inordinate, unjustified and prejudicial to the plaintiff's interests. Suffice to state and hold that these delays were not only a breach of the covenants stipulated in Exhibit 6, they also inflicted a damage on the plaintiff. Details of each of the delays and the resultant consequence of each of them are stated in the respective claims.

The next issue for determination is whether the plaintiff is entitled to recover the sum of TZS. 838,713,750. This sum allegedly arises from the plaintiff's involvement in the reclamation or upgrading of a piece of land that held the plant and machinery. The contention by the plaintiff is that this activity was done in the full knowledge and with the blessing of the 1st defendant, who does not dispute that plant and machinery were installed on the site and that the same are still on the site. The plaintiff further contends that Exhibit P39 bears testimony to the contention. It is in view of the 1st defendant's handling of the project that a claim of reimbursement is sought for the expenses incurred.

This claim has been pleaded in paragraph 24 of the plaint though the quantum raised for payment was not stated. Whilst the defendants do not appear to deny the claim, no evidence has been led by the plaintiff to prove that the alleged reclamation consumed the sum that is called for refund. In the absence of any opposition from the defendants, I take this to be the legitimate cost of the alleged reclamation and I would have no basis to question it. I hold that the plaintiff is entitled to recover it and the issue raised is answered in the affirmative. In sum, I allow payment of TZS. 838,713,750/- as prayed under this head.

The last issue relates to reliefs to which the parties are entitled. Most, if not all of the reliefs, are predicated on the grand allegation of breach of contract. In other words, these are reliefs founded on the contention that there is a breach. This implies, by and large, that these are claims of damages against the 1st defendant. With respect to damages, it behooves me to spend a little bit of time to lay a foundation of what they entail. In the Halsbury's Laws of England 3rd Edition Volume 11 page 216, damages are defined as follows:

> *"Damages may be defined as the pecuniary compensation which the law awards to a person for the injury he has sustained by reason of the act or default of another, whether that act or default is a breach of contract or a tort or to put more shortly damages are the*

compensation given by process of law to a person for the wrong that another has done to him."

The quoted definition got an extended scope through Lord Blackburn who held in an old English case of ***Livingstone v. Rawyards Cool Co.*** (1880) 5 App. Cas. 25, as follows–

".... that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation."

Underlining the importance and the role the damages play, Asquith, LJ., held in ***Victoria Laundry v. Newman*** [1949] 2 KB 528 at page 539, held that the purpose of damages is to put the plaintiff *"... in the same position, so far as money can do so, as if his rights had been observed."*

Back home, such role was accentuated in ***Hotel Travertine Limited v. M/S Gailey & Roberts Limited*** [2009] TLR 158, in which the Court of Appeal of Tanzania quoted a passage in ***Johnson and Another v. Agnew*** [1980] AC 367. In the latter, Lord Wilberforce guided as hereunder:

"The general principle for the assessment of damages is compensatory i.e. the innocent party is to be placed so far as money can do so, in the same position as if the

contract had been performed. Where the contract is one of sale, this principle normally leads to assessment of damages as at the date of breach ...."

See also: ***Stanbic Bank Tanzania Limited v. Abercrombie & Kent (T)*** Limited, CAT-Civil Appeal No. 21 of 2001 (unreported).

Worthy of a note is the fact that assessment of damages is the domain of a trial court. This is in view of the fact that the trial court is placed in a much better position to do so than an appellate court can do. It implies that the appellate court's intervention would only be warranted where the trial court's assessment is shrouded in profound irregularities that would render the assessment a serious travesty. Thus, in ***Razia Jaffer Ali v. Ahmed Mohamedali Sewji***, CAT-Civil Appeal No. 63 of 2005 (unreported), the upper Bench borrowed a leaf from Lord Wright's reasoning in ***Davies v. Powell Duffryn Associated Colliers Ltd.*** [1935] 1 KB 354, 360, wherein it was held:

"In effect the court, before it interferes with an award of damages should be satisfied that the judge has acted on a wrong principle of law, or has misapprehended the facts, or has for these reasons or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference."

The foregoing subscription was reiterated in the subsequent decision of ***Anthony Ngoo & Another v. Kitinda Kimaro***, CAT-Civil Appeal No. 25 of 2014 (unreported), in which it was observed:

> *"The law is settled that general damages are awarded by the trial judge after consideration and deliberation on the evidence on record able to justify the award. The judge has discretion in the award of general damages. However, the judge must assign a reason ...."*

In the instant matter, the plaintiff has clustered its claims in two main categories:

(a) Measured works and contract execution related claims for approved works and variations that came subsequently. They include laying of separation membrane; differential costs between consoled methodology and lean concrete; works done on Ex-Revenue site and extension of time for completion of projection. The latter attracted costs; and

(b) Compensation claims arising from breach of agreement. They constitute claims of interest on delayed payments of certified payments for Interim Payment Certificates; claims arising from extension of time with costs as a result of the alleged breaches; loss of profit; compensation for idle mobilized

resources; and overhead costs arising from failure to hand over Ex-Copper site.

These claims constitute the plaintiff's claims as constituted in the Final Account, allegedly arising under Clause 14.10 (b) of the FIDIC Conditions. The plaintiff has maintained that claims under item (b) above are special damages arising from the Agreement and those that the 1st defendant ought to have known that they would arise if the Agreement was, as contended by the plaintiff, breached. In support of these claims, the plaintiff has relied on the lengthy testimony of PW1 and PW2, and the submission by its counsel.

Relating to breach of contract, the plaintiff's counsel urged the Court to be implored by the spirit ushered in section 73 of Cap. 345, which, as quoted by the plaintiff, is worth reproducing here, as hereunder:

> *"73.-(1) Where a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.*
>
> *(2) The compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.*

(3) Where an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge is entitled to receive the same compensation from the party in default as if such person had contracted to discharge it and had broken his contract.

(4) In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account."

The plaintiff has also enlisted the assistance of the holding in ***Mexon's Investment Limited v. DRTC Trading Company Limited*** (supra), to contend that the plaintiff is entitled to the payment of damages as prayed. Regarding the justification for the quantum prayed, the plaintiff has relied on Exhibit P59 which is a tabulation of various claims as they are perceived or contended by the plaintiff.

The plaintiff's counsel considers the defendant's failure to cross-examine PW1 and PW2 on Exhibit P59, a coup or a scoop. This explains why they have belaboured, quite significantly, in highlighting the implication that failure to cross-examine a witness brings to a case. Numerous cases have been cited to support the contention. These are ***Cheyonga Samson @ Nyambare v. Republic***, CAT-Criminal Appeal No. 510 of 2019; ***Sanlam General Insurance (T) Ltd & 5 Others v.***

Gulf Bulk Petroleum (T) Ltd, CAT-Civil Appeal No. 170 of 2016; ***Paul Yusts Nchia v. Nationa Executive Secretary Chama cha Mapinduzi***, CAT-Civil Appeal No. 85 of 2005; and ***Kilanya General Supplies Ltd & Another v. CRDB Bank Limited & 2 Others***, CAT-Civil Appeal No. 1 of 2018 (all unreported).

In all of these decisions, the uniform position is that failure to cross examine a witness on important matter means acceptance of the truth of the evidence.

The defendants are adamant that these being claims for specific damages, their granting is dependent on proving them specifically and strictly. They have relied on the testimony of DW1 to stake their contention, and the holdings in a number of decisions, including ***AMI Tanzania Limited v. Prosper Joseph Msele***, CAT-Civil Appeal No. 159 of 2020 (unreported). The defendants urged the Court to dismiss the plaintiff's claims as the same have not been specifically proved.

As stated by the defendants, special damages bear some specialty which requires some specificity in their proof. It is a principle that has stood the test of time. In ***Zuberi Augustino v. Anicet Mugabe*** (supra), which has been widely quoted by counsel for the parties, the Court of Appeal of Tanzania made the following finding:

"It is trite law, and we need not cite any authority, that special damages must be specifically pleaded and proved. Cost of repair was pleaded but not proved.

Specific claims constituting the plaintiff's clamour for specific damages have been dealt with in each head of the claims. Reasons for award or refusal to award them have also been stated in each of the items, and I find no reason to replicate or duplicate them here.

This allows me to turn to the next head of claims. This relates to generals damages. These damages allegedly arise out of inconveniences that the plaintiff suffered in the hands of the 1st defendant. The contention is that there was mishandling of the project by the 1st defendant, mostly arising out of delays. These allegedly resulted in idleness of labour and equipment, cost escalation, dwindling of the plaintiff's cash flow, and erosion of the plaintiff's image in the public. The plaintiff's argument is that the 1st defendant knew that this was coming. The plaintiff's submission is that how much should be charged as general damages is a matter that is left in the hands of the Court. On this, he cited the decisions of ***Said Kibwana & General Tyre E.A. Ltd v. Rose Jumbe*** [1993] T.L.R. 175; and ***Yara Tanzania Limited v. Charles Aloyce Msemwa t/a Msemwa Junior Agrovet & 2 Others***, HC-Commercial Case No. 5

of 2013 (unreported). The plaintiff urged the Court to award general damages befitting the circumstances of this case.

The contention by the defendants in this respect is that the trite position is that the same are awarded at the court's discretion and, whenever issued, such issuance must be accompanied by reasons for the award and justification of the amount awarded. The defendants bolstered their position by citing the Court's decision in ***FINCA Microfinance Bank Limited v. Mohamed Omary Magayu***, HC-Civil Appeal No. 26 of 2020 (unreported).

The defendants further contend that, in the absence of any evidence of the allegation of the alleged wrong doing, it would be erroneous to award general damages for, the trite position is that damages cannot be awarded where they are neither pleaded nor are they broken down into figures that demonstrate the extent of the plaintiff's suffering. The defendants' further contention is that a party craving to be awarded damages must prove his case on the balance of probability. Enlisting the assistance ***of Kiteto District Council v. Tito Shumo & Others*** [2012] 2 EA 197, the defendants argued that these requirements have not been fulfilled by the plaintiff.

As I tackle the issue of general damages, I need to restate the trite position, which is to the effect that general damages need not be specifically claimed or proved. A mere statement in the prayers is enough.

In defining the term damages, the **Black's Law Dictionary 7th Edition** at page 394, went as far as stating as follows, with respect to general damages.

> *General damages do not need to be **specifically** claimed or proved to have been sustained".* (Emphasis added).

The quoted position has been widely accentuated in countless judicial pronouncements. One of such decisions is ***Cooper Motor Corporation Ltd. V. Moshi Arusha Occupational Health Services*** [1990] TLR 96, wherein it was held:

> *"General damages need not be specifically pleaded, they may be asked for by a mere statement or prayer of claim."*

Further emphasis was put in the case of ***Hass Petroleum (T) Ltd & Another v. Richard Nehemia Gwau & Another*** [2015] T.L.R. 316. The Court held:

> *"General damages need not be specifically pleaded; they may be asked for by a mere statement or prayer of claim. In order to exercise discretion on how much general damages should be awarded to the plaintiff, there should*

be some material upon which to peg the amount to award ...."

See also: ***Anthony Ngoo & Davis Anthony Ngoo v. Kitinda Kimaro*** [2015] T.L.R. 54 (CA).

As submitted by counsel for the defendants, the generally accepted position is that exercise of discretion by the Court in the award of damages must be informed by some basis. It implies that the Court must have been moved by some evidence that the damage complained about has been suffered and that the perpetrator thereof is none other than the defendant.

I have gone through the pleadings and evidence adduced by the plaintiff, together with arguments presented in the final submission. It comes out clearly that the claim for general damages was pleaded in the plaint that founded the instant proceedings. The prayer for such damages was predicated on several allegations of breach of contract some of which have been sustained in my earlier determination in this decision. Most of these emanate from delays in taking essential steps in the performance of the contract, while others are premised on the negligent conduct of the 1st defendant. Without any flicker of doubt, such abhorrent acts had an adverse impact on the plaintiff. In my considered view, the testimony of perpetration of acts of breach and the 1st defendant's negligent conduct

are sufficient material upon which the award of general damages may be awarded. It also applies to the amount of damages to be awarded.

In consequence of all this, I find that the claim of general damages is, in the circumstances of this case, justified and I grant. Accordingly, I award the general damages to the tune of TZS. 5,000,000,000.00. I have settled on this sum considering the fact that the plaintiff has suffered a prolonged period of anxiety and uncertainty of more than a decade, during which a chunk of their time and resources have been consumed in the pursuit of the matter. As a result of the 1st defendant's procrastinated behaviour, the plaintiff has had to dedicate a bigger part if not all of its efforts in the project, meaning that it was difficult to engage in other contractual undertakings knowing that it had not completely disengaged or withdrawn from the project, at least until 2013, when the 1st defendant wrote to accept the termination of contract albeit on a different ground.

The plaintiff has also narrated its economic tribulations and reputational issues that arose as a result the delayed payments, going as far as disclosing its indebtedness with a financial institution that bankrolled their activities in both of the projects. Some of these financial obligations are allegedly due, to-date.

I am persuaded to hold that, the totality of the plaintiff's submission in this aspect has done enough to justify the Court to live the script made

by this Court in ***Hemed Said v. Mohamed Mbilu*** [1984] TLR 113, wherein it was held:

> *"**According to law the person whose evidence is heavier than that of the other is the one who must win.** In this instance each party called two witnesses in addition to himself at the hearing of the case in the Court of first instance. In measuring the weight of evidence in such cases as the present one it is not, however, the number of witnesses whom a party calls on his side which matters. It is the quality of the said evidence. In this connection the evidence of a single witness may be a lot heavier than that of ten witnesses."* [Emphasis is added]

In my considered view, the testimony adduced by the plaintiff is potent enough to tilt the claim of general damages in its favour. I hold so.

Before I wind down, it feels compelling that I should drop a line or two regarding one nagging point. This is with respect to the competence of the witness statements which constituted the evidence in chief of the witnesses who testified in support of the plaintiff's case. The contention is that these statements did not conform to the requirements of rule 48 (1) (e) of the High Court (Commercial Division) Procedure Rules (supra). In the defendants' contention, the cited rule prohibits matters of information or belief from being admitted except where the source of that matter of information or belief has already been cited.

I will waste no time in castigating the defendants' late sneaking of this contention. It is a contention that has been raised at the tail end of the proceedings, knowing that the plaintiff would not get an opportunity to give its account of the matter. If entertained, that would be tantamount to condemning the plaintiff unheard and I resist the temptation of blessing that irregular conduct.

It is also my considered opinion that witness statements do not stand on their own. Their form and content are, subsequent to their adduction, subjected to cross-examination during which issues relating to their competence and compliance with the law, and veracity of their contents are impeached. It is part of the object of cross-examination, as was stated in the Indian case of ***Juwar Singh v. State of MP***, AIR 1981 SC 373, wherein it was held that:

> *"the objects of cross-examination are to impeach the accuracy, credibility, and general value of the evidence given in chief; to sift the facts already stated by the witness, to detect and expose discrepancies, or to elicit suppressed facts that will support the case of the cross-examining party."*

In this case, all of the three witnesses were subjected to a grueling cross-examination that lasted for days. None of the members of the battery of the State counsel who represented the defendants punched a

hole or two on the competence of the statements. I consider this contention misplaced, and I reject it out of hand.

The last of the plaintiff's prayers is on any other orders and reliefs that the Court may deem fit and just to grant. The plaintiff has dug deep into what it considers to be the 1st defendant's acts of breach of contract, and submit that the Court ought to go further and grant some reliefs, besides those which have been specifically pleaded and prayed in the plaint. In this respect, reliance has been placed on Exhibit P87, believing that the 1st defendant disclosed its indebtedness to the plaintiff, prompting the former's auditor to seek a confirmation on whether the sum of TZS. 455,881,231/- disclosed in the 1st defendant's books of accounts exist. The Court is urged to take cognizance of section 20 (1) of the Evidence Act (supra) and decisions of the Court of Appeal of Tanzania in ***Zuberi Augustino v. Anicet Mugabe*** (supra); and ***International Commercial Bank Limited v. Jadecam Real Estate Limited***, CAT-Civil Appeal No. 446 of 2020 (unreported).

It is noteworthy, that the established principle is that a claimant may press for reliefs under *"any other orders and relief that the Court may deem fit and just."* Application of this item is intended to ensure that all reliefs that the claimant is entitled to are not lost. This is in terms of Order VII rule 7 of the Civil Procedure Code which provides as follows:

"Every plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be given as the court may think just to the same extent as if it had been asked for; and this rule shall apply to any relief claimed by the defendant in his written statement."

It is part of the wider spirit of the law that is to the effect that the plaintiff is entitled to reliefs, even where such reliefs are not specifically prayed for, but only if the facts established on evidence demand so. This position was enunciated in the Indian case of ***Shiv Dayal v. Union A*** [1963] Punj. 538, quoted by the Court of Appeal of Tanzania in ***Commercial Bank Limited v. Jadecam Real Estate Ltd*** (supra). It was held:

"The Plaintiff ought to get such relief as he is entitled to on the facts established on evidence even if that relief has not been specifically prayed for."

In the instant case, however, need for granting any other reliefs falls by the wayside, essentially because, besides other reliefs such as specific damages and interest on the principal claims, the Court has awarded general damages. In my considered view, general damages address everything that the plaintiff would be awarded through the

window of *"any other orders and relief that the Court may deem fit and just."* In view thereof, this prayer is declined.

Regarding Exhibit P87, my take is that the same cannot constitute the basis for founding a claim by the plaintiff, unless it is established, in the clearest of the indications, that the said sum constituted a contingency liability or sum set aside by the 1st defendant to settle a particular obligation due to the plaintiff. It is not stated which of the plaintiff's myriad of claims were to be settled through the sum stated in Exhibit 87. It is only fair that the significance of the said exhibit be played down.

In the upshot of all this, I take the view and hold that this suit partly succeeds in the manner shown hereinabove. For clarity and ease of understanding, the following reliefs are ordered:

(i) Payment of the sum of TZS. 225,130,200/- constituting a cost build up for works executed and arising from the verbal instructions;

(ii) Payment of the sum of TZS. 5,360,135,966.15 comprising the plaintiff's payment due from the Statement at completion;

(iii) Payment of TZS. 5,768,876,258.99 constituting interest on the sum payable as a claim due from the Statement at completion;

(iv) Payment of TZS. 10,700,625/- and TZS. 6,385,688.08 constituting being costs of designing documents for approved and applied variations of the work;

(v) Payment of the sum of TZS. 130,113,174.15 being the cost for works done on the Ex-Revenue site;

(vi) Payment of TZS. 86,814,546.54 being the plaintiff's claim of interest on payment of certified payments;

(vii) Payment of TZS. 181,099,800/- being the cost of laying a separation membrane;

(viii) Payment of the sum of TZS. 838,713,750/- being the cost of reclamation/upgrading of a piece of land at the Ex-AMI site;

(ix) Payment of TZS. 2,500,000,000/- being compensation for loss suffered as a result of delays in the completion of the projects;

(x) Interest on the above items, at the commercial rate that prevailed at the time the sums fell due;

(xi) Interest on the aggregate sum on computation based on item (x) above, at the current commercial rate from the date of filing of the suit to the date of judgment;

(xii) Interest on the aggregate sum under item (x) from the date of judgment to the date of full satisfaction of the decretal sum; and

(xiii) Costs of the matter.

It is ordered accordingly.

DATED at **DAR ES SALAAM** this 4th day of July, 2022.

M.K. ISMAIL

JUDGE

04/07/2022