IN THE SUPERIOUR COURT OF JUDICATURE

IN THE COURT OF APPEAL

ACCRA-GHANA

CORAM: ADJEI, J.A

MERLEY, J.A

BAAH, J.A

SUIT NO.H1/156/2019

Date: 15th December,2022

SMITHCROWN GHANA LTD. ---- PLAINTIFF/APPELLANT

VRS.

AVNASH INDUSTRIES GHANA LTD. -- DEFENDANT/RESPONDENT

J U D G M E N T

ADJEI, J.A:

The Plaintiff/Appellant dissatisfied with the decision of the High Accra, rendered on 18th May, 2017 which dismissed all its reliefs as unproven filed an appeal against same to this Court on 11th August, 2017. The trial Judge also dismissed the counterclaim filed by the Defendant as unproven, but it did not appeal against the dismissal of its counterclaim.

The brief facts of the case were that the Defendant, which is a Ghanaian registered company, awarded a contract through competitive bidding to the Plaintiff to construct a rice mill at a place known as Changnayili in Tamale. The agreement between the parties was governed by a written agreement executed on 12th November, 2021, and titled "Contract Agreement for Civil, Structural, Mechanical, and Electrical Works for Rice Plant at Village Changnayili Tamale." The above-mentioned agreement was admitted into evidence as exhibit "C". There was another document containing the bills and quantities for the project prepared by Secmec Consultants PVT Ltd., Architects and Planners in association with Nel-Arc Consult and Beau Sackey & Associates Ltd., and quantity surveyors dated October 2021, which was also admitted into evidence as exhibit "D" Exhibit "D" is captioned exhibit "D".

The total project cost was Gh¢8,250,000.00 and was to be completed within four months and two weeks, which were to be reckoned from the date of either the release of the mobilization fund or from the date of handing over of the site, whichever was earlier. The agreement further provided that if the work was delayed arising from reasons beyond the control of the Plaintiff, and same is accepted by the Defendant, the Plaintiff could seek an extension of time in writing from the Engineer - in - charge at the site, subject to the final and binding decision of the Defendant on the matter.

The defect liability period is six months to be reckoned from the date of issue of certificate of completion by the Engineer –in- charge. There was another proviso that should the Plaintiff fail to complete the work and clear the site on or before the agreed schedule or any extended date of completion, a penalty was to be paid at certain agreed rates.

The Plaintiff could not comply with the agreement entered into between the parties and defaulted on most of the conditions. The Defendant equally breached some of the conditions of the agreements.

The Plaintiff on 5th June, 2013 sued the Defendant for several reliefs including a declaration that the agreement entered between them on 12th November, 2011 whose life span was four and half months commencing from the date of the release of the mobilization fund or from the date of handing over which one whichever was earlier was in existence and was therefore entitled to some payments arising under same. The Defendant resisted the Plaintiff's claim and counterclaimed against it, *inter alia*, that the Plaintiff was in breach of the agreement and was therefore entitled to damages against it.

The trial High Court Judge dismissed both the claim and counterclaim, which provoked the appeal before this Court. The Plaintiff, dissatisfied with the decision of the trial High Court, filed an appeal against same. The grounds of appeal are as follows:

> ***"a. The judgment is against the weight of evidence.***
>
> ***b. The learned trial Judge erred in discounting the evidential value of Exhibit 'E' which error has occasioned the appellant a substantial miscarriage of justice.***
>
> ***c. The learned trial judge, with respect clearly erred in the face of crucial evidence on record that the claim for the retained amount of Gh¢412,000.00 was not due when he ironically but rightly had found that same was in the form of a bond or security against defect liability.***
>
> ***d. The learned trial Judge grievously erred when he made a finding that the effect of issuing certificates for payment under the contract for "Practical Complexion" did not guarantee automatic and unimpeded payment if there existed liability to be made good by Smithcrown.***
>
> ***e. The learned trial judge erred in making a finding that the job the appellant did was riddled with several defects, in spite of overwhelming evidence on record to the contrary, which error has occasioned the appellant a substantial miscarriage of justice.***

f. The learned trial Judge grievously erred in holding that within the terms of the agreement the Respondent (AVNASH) was justified in withholding the payments for part of valuation "5" and the whole of valuation "6".

g. The learned trial Judge erred, in his finding, contrary to overwhelming evidence on record, that it was the poor workmanship that resulted in the collapse of the steel structure and this error has inter alia occasioned the appellant a substantial miscarriage of justice".

We address ground (a) of the appeal, the omnibus ground of appeal, and we are required to evaluate the entire evidence on record and correct all errors committed by the trial High Court. We have to examine all the errors committed by the trial Court Judge in respect of the evaluation of material evidence, which were improperly evaluated material evidence not evaluated at all, legal issues that required factual evidence to be resolved and were not properly resolved, and the improper application of the standard burden of proof in accordance with the law and which has occasioned a miscarriage of justice.

The plethora of cases on the principle stated above include **Owusu-Domena v. Amoah [2015-2016] 1 SCGLR and Tuakwa v. Bosom [2001-2002] SCGLR 686.** The Defendant paid the mobilization fund to the Plaintiff on 7th December 2011 but the latter took possession of same in the first week of January 2012, contrary to the agreement that which provides that time was to be reckoned from the date of the release of the mobilization advance or from the date the site was to be handed over to the contractor, whichever is earlier.

Looking at the agreement, the four and a half months within which the contract was to be executed commenced from 7th December, 2011, when the mobilization advance was

paid to the Plaintiff. There was a further condition that if there is a delay, the decision of the Defendant on the issue shall be final and binding.

There was a penal provision in the agreement to ensure that the Plaintiff completed the work on schedule. The Plaintiff was to pay a penalty of one (1) percent of the contract value to the Defendant if it failed to complete the work and it delayed for one week; three percent if it delayed for the second week; and five percent if it delayed beyond the second week unless the time was extended by the Defendant.

The Plaintiff was required to submit the R/A Bills in a prescribed form on a monthly basis on or before the date of every month fixed for the same, and the Defendant shall pay same within seven working days after receipt of a certified bill from the Architect. The parties, through their representatives, and the Architect, were to jointly measure the work done on the 25th of each month upon a written request by the Plaintiff within a minimum of 48 hours in advance. The Plaintiff contended that the work done was valued at different stages and that valuation No. 5 was delayed and that full payment of same has not been made by the Defendant.

Furthermore, as a result of the delay, payment for valuation 6 is still outstanding, and according to the Plaintiff, several demands made for same have fallen on deaf ears. The other outstanding payments to be made were in respect of the retention of GH¢404,500.00 and tax deductions of GH¢300,000 .00. The Defendant, in its evidence through James Bentie, admitted that the outstanding balance to be paid on valuation 6 and part of valuation 5 was GH¢918, 731.30, but it was not happy with the work done on valuations 5 and 6, even though they were certified by the engineers and architects appointed by the Defendant on site.

Apart from the payments stated above, the Plaintiff was further claiming for an amount of GH¢1.4 million, representing the loss of income from the other component of the work the Defendant re-awarded to another contractor without its consent, and GH¢1.7 million as special damages emanating from the cost of maintenance of equipment and money spent on employees.

The Defendant in its evidence admitted that part of the external works which originally formed part of the contract awarded to the Plaintiff were re-awarded to another contractor, thereby reducing the value of the contract awarded to the Plaintiff from GH¢8,250,000.00 to GH¢7,850,000.00. In June 2012, the Defendant further awarded a contract to the Plaintiff to construct an international steel structure costing GH¢2,253,612.05, bringing the total cost of the entire contract to GH¢10,103,612.05; which the Plaintiff is required to prove that it executed the entire contract to enable it to claim the entire amount.

During cross examination of the witness called by the Plaintiff, the Defendant suggested to him that the amount of money payable to the Defendant was dependent upon the total value of the contract executed by it, and the response was positive, and therefore put the burden of proof on the Plaintiff to prove the work done by it. When Samuel Oloruntoba was under cross-examination, the following questions were posed and answered accordingly:

> ***"Q. So this amount in essence means that you will be paid GH¢8,250,000.00 at the end of the contract.***
>
> ***A. Yes, either reduce or increase.***
>
> ***Q. At the end of the day the total amount you will receive will depend on the total value of contract you executed, is that not it.***

A. It is true

Q. So it means this contract is not lump necessarily a lump sum contract.

A. The contract is not lump sum contract it could decrease or increase.

Q. So it is true that the total amount to be paid is dependent on the total work done and valued.

A. Yes, my lord.

Q. As you stand here you received a total of GH¢6,349,611.44.

A. I don't know the actual amount but I know we have received something like that.

Q. I am putting it to you that you have received a total of GH¢6,349,611.44.

A. I do not know the exact amount but I said we have received some amount of money.

Q. You are saying that the contract is not completed as at now.

A. Exactly

Q. And you agree with me that the retention fee is paid at the end of the contract.

A. Yes, my lord after six months.

Q. When there is no defect?

A. Yes my lord."

Sections 11(4) and 12 of the Evidence Act, 1975 (N.R.C.D. 323) require the person who has the burden of proof, such as the Plaintiff in an instant appeal, to prove its case on the preponderance of probabilities. The cases on the above subject matter, including **Adwubeng v. Domfeh [1996-97] SCGLR 660 and Effisah v. Ansah [2005-2006] SCGLR 943**, have crystallised the statutory position in sections 11(4) and 12 of the Evidence Act, 1975 (N.R.C.D. 323) that where the burden of proof in civil matters is on a party, that

party is required to prove its case by a preponderance of probabilities, and there is no exception to this rule unless the issue to be resolved in a civil matter is of criminal nature, such as fraud or forgery, which requires proof beyond a reasonable doubt. There is no doubt that the work has been delayed, and as of now, the work has not been completed.

The Plaintiff attributed the late start of the contract to the Engineer appointed by the Defendant. The Defendant's representative in his evidence in chief stated in clear terms that the delay was occasioned by the Defendant. He testified as follows:

> *" ..... The delay was caused by them because the site was not ready for the construction work to start and because there was additional work on site. So, the delay is coming from the Engineer."*

There is overwhelming evidence on record that the Defendant paid the mobilization fund to the Plaintiff on 7th December, 2011 and the Plaintiff delayed by going to the site as agreed between them in the written contract until the first week in January 2012. The clause 4 of the contract which was tendered as exhibit "D" on the commencement date provides as follows:

> *"The time for completion for this project is 4.5 months and will be reckoned from the date of the release of the mobilization advance or from the date of handing over the site, whichever is earlier."*

I am satisfied that the Plaintiff delayed the commencement of the project for barely a month as the mobilization fund was paid to it on 7th December, 2011 and failed to prove that the Defendant rather put in an impediment on its way to move unto the site.

From the evidence on record, particularly the evidence of the Plaintiff's representative, it is established that part of the structure collapsed when the project was still under construction. The Plaintiff gave two reasons which occasioned the collapsed of the structure and attributed it to storm and the fact that the construction was under construction and was never completed due to lack of money to buy materials to complete same. The Plaintiff's representative testified on that issue under evidence in chief as follows:

> **"Q. They also contend that your poor workmanship contributed to the collapse of the entire scale structure leading to the delay of the entire project, what is your reaction to that.**
>
> **A .It is never true, my lord. The collapse was caused by two reasons:**
>
> **"1. There was a storm at that time, and that was when we even had a plane crash in Ghana in 2012.**
> **2. It is because the construction was never completed and we were expecting them to make payment on our valuation so that we can have some of these materials to complete the work, but they did not pay. So, when the storm came, it nearly collapsed the construction. So, if they had paid us early, we would have finished the work. The agents were on site, and they never complained about our work."**

I find that the work was not completed by the Plaintiff's own agent and was not therefore entitled to the total cost of the contract sum. I dismiss ground (a) of the appeal

as unmeritorious, as the Plaintiff failed to prove that the trial High Court Judge committed any factual or legal error in his evaluation of the evidence on record.

I find that exhibit "E" was issued by the Defendant's site Engineer to award additional contract to the Plaintiff to execute the internal structural steel works. There is evidence on record that the internal structures constructed by the Plaintiff collapsed. The Plaintiff's representative under cross examination admitted that part of the internal structure constructed by the Plaintiff collapsed but it was not all. Therefore, no payment would be made on the internal structures until they are fixed and approved for payment.

On the whole, the Plaintiff did, in most cases, shoddy work as asserted by the Defendant and was not entitled to payments until they were fixed, but the Plaintiff failed to adduce evidence to prove that the other part of the contract for which it had not been paid went through valuation and payments were not made. The agreement was that payments were to be made by the Defendant to the Plaintiff depending on the work executed and valued, and not in respect of the entire contract.

However, there is no evidence that the Plaintiff completed same and submitted the valuation for payment, and I dismiss grounds (b), (d), (e), and (f) as unmeritorious. I must say that grounds (b), (d), (e), and (f) of the appeal come under the omnibus ground of appeal, and were largely discussed under it, and could have been dismissed under that ground.

There are overwhelming evidence on record to the effect that the Plaintiff did not complete the work and payment was made upon submission of valuation approved by both parties. Furthermore, part of the structure collapsed as a result of shoddy work

done by the Defendant. The defendant's evidence stated above indicated that if the structure had been completed, it would not have been demolished by the storm. The Plaintiff should have protected the structure from collapsing by completing that part of the structure that could not have withstood the storm.

I further dismiss ground (c) of the appeal as unmeritorious, as the Plaintiff's witness admitted that the retention fee is to be paid after six months at the end of the contract where there is no defect. The work was not completed, and from the evidence, several defects have been found by the Defendant, and the retention amount cannot be paid to the Plaintiff.

I find as a whole that the Plaintiff, who has the burden to prove its case on the preponderance of probabilities, failed to prove the actual work done by it, and the appeal fails in its entirety. The Plaintiff failed to prove that it completed the work without defects and was not paid, and further failed to prove that there were particular parts it completed without defect and was paid for them. The Defendant was justified in failing to pay the retention fee as the defects detected were not rectified and would have acted contrary to their agreement. The Plaintiff is not entitled to the tax deducted by the Defendant from the payments made, as the Defendant is mandated by law to withhold and pay the tax to the Ghana Revenue Authority.

The Plaintiff's representative, in his evidence in chief, made a demand for the sums of GH¢404,500.00 and GH¢300,000.00 being retention fees and tax deductions, respectively, and from the evidence on record, it was not entitled to any of them. He testified as follows:

"Yes, we have a retention of GH¢404,500.00, and apart from that, we also had tax deductions, and we did not receive the retention from the government, and it is about GH¢300,000.00."

The Plaintiff failed to make a case for the retention of the amount claimed, as the evidence on record disclosed that the defects were not corrected to satisfy the condition precedent for payment of the retention to be made. Furthermore, the withholding taxes are supposed to be paid on behalf of the Plaintiff to the Ghana Revenue Authority, and the Defendant cannot claim ownership to it.

The uncontroverted evidence on record is that both parties breached the contract executed between them, and the Plaintiff who initiated the breach and continued with it shall not be entitled to damages for breach of contract. The Plaintiff, who is invoking equity, has come before it with tainted hands.

I dismiss all the grounds of appeal filed by the Plaintiff. I affirm the judgment of the trial High Court Judge delivered on 18th May, 2017 and dismiss the appeal in its entirety.

(SGD.)

DENNIS DOMINIC ADJEI
JUSTICE OF THE COURT OF APPEAL

(SGD.)

WOOD,J.A I agree **MERLEY WOOD**
JUSTICE OF THE COURT OF APPEAL

(SGD.)

BAAH,J.A I also agree ERIC BAAH
JUSTICE OF THE COURT OF APPEAL

COUNSEL

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