IN THE SUPERIOR COURT OF JUDICATURE

IN THE COURT OF APPEAL

KUMASI, A. D. 2022

CORAM:

ANGELINA M. DOMAKYAAREH (MRS.) J A (PRESIDING)

ALEX B. POKU-ACHEAMPONG, J A

SAMUEL K. A. ASIEDU, J A

CIVIL APPEAL NO.: H1/08/2018

DATE: 28TH NOVEMBER, 2022

JULIANA OSEI BONSU - PLAINTIFF/RESPONDENT
(DOING BUSINESS UNDER
THE NAME AND STYLE OF
"OSBORN ENTERPRISE"),
PLOT 18, BLOCK G GYINYASE,
KUMASI.

VRS.

KUMASI METROPOLITAN ASSEMBLY -
DEFENDANT/APPELLANT
KUMASI, ASHANTI

J U D G M E N T

DOMAKYAAREH (MRS.), JA:

[1] This appeal is against the judgment of the High Court (Commercial Division), Prempeh Assembly Hall, Kumasi dated 19th June, 2015.

For ease of reference, the Plaintiff/Respondent will be referred to as the Respondent whilst the Defendant/Appellant will be called the Appellant.

BRIEF FACTS:

THE RESPONDENT'S CASE:

[2] The Respondent is a Business Woman doing business under the name and style of **OSBON ENTERPRISE**. Per her Statement of Claim filed on 22/3/13 she averred that in or around January 2007 after going through a bidding process organized by the Appellant, the Appellant awarded her "a franchise for the provision of solid waste collection services in the Asawase Sub-Metropolitan Area" within the Kumasi Metropolis. The Respondent averred that before the formal award of the Contract, there was a negotiation meeting between the parties where it was agreed that the Appellant would pay the Respondent **GH¢33,051.31** per month, made up of a Provisional Expected Monthly Revenue from the franchise service totaling **GH¢16,265.00** and a Provisional Monthly Deficit Amount (subsidy) totaling **GH¢16,786.37**.

[3] The Respondent further averred that she was formally awarded the Contract on 24th December, 2007 for five years and she commenced work on 1st January, 2008 by renting trucks and doing the house-to-house collection of solid waste in the area assigned to her. It is the case of the Respondent that soon after she commenced the work, the Appellant invited her and wanted to know the challenges she was facing in her work. The Respondent said upon informing the Appellant about the challenges she was facing with trucks, the appellant agreed that she should repair two of the Appellant's tractors and two skip loaders which had broken down at her own cost which she did to assist her in the execution of the work.

[4] The Respondent also averred that she worked for the first five months without encountering any operational difficulties but in or around June 2008, her toll collectors who went round to collect tolls from people in her operational area were chased away by the Appellant's agents. The Respondent stated that she lodged complaints with the Appellant who promised to meet her to resolve the issue but no meeting was ever called to resolve the matter. The Respondent stated that in or around August 2008, she handed over the Appellant's vehicles to it and resorted to renting vehicles for the work. According to the Respondent, notwithstanding the difficulties and the risks under which she and her staff were working, she continued to provide the invaluable service to the Appellant without being paid any remuneration by the Appellant until October 2008, when without any prior notice to her, the Appellant unilaterally wrote to her to terminate the Contract.

[5] In itemizing the expenses that she incurred in the execution of the works, she stated that she spent a lot of money to secure a Bank Guarantee and a Bond from her Bankers and Insurers; she hired six Drivers, one Operations Manager, one Supervisor and eight Labourers whom she paid to perform the works. The Respondent averred that it was actually the Appellant that employed all these workmen but she had to pay their remuneration. The Respondent also stated that she purchased fuel and lubricants on credit at the prevailing market price for the vehicles and machinery that she used to execute the work and lamented that the Appellant did not pay her for all the period that she worked for it. The Respondent concluded her case by stating that she made several demands on the Appellant to pay for her legitimate claim including letters by her Solicitors to no avail hence she issued the Writ of Summons from the Registry of the trial court against the Appellant and claimed the under listed reliefs.

[6] RELIEFS CLAIMED BY THE RESPONDENT AT THE TRIAL COURT:

a) Cash sum of Five Hundred and Thirty-Two Thousand Four Hundred and Seventy-Six Ghana Cedis Forty Pesewas (GH¢ 532,476.40) consisting of money owed to the Plaintiff by the defendant for works done for the defendant as well as money actually spent pursuant to an

agreement entered into between the Plaintiff and the defendant in or around January 2008 but which said agreement the defendant has since unlawfully terminated.

b) Interest on the sum mentioned in paragraph (a) supra from January 2008 till the date of final payment at the prevailing bank rate.

c) General Damages for unlawful termination of the Plaintiff's contract with the defendant.

d) Cost (inclusive of legal fees)

THE APPELLANT'S DEFENCE:

[7] The Appellant is the Local Government Authority in charge of the Kumasi Metropolitan Area. Per a Statement of Defence filed on its behalf on 28th May, 2013, the Appellant, apart from admitting that it awarded a franchise to the Respondent on 24th December, 2007, essentially denied all the averments and claims by the Respondent.

The Appellant averred that the Respondent and six other companies were given a six-month probation period to justify their preparedness to execute the project which consisted of two types of refuse collection, namely, communal and door to door collections.

[8] It is the case of the Appellant that the contract was such that aside charging residents for the refuse collected, the Appellant would also pay a subsidy to the Respondent for every ton of refuse collected by the Respondent. The Appellant further averred that three months after the bidding, the Respondent complained of encountering difficulties in executing the contract and said she needed to have discussions with the officials of the Appellant. Among the complaints she made was that she lacked vehicles for the effective execution of the contract and pleaded with the Appellant to loan her company some of its vehicles to execute the Contract. The Appellant admitted that it offered some of its vehicles to the Respondent which she repaired and used without hindrance from the Appellant. The Appellant stated that among the seven companies awarded the contract, the Respondent was the only one it had to assist logistically to execute the Contract. The Appellant further averred that it received a lot of complaints from the residents in the Respondent's operational area consequently, a meeting was held between the Respondent and officials of the Appellant where the Respondent again complained of

difficulties in executing the contract. The Appellant went on to aver that the Respondent abandoned the contract even before the expiration of the six-month probation period. The Appellant went on to elaborate that at the time of abandoning the Contract the Appellant had collected three thousand five hundred and fifteen point nineteen (3,515.19) tonnes under the communal collections and four hundred and sixty-one point eight (461.8) tonnes under the door to door collections.

[9] The Appellant further asserted that all the six Contractors who won bids with the Respondent were paid subsidies of (GH¢9.00) per ton on the communal collection and (GH¢3.60) per ton on house to house collections. The Appellant asserted that in June 2008, it paid the Respondent all the money that she was entitled to for the period she executed the Contract therefore, she was not entitled to the reliefs she claimed.

REPLY:

[10] In her reply to the Appellant's Statement of Defence filed on 5/6/13, the Respondent joined issues with the Appellant and further averred that the discussion she had with the officials of the Appellant centered on the payment of accumulated arrears which had resulted in her difficulty in raising money to rent trucks for the work. The Respondent said it was as a result of these discussions that the suggestion to lend the Respondent some equipment for the work was mooted.

DECISION OF THE TRIAL COURT:

[11] On 19th June, 2015, the trial judge entered judgment in favour of the Respondent as follows:

"(a) An amount of GH¢249,188.40 representing the five months subsidies from January to May 2008 and also the monthly sum of GH¢33,051.31 for the period June to October, 2008.

(b) Interest on the total sum of the above as prayed.

c) General damages of GH¢800,000.00

(d) Cost (inclusive of solicitor's fee) of GH¢50,000.00"

APPEAL:

[12] The Appellant was naturally dissatisfied with this judgment. Consequently, it caused this appeal to be filed on its behalf on 16th September, 2015 in which the Appellant complained about the entire judgment and the Cost. The Appellant relied on two grounds of appeal. These are: -

GROUNDS OF APPEAL:

a. The learned judge erred when he failed to consider fully the evidence of the parties on record.

b. The judgment was against the weight of evidence

c. Additional grounds to be filed upon receipt of the record of appeal.

We place on record that no additional grounds of appeal have been filed.

RELIEFS SOUGHT:

An order allowing the appeal and a further order setting aside the judgment and costs.

CONSIDERATION OF THE GROUNDS OF APPEAL:

WRITTEN SUBMISSION ON BEHALF OF DEFENDANT/APPELLANT IN SUPPORT OF THE APPEAL:

[13] Counsel argued the two grounds of appeal together which he subsumed under the omnibus ground that the judgment is against the weight of the evidence adduced at the trial.

It is trite law that when an appellant alleges on appeal that the judgment appealed against is against the weight of evidence adduced at the trial, then that appellant implies that certain pieces of evidence in his favour were ignored by the trial court which if the said evidence were duly and appropriately considered, the case would have tilted in favour of the appellant. In addition, the appellant also implies that certain pieces of evidence were wrongly applied against him/her and therefore those wrong applications ought to be reversed. In these circumstances, such an appellant has the duty to demonstrate that indeed the trial judge failed to consider evidence adduced at the trial and further that if the appellate court considers the evidence, it would find in favour of the appellant. The well-known cases of **AKUFO ADDO V.**

CATHELINE [1992] 1 GLR 377, TUAKWA V BOSOM [2001 – 2002] SCGLR 61 and **DJIN VRS. MUSAH BAAKO [2007 – 2008] 1 SCGLR 686** are some of the few cases among the litany of cases enunciating the principles of law when the omnibus ground of appeal in invoked in an appeal.

[14] Counsel referred to the evidence of two witnesses of the Respondent, namely PW1 and PW 4. PW1, Emmanuel Boateng, did the registration and counting of the households for the Respondent and also collected money from the households on behalf of the Respondent. (See pages 47 – 49 of the Record of Appeal). PW4, Awine Musah, was a waste collection labourer of the Respondent (See pages 60 – 64 of the Record of Appeal). Counsel submitted that both witnesses testified that they did not work for the ten months that the Respondent claimed they did. However PW1 testified that he worked up to September, 2008 and that he was duly paid by the Respondent. This is what PW1 said in his evidence-in-chief at page 48 of the ROA:

"Q. When did you leave the employment of the Plaintiff to join the ECG?

A. Around August – September 2008

Q. From April to August or September you left, did the Plaintiff pay you?

A. Yes"

A legitimate inference to draw from these answers is that if PW1 did not work up till September, he would not be paid. Again, the fact that PW1 left the employment of the Respondent around August - September 2008 does not mean that all the employees left at the same time. PW1 spoke for himself on this issue and not for all the employees of the Respondent. PW4 on his part, testified in his evidence-in-chief at page 61 of the ROA thus:

"Q. Where were you collecting the refuse from?

A. Both street and house to house collections.

Q. When did you do this job for the plaintiff?

A. From July to October 2008

Q. Were you paid?

A. Yes"

This is evidence that an employee worked up to October 2008.

[15] Counsel also submitted that these two witnesses (PW1 and PW4) of the Respondent rather corroborated the case of the Appellant that the Respondent did not complete the six-month probation period. The evidence-in-chief of these witnesses prove otherwise. Therefore, the submission by counsel for the Appellant that the trial judge erred when he ordered the Appellant to pay the Respondent from June 2008 to October 2008 when in fact the Respondent did not work for that period is not supported by the evidence on record.

[16] Counsel also pointed out that apart from repeating her averments when she mounted the witness box as well as her witnesses also repeating the averments under oath, The Respondent failed to provide any proof to show that she worked up to June when her foreman stated that they worked up to May. Counsel also faulted the trial judge by asserting that he failed to give full effect to the evidence of PW1 when he said that they worked in April and June but accepted the evidence of PW4 who indicated that they worked for three months but could not tell the months of the year. It is true that PW4 who has never been to school prevaricated when counsel for the Appellant took him through the names of the months during cross-examination; but in the end he was emphatic he worked in October 2008. Hear him at page 64 of the ROA:

"Q. I put it to you that in October 2008, you did not work for the Plaintiff?

A. That is not correct."

Counsel submitted that the evidence of the Respondent and her witnesses did not meet the standard of proof required in the case of **MAJOLAGBE V. LARBI & ORS [1959] GLR 190** where OLLENNU J (as he then was) posited thus:

Proof, in law, is the establishment of fact by proper legal means; in other words, the establishment of an averment by admissible evidence. Where a party makes an averment, and his averment is denied, he is unlikely to be held by the Court to have sufficiently proved that averment by his merely going into the witness-box, and repeating the averment on oath,

if he does not adduce that corroborative evidence which (if his averment be true) is certain to exist."

Although this **MAJOLAGBE** case represents good law, it is clearly not applicable in the circumstances of this case because as shown above and to be further elaborated in due course, the evidence on record supports the decision of the trial court that the Respondent was able to prove her case on the balance of probabilities as required by law in civil litigation.

[17] It has been the case of the Appellant that the Respondent failed to do the work satisfactorily and that was the basis on which the Appellant terminated the franchise. However, this what the Representative of the Appellant Anthony Mensah, the Waste Management Director of the Appellant said under cross-examination at page 79 of the ROA:

"Q. You wrote Exhibit "D" on the 31st July, 2008?

A. Yes

Q. Prior to Exhibit "D" you had not written to the Plaintiff terminating her contract?

A. No

Q. Though you had complained about her performance, you had not written to her to stop executing the contract?

A. No"

This evidence showed that the Appellant never wrote to the Respondent to complain about her unsatisfactory performance prior to 31st July, 2008 when it wrote to terminate the Contract. Therefore, there is no sufficient basis for the Appellant to plead unsatisfactory performance on the part of the Respondent for terminating the Contract.

[18] Counsel submitted that one of the basis for the decision of the trial judge was that the Appellant failed to call a witness to prove that the Respondent failed to work satisfactorily. The Appellant pleaded at paragraph 10 of its Statement of Defence found at page 12 of the ROA that the defendant received a lot of complaints from the residents in the locations where the Respondent was supposed to render services pursuant to the contract. This is a critical/vital matter for which there is the need to call a material witness to prove same. This the Appellant

failed to do. In the case of **GIHOC REFRIERATION & HOUSEHOLD PRODUCTS LTD V. HANNA ASSI [2005 – 2006] SCGLR 458 at 476** the Supreme Court held that: **"What was pleaded is not necessarily proof of the truth of the matter pleaded."** Again, assertions in a witness box without proof does not shift the evidential burden on the other party. See the case of **DZAISU & Others V. GHANA BREWERIES LTD [2007 – 2008] 539 at 547** where SOPHIA ADINYIRA JSC (as she then was) stated the legal position thus: -

"The first plaintiff, on mounting the witness box, merely repeated paragraph (5) of the statement of claim without any elaboration. Neither did he call any witness in support of this. Counsel for the plaintiffs urged upon this court that the defendant did not cross-examine the first plaintiff on this bare assertion and must therefore be deemed to have admitted the plaintiff's claim that they did the same work as the permanent workers. …

We are not impressed by this argument as the principle that when a party fails to cross-examine on an issue that issue would be ruled against him is not an infallible rule. It is trite law that a bare assertion by a party of his pleadings in the witness box without proof did not shift the evidential burden onto the other party."

It is also trite learning that failure to call a material witness can be fatal to one's case. In the case of **YAW OPPONG V. CHARLES ANARFI CIVIL APPEAL SUIT NO. J4/40/10 DATED 10TH FEBRUARY, 2011 (UNREPORTED)** AKOTO- BAMFO JSC (as she then was) stated the position of the law in these words:

"One Nana Agyapahene was named as having intervened in the matter and having succeeded in getting the plaintiff to agree to exact some interest on the loan. This piece of evidence was strenuously denied by the plaintiff; yet the defendant failed to call Nana Agyapahene. He is a material witness whose evidence would have assisted the Court immensely. Failure to call him clearly dealt a big blow to the defendant's case." The trial judge was therefore right in holding that the failure by the Appellant to call such a material witness was fatal to its case.

[19] Counsel then contended that on the other hand, the Respondent merely indicated that the inhabitants had indicated that the Appellant had directed them not to pay the Respondent for the services she provided without calling any of the inhabitants to testify in court to prove that assertion yet the learned trial judge accepted that piece of evidence to the detriment of the Appellant. This is what the representative of the Appellant said under cross-examination at page 79 of the ROA:

"Q. The Plaintiff was therefore right in saying that before the termination, the Defendant went round telling people not to pay any fees to the Plaintiff?

A. Yes"

We refer to the case of **AGYEIWAA V, P & T CORPORATION [2007 – 2008] 2 SCGLR 985 at 990** where GOERGINA WOOD CJ (as she then was) stated the principle of law that **"The rule is that where the evidence of an opponent corroborates the evidence of the opposite party, and that opponent's remain uncorroborated, the court is bound to accept the corroborated evidence unless there are compelling reasons to the contrary."**

Also see **ASANTE V BOJABI AND OTHERS [1966] GLR 232 SC H 2** wherein the Supreme Court stated that:

"(2) Where the evidence of one party on an issue in a suit was corroborated by witnesses of his opponent, whilst that of his opponent on the same issue stood uncorroborated even by his own witnesses, a court ought not to accept the uncorroborated version in preference to the corroborated one unless for some good reason (which must appear on the face of the judgment) the court found the corroborated version incredible or impossible." The Supreme Court is consistent in stating the same principle of law as same was stated at Holding 1 of **OSEI YAW AND ANOTHER V DOMFEH [1965] GLR 418 SC.** Also see **MANU V NSIAH [2005 – 2006] SCGLR 25 H 1.**

As the authorities tell us, in law, there can be no better proof than your opponent corroborating your case. The trial judge was therefore right in accepting the evidence of the Respondent on this issue.

Also see the case of **KRU V. SAOUD BROS & SONS [1975] I GLR 46. CA** where the Court of Appeal held at Holding 1 that **"(1) … there was no rule of law or practice which required corroboration, the test being whether the evidence, though given by a single witness, was entitled to credit. The courts could act on the uncorroborated evidence of a single witness since judicial decisions depended upon intelligence and credit and not the multiplicity of witnesses produced at the trial."**

Also, in the case of **TAKORADI FLOUR MILLS V SAMIR FARIS [2005 – 2006] SCGLR 882 at 896** ANSAH JSC (as he then was) posited thus **"… testes ponderantur non numerantur, that is to say, 'witnesses are weighed, but not counted.' Therefore a tribunal of fact can decide an issue on the evidence of only one party. A bare assertion on oath by a single witness might in the proper circumstances of a case, be enough to form the basis of a judicial adjudication. The essential thing is that the witness is credible by the standards set in section 80 (2) of the Evidence**

Decree 1975. Therefore when a party has named certain persons in his evidence-in-chief, the fact that he did not call all, or any of them even though they were available, per se, would not prove fatal to the case of the party. The adjudicator has the whole of the oral evidence of the party and the documents tendered in evidence, if any, before him to consider for his decision."

Besides, in the case of **AYIWAH AND ANOTHER v. BADU AND OTHERS [1963] GLR 86 SC,** the Apex Court of the Land held at Holding 3 that:

"(3) There is no rule of law providing that in no instance and under no circumstances whatsoever can the court accept the evidence of a single another witness."

[20] Counsel for the Appellant also faulted the trial judge for ordering the payment of subsidies from January to October, 2008 when PW1 testified that they stopped work in May 2008 and PW4 said they worked for only three months. PW1 never testified that they stopped work in May 2008. This is what he said in his evidence-in-chief at page 48 of the ROA:

"Q. did you do any other job for the Plaintiff?

A. We were also collecting money from the people (households). I collected in the month of April and May 2007 (sic) 2008

Q, Why did you collect for April and May only?

A. Some households refused to pay. They even chased us away with cutlasses and sticks.

Q. Why?

A. According to them, the defendant instructed them not to pay us."

The above answers do not disclose that work was stopped in May. PW1 said he collected money ***in April and in May***. The collection of the money is a different function from the collection of the refuse though they are related

PW4 on the other hand, as explained above, testified under the yoke of stark illiteracy. The preponderance of the evidence shows that the trial judge was right in holding that work did not stop in May.

[21] Counsel for the Appellant was also not happy about the rejection by the trial judge of the evidence of other similar Service Providers who were called as witnesses by the Appellant to explain how they executed the project to the trial court. The reason given by the trial judge for rejecting those pieces of evidence is that, that amounted to interference with the intentions envisaged in Exhibit A which is the Provisional Acceptance Letter for the award of Franchise for Provision of Solid Waste Collection Services in the Asawase Sub-Metropolitan Area - Kumasi written by an accredited officer of the Appellant to the Respondent dated December, 24, 2007. Those witnesses of the Appellant, are DW1 and DW3. DW1 Boniface Yigan, testified on behalf of Waste Group Ghana Ltd. as a Supervisor but as at 2008 he was a revenue collector. Hear DW1 under cross-examination at page 88 of the ROA:

"Q. Are you giving this evidence on behalf of the Waste Group?

A. The evidence I am giving is according to the work that we have done.

Q. Are you giving this evidence on behalf of the Waste Group, yes or no

A. Yes my Lord

Q. Who in the Waste Group authorized you to come and give this evidence?

A. My Lord no one

Q. Now you don't work at the land fill site of the Kumasi Metropolitan Assembly?

A. No

Q. So you have no records at the Kumasi Metropolitan Assembly in reference to work done by a waste company in Asawase sub Metro?

A. No."

DW1 testified on matters that are outside the confines of Exhibit "A" and also outside the Asawase Sub-Metropolitan area. He also had no authority to testify on behalf of the Waste Group Ghana Ltd. Clearly, his evidence was not helpful in the resolution of the dispute between the parties.

DW3 is Francis Asiedu Marshall the Operations Manager of Kumasi Waste Management Company Ltd. His testimony under cross-examination spans from pages 152 to 158 of the ROA. His oral evidence seriously contradicted the contents of Exhibit "A". He testified among others that the terms of payment captured in Exhibit "A" were never agreed at the meeting held on 17th December, 2007 as stated in Exhibit "A". The law is that when there is a conflict/discrepancy between a documentary evidence and oral testimony in respect of the same matter, the documentary evidence ought to be preferred. See **FOSUA & ADU-POKU V DUFIE (DECEASED) & ADU-POKU MENSAH [2009] SCGLR 310 at Holding 1** where the Supreme Court stated that: **"it was settled law the documentary evidence should prevail over oral evidence."** And also **DONKOR V MAYE KOM MEHWE ONYAME ASSOCIATION [2007 – 2008] SCGLR 179 at 183** where BROBBEY JSC (as he then was) had earlier stated the same principle thus: **"The law is well settled that a written document which is properly authenticated cannot be varied or contradicted by oral evidence. The rule is codified by the Evidence Decree, 1975 (NRCD 323) s 177 (1). …"**

Again, in the case of **WILSON V. BROBBEY [1974] 1 GLR 250 at 253** where the court held that: **"The general rule is also that where parties have embodied the terms of their contract in a**

written document extrinsic evidence or oral evidence will be inadmissible to add to, vary, subtract from or contradict the terms of the written instrument."

Also see the case of **INUSAH V D.H.L. WORLDWIDE EXPRESS [1992] 1GLR 267.**

The trial judge was therefore right in rejecting the evidence of DW1 and DW3.

[22] Counsel for the Appellant also complained about the rejection by the trial judge of the daily recordings (Exhibit 3) by the Appellant which formed the basis of payment by the Appellant to the Respondent as self-serving. The trial judge also held that Exhibit 4 which is evidence of some payment by the Appellant to the Respondent was in respect of mass evacuation of solid waste which had nothing to do with the services envisaged in Exhibit A. The trial judge gave acceptable reasons why she placed no weight on Exhibit 3 because he found it to be self-serving. DW2 Prosper Kotoka who works at the Waste Management Department of the Appellant tendered Exhibit 3 in evidence to show that the Respondent's daily operations were recorded by an attendant at the dumping site. See pages 135 to136 of the Record of Appeal. Exhibit 3 was however not signed by the Respondent nor any of her agents. When he was asked to explain why the Respondent did not sign Exhibit 3, his explanation was that Exhibit 3 was not for the consumption of the Respondent and that she was to keep her own records and at the end of the month if she felt that she was underpaid, she could then use her record to challenge the Appellant's assessment. DW2 also told the court that it would have been a tedious work on the Appellant if the Respondent or her agents were to counter-sign the Appellant's records of the Respondent's operations. See pages 143 to 144 for the testimony of DW2 under cross-examination. The trial judge labeled this explanation as ridiculous and we agree with him. Certainly, allowing the Respondent or her agents to counter-sign the record of the Respondent's operation contemporaneously would have been an easier and a more acceptable way of avoiding conflicts in the recordings of the Respondent's operations. We find this holding by the trial judge to be reasonable and we have no basis to interfere with it. In the case of **AMOAH V. LOKKO & ALFRED QUARTEY (substituted by) GLORIA QUARTEY & Others [2011] 1 SCGLR 505 at 514,** the Supreme Court speaking through ARYEETEY JSC (as he then was)

enumerated the conditions under which an appellate court can interfere with the findings of a trial court as follows: -

"The appellate court can only interfere with the findings of the trial court if they are wrong because (a) the court had taken into account matters which were irrelevant in law; (b) the court excluded matters which were critically necessary for consideration; (c) the court had come to a conclusion which no court properly instructing itself would have reached; and (d) the court's findings were not proper inferences drawn from the facts. … However, just as the trial court is competent to make inferences from its specific findings of fact and arrive at its conclusion, the appellate court is equally entitled to draw inferences from findings of facts by the trial court and to come to its own conclusions." None of the above conditions are applicable to this case. Also see the following cases: - **IN RE OKINE (DECD); DODOO and Another V OKINE and Others [2003 2004]1 SCGLR 582 at 607; OPPONG KOFI AND ANOTHER v. FOFIE [1964] GLR 174 SC and FOFIE V. ZANYO [1992] 2 GLR 475 SC.**

[23] Counsel concluded his submission by contending that if the trial judge had fully considered the evidence adduced at the trial, he would not have found against the Appellant and award excessive damages higher than the principal amount and for that matter, the appeal should be upheld. The analysis of the Appellant's submissions shows that it is not entirely right in praying that it appeal should be upheld.

SUBMISSIONS ON BEHALF OF THE PLAINTIFF/RESPONDENT IN SUPPORT OF THE JUDGMENT BY THE TRIAL COURT:

[24] Counsel for the Respondent naturally defended the judgment delivered by the trial judge. It is the case of the Respondent that the trial judge rightly considered the issues germane to resolving the dispute between the parties and considered the evidence proffered by the contending parties and their witnesses before arriving at his decision.

Among the issues that were germane to the resolution of the dispute, counsel submitted that the trial High Court Judge was right in his finding that the payment of the subsidy was not based on the tonnage of rubbish collected and therefore, he invited this court not to disturb that finding. Counsel pointed out that the content of a written document or contract between private individuals are presumed to represent the intentions of the parties unless otherwise proven. In such a case, the burden of proof is on the party who alleges that the written document or contract does not represent the intentions of the parties to prove same. See the following cases cited supra: - **FOSUA & ADU-POKU; DONKOR V MAYE KOM MEHWE ONYAME ASSOCIATION; WILSON V. BROBBEY** and **INUSAH V D.H.L. WORLDWIDE EXPRESS**

[25] Counsel then contended that after considering all the evidence the trial judge was right in rejecting the evidence of the Appellant's witnesses who were service providers to the Appellant who testified that they were paid based on the tonnage of rubbish they collected since their evidence was outside the contents of the written contract between the Appellant and the Respondent herein. Indeed Exhibit "A" which is the franchise agreement between the parties does not contain any term as to payment based on the tonnage of refuse collected. The trial judge was therefore right in disregarding any extraneous oral evidence that was introduced to modify the said Exhibit "A". Paragraph 2 of the said Exhibit "A" provided among others that the services would be ***"at a Provisional Monthly sum of GH¢ 33,051.31 as detailed in Annex 1"*** The Appellant did not and or could not produce this Annex 1 at the trial for the court to ascertain its content and determine what weight to accord it. The Appellant thus failed to discharge the burden on it to prove the issue of payment based on the tonnage of rubbish collected.

[26] On the issue of whether the Respondent worked from January to October 2008, the parties had different positions. The Respondent maintained that she performed the contract for refuse collection from January to October, 2008 until the Appellant handed over a letter to her in October 2008 purporting to terminate the contract, which letter was written on 31st July 2008. The Appellant on its part stated that the Respondent worked from January to April, 2008.

Counsel submitted that the evidence of the Respondent supports the finding by the trial court that the Respondent worked from January to October, 2008 whereas there is no evidence on record to support the assertion by the Appellant that the Respondent abandoned the works in April 2008. Here is what transpired during the cross-examination of the Respondent at page 32 of the Record of Appeal: -

"Q. How many months did you work for the Defendant?

A. Ten (10) months

Q. Do you have all the figures for these months in terms of revenue?

A. I have the first five months. In respect of the other five months, I was not allowed to collect the revenue."

This is counsel for the Appellant who elicited these responses from the Respondent yet he did not deem it fit to challenge those responses. By law, the Appellant is deemed to have admitted same. In the case of **FORI V. AYIREBI AND ORTHERS [1966] GLR 627 SC** which dealt with a dispute on title to land, the Supreme Court held that: - **"Since the statement made by the representative of Dwendwenasi stool at the survey was not challenged by any other person, and since the surveyor who gave evidence about the making of the plan was not cross-examined on that matter, the implication is that that fact is not in dispute, there was therefore no need to call the Dwendwenasi stool to give further evidence of it. The law is that when a party makes an averment and that averment is not denied, no issue is joined on that averment, and no evidence need be led. Again, when a party gives evidence of a material fact and is not cross-examined upon it, he needs not call further evidence of that fact. Since the statement made by the representative of Dwendwenasi stool at the survey was not challenged by any other person, and since the surveyor who gave evidence about the making of the plan was not cross-examined on that matter, the implication is that that fact is not in dispute, there was therefore no need to call the Dwendwenasi stool to give further evidence of it. The law is that when a party makes an averment and that averment is not denied, no issue is joined on that averment, and no evidence need be led. Again, when a party gives**

evidence of a material fact and is not cross-examined upon it, he needs not call further evidence of that fact." Again in the case of **BILLA V. SALIFU [1971] 2 GLR 87,** the court held that: -

"It seems to me that the evidence which the wife of the respondent gave can only mean that she was confessing to having been carnally known by the appellant and on principle the failure of the appellant to challenge her evidence must be taken as an admission of the allegation that he did indeed commit adultery with the respondent's wife."

The following cases are also apposite: **QUAGRAINE V. ADAMS [1981] GLR 599 CA** and **HAMMOND V. AMUAH AND ANOTHER [1991] 1 GLR 89.**

[27] From the evidence as indicated earlier on, it is clear that the Respondent performed the services up to October 2008. The Appellant wrote the purported letter of termination Exhibit "D" on 31st July 2008 (see page 216 of the ROA). Counsel asked the legitimate question of why the Appellant would see the need to write a termination letter in July when it claimed that the Respondent abandoned the work in April i.e. three months earlier. The content of the letter showed that it took effect before it was written on 31st July 2008 since the termination was with effect from 1st May, 2008. Nothing can be more incongruous than that! The Appellant could not also tell the court when the termination letter was served on the Respondent but the Respondent was steadfast that the continued to perform the work until the termination letter was served on her in October 2008. This is corroborated by PW4 who testified that he worked for the Respondent from July to October when the Respondent asked them to stop. See pages 61 to 62 of the ROA.

Counsel also pointed out that the Appellant's witness admitted that the contract was extended for an additional three months after the initial probation period of January to March. See the testimony of Anthony Mensah, Waste Management Director and the Appellant's Representative under cross-examination at pages 74 to 75 of the ROA where he testified thus:

"Q. Now from Exhibit "A" the Plaintiff was supposed to be on probation from the 1st of January to 31st March, 2008, is that correct?

A. Yes my Lord.

…

Q. Now after the three months, Exhibit "A" was suggesting that the actual levels of revenue and subsidies shall be established ahead of signing the contract, is that no so?

A. That is so

Q. Now were the actual levels of revenue and subsidy established?

A. My lord the period was extended by additional three months.

Q. So you will agree with me that from April, May and June the Terms and Conditions associated with the first three months will apply to the extended three months?

A. Yes My lord."

[28] Counsel further pointed out that there is evidence to support that in June 2008, the Respondent's workers were still collecting the refuse, save that the Appellant had informed households not to pay money to the Respondent.

Counsel concluded his submission on behalf of the Respondent by submitting that once the Appellant could not show when it delivered the letter of termination to the Respondent, the trial judge was right to prefer the evidence of the Respondent on the balance of probabilities. Counsel therefore invited this court to dismiss the appeal and affirm the judgment of the trial court.

[29] The standard of proof in civil litigation is on the preponderance of probabilities.

In the case of **ADWUBENG V. DOMFEH [1996 – 1997] SCGLR 660** at **H 3,** the Supreme court posited that: -

"Sections 11(4) and 12 of the Evidence Decree, 1975 (NRCD 323) have clearly provided that the standard of proof in all civil actions was proof by preponderance of probabilities – no exceptions were made. …"

And in the case of **SARKODIE V. FKA CO LTD [2009] SCGLR 65** at **H1,** the Supreme Court again stated that: - **"(1) On the preponderance of probabilities, the plaintiff-company's evidence on the acquisition of the disputed land, is more probable than not in terms of**

sections 11 (4) and 12 of the Evidence Act, 1975 (NRCD 323). It is therefore not surprising that the trial High Court found for the plaintiff-company."

Sections 11(4) and 12 of the Evidence Act, 1975 (NRCD 323) provide as follows: -

"Section 11—Burden of Producing Evidence Defined.

(1) For the purposes of this Decree, the burden of producing evidence means the obligation of a party to introduce sufficient evidence to avoid a ruling against him on the issue.

(2) In a criminal action the burden of producing evidence, when it is on the prosecution …

(3) In a criminal action the burden of producing evidence, when it is on the accused …

(4) In other circumstances the burden of producing evidence requires a party to produce sufficient evidence so that on all the evidence a reasonable mind could conclude that the existence of the fact was more probable than its non-existence."

"Section 12—Proof by a Preponderance of the Probabilities.

(1) Except as otherwise provided by law, the burden of persuasion requires proof by a preponderance of the probabilities.

(2) "Preponderance of the probabilities" means that degree of certainty of belief in the mind of the tribunal of fact or the court by which it is convinced that the existence of a fact is more probable than its non-existence."

On the basis of the above standard of proof prescribed by the law and expatiated in binding judicial pronouncements, we are of the considered view that the story of the Respondent is more probable than that of the Appellant.

[30] In the Notice of Appeal, the Appellant asked for a further order of setting the costs awarded by the trial judge aside. In arguing the appeal, counsel for the Appellant was silent on this issue as he did not proffer any reasons why the costs should be set aside. It is trite learning that the award of cost lies within the discretion of the trial judge to be nevertheless exercised in

accordance with Order 74 of the High Court (Civil Procedure) Rules 2004 (C I 47). Appellate courts are enjoined to be very slow in interfering with the exercise of the discretionary powers of trial courts. In any event, not having proffered any argument against the costs awarded by the trial judge, the appellant is deemed to have abandoned same albeit sub silentio. See the case of **MARTIN J. VERDOSE V PATRICIA ABENA VERDOSE-KURANCHIE [2017] 111 GMJ 247 at 253 SC** where the Supreme Court, per PWAMANG JSC stated that grounds of appeal that are not argued are struck out as abandoned.

[31] As a function of rehearing this appeal, we have considered the GH¢800,000.00 awarded by the trial court to the Respondent as General Damages. We note that the Respondent did not plead special damages as there is a distinction between special damages and general damages. The distinction between the two was explained by the Supreme Court in the case of **DELMAS AGENCY GHANA LTD V FOOD DISTRIBUTORS INTERNATIONAL LTD [2007 – 2008] 2 SCGLR 748** at **Holding 3 thus:**

"Special damages is distinct from general damages. General damages is such as the law will presume to be the natural or probable consequence of the defendant's act. It arises by inference of the law and therefore need not be proved by evidence. The law implies general damage in every infringement of an absolute right. The catch is that only nominal damages are awarded. Where the plaintiff has suffered a properly quantifiable loss, he must plead specifically his loss and prove it strictly. If he does not, he is not entitled to anything unless general damages are also appropriate."

Again, in the case of **KLAH V PHOENIX INSURANCE CO LTD [2012] 2 SCGLR 1139 at 1152 – 1153,** the Supreme Court, speaking through VIDA AKOTO- BAMFO JSC (as she then was) further elaborated the differences between general damages and special damages in these terms:

"A distinction exists between general and special damages: for whereas general damages arise by inference of law and therefore does not need to be proved by evidence; special damages representing a loss which the law will not presume to be the consequence of the

defendant's act but which depends in part on the special circumstances, must therefore be claimed on the pleading and particularised to show the nature and extent of the damages claimed. The plaintiff must go further to prove by evidence that the loss alleged was incurred and that it was the direct result of the defendant's conduct."

It therefore goes without saying that once the Appellant has been found to have breached the franchise agreement between it and the Respondent, the latter is entitled to general damages without the need to proffer any evidence to prove same. The record shows that the Respondent performed the services contemplated for only ten months before the five year franchise was unlawfully terminated by the Appellant. As the trial judge rightly found, the franchise still had fifty months to run before its expiry by the effluxion of time. The trial judge further determined that based on the provisional monthly sum of GH¢33,051.31, the Respondent would make a profit of GH¢8,000.00 per month which gives a profit margin of approximately 24%. Without disturbing these findings, the total profit lost by the Respondent for the fifty months would be 8,000 multiplied by 50 months which yields GH¢400,000.00. We therefore find the award of GH¢800,000.00 as general damages to be **excessively high**. The trial judge tried to justify this substantial damages by taking into account, inflation and the fact that if the Respondent had invested the profit, the investment would have yielded some profit for her. We do not accept this line of reasoning especially as any amount due and owing is subject to the payment of interest in accordance with Rule 1 (1) (a) and Rule 2 (2) (1) of the **COURT (AWARD OF INTEREST AND POST JUDGMENT INTEREST) RULES, 2005 C. I. 52** reproduced herein below:

"Rule I-Order for payment of interest

1. If the court in a civil cause or matter decides to make an order for the payment of interest on a sum of money due to a party in the action, that interest shall be calculated

***(a)* at the bank rate prevailing at the time the order is made, and *(b)* at simple interest…**

Rule 2-Post Judgment interest

2. (1) Subject to sub rule (2) each judgment debt shall bear interest at the statutory interest rate from the date of delivery of the judgment up to the date of final payment.

[32] We therefore vary the award of general damages from GH¢800,000.00 to **GH¢400,000.00**. **Interest should be paid on same from 2012 (the year the franchise would have lapsed in accordance with its terms to the date of final payment.** We are fortified in this variation because the Supreme Court has empowered appellate courts to review the award of damages on appeal under certain circumstances. In the case of **FABRINA LTD V SHELL GHANA LTD [2011] 1 SCGLR 429 at 440,** the Supreme Court, speaking through BROBBEY JSC (as he then was) had this to say:

"The principles on the review of the award of damages for breach of contract are well known and need no expatiation. Such an award may be reviewed only if the correct law is wrongly applied, or incorrect law is applied or where the award is so excessively high or so excessively low as to be erroneous"

Also see the case of **STANDARD CHARTERED BANK V NELSON [1998 -99] SCGLR 810**

[33] In conclusion, subject to the variation of the general damages awarded by the trial court as indicated herein, the appeal is dismissed and the judgment of the Trial High Court dated 19th June, 2015 hereby affirmed.

(SGD.)

ANGELINA M. DOMAKYAAREH (MRS.)

JUSTICE OF APPEAL

(SGD.)

I agree **ALEX B. POKU-ACHEAMPONG**

JUSTICE OF APPEAL

(SGD.)

I also agree **SAMUEL K. A. ASIEDU**

JUSTICE OF APPEAL

COUNSEL:

For the Plaintiff/Respondent – ROBERT KINGSLEY YEBOAH (NOT IN COURT, SICK)

PATRICK ADU POKU for the Defendant/Appellant.