**THE REPUBLIC OF UGANDA**

**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**

**CIVIL APPEAL NO. 77 OF 2013**

*(Arising from H.C.C.S No. 790 of 2006)*

**BISONS CONSULT INTERNATIONAL LTD :::::::::::::: APPELLANT**

**VERSUS**

**SALINI COSTRUTTORI S. P. A :::::::::::::::::::::::::::: RESPONDENT**

**CORAM: HON. JUSTICE ELIZABETH MUSOKE, JA**
**HON. JUSTICE CATHERINE BAMUGEMEREIRE, JA**
**HON. JUSTICE STEPHEN MUSOTA, JA**

**JUDGMENT OF HON. JUSTICE STEPHEN MUSOTA, JA**

**Background**

The appellant sued the respondent for a claim of UGX 535,645,848/= on account of the price of rock fill material delivered by the appellant for the use of the respondent. The appellant had signed a contract with the respondent in which the respondent placed an order for the supply of 30,000 tons of rock fill material amounting to UGX 300,000,000/= at an agreed rate of UGX 10,000/= per ton to be transported to any area within 3 km along Kampala Northern bypass. After the contract commenced, the respondent orally requested the appellant to deliver rock fill beyond the original 3km range along the Northern Bypass Road but the price had not been agreed upon for

the additional rock fill material. The appellant claims to have delivered a total of 54,662.5 tons of rock fill beyond the original 3 km range. The appellant re-negotiated with the transporter and agreed that UGX 1,500/= per kilometer per ton was the rate at which the additional distance would be charged. On 26th March 2006, the appellant wrote a letter to the appellant stopping anymore supply of rock fill thereby terminating the contract. The respondent had however given the appellant a materials engineer to supervise the blending of the materials that formed rock fill and by the time the contract was terminated, the appellant had stock piled rock fill customized to the respondents specifications at a cost of 123,000,000/=

On 15th June 2006, the appellant informed the respondent that the said stock pile consisted of 500 trips and the respondent responded that they were in a financial crisis and would not pay the amount. The appellant sued the respondent and the trial court held that the respondent was not in breach of any contract and denied the appellants claim.

The appellant, being dissatisfied with the decision of the High Court filed this appeal on the following grounds;

1. The learned trial Judge erred in law and in fact in finding that there was no variance of the terms of the original contract and/or evidence thereof.

2. That the learned trial Judge erred in law and fact in finding that the respondent did not breach the terms of the contract between themselves and the appellant.
3. That the learned trial Judge erred in law and in fact in finding that the appellant was not entitled to the UGX 123,000,000/= (Uganda Shillings One hundred Twenty Three Million) as special damages.
4. That the learned trial Judge erred in law and in fact in finding that no award of interest at the commercial rate was applicable to the monies owed to the appellant.
5. That the learned trial Judge erred in law and fact in finding that UGX 338,559,240/= (Uganda Shillings Three Hundred Thirty Eight Million Five Hundred Fifty Nine thousand Two hundred Forty only) should not be paid to the appellant as costs for the additional haulage of rock.

At the hearing of the appeal, Ms. Akantorana Kobusigye appeared for the appellant while Mr. Patrick Alunga represented the respondent. Both parties filed written submissions, which they prayed be adopted by this court under Rule 68 of the Rules of this Court.

**Appellant's arguments**

Counsel submitted that the original contract between the appellant and the respondent was varied when the respondent orally and in writing requested the appellant to deliver more rock fill beyond the contracted 3km range. Counsel argued that the respondent, in its scheduling memorandum and submissions agreed to this as an

admitted fact. Further, that Exhibit P3 at page 33 of the appellant's exhibits clearly shows that there was a request from the appellant to the respondent for clarification as to price increment for the additional rock fill. Counsel submitted that the respondent, in paragraph 6 (b) of their Written Statement of Defence, admitted that they made a verbal agreement that the appellant was to supply additional rock fill material to them in excess of the 30,000 tons initially agreed upon beyond the 3km range.

Counsel argued that whereas the original contract was for the supply of 30,000 tons of rock fill material between 0-3 kilometers at a price of UGX 10,000 per ton, the respondent's request for additional rock fill material beyond the 3km range clearly shows that there was a variation in the original contract. Counsel relied on **Section 67** of the **Contracts Act** for the proposition that 'where any right, duty, or liability would rise under agreement or contract, it may be varied by the express agreement or by the course of dealing between the parties or by usage or custom if the usage or custom would bind both parties to the contract'.

Counsel further argued that the dealings of the parties in this case clearly show that there was a variation of the subcontract as illustrated by the following instances; the respondent orally requested for the supply of additional rock fill material beyond 3 kilometer range. On 11th July 2005, the appellant confirmed that she got instructions from the respondent to deliver the rock fill material to chainage 5km on Hoima Road intersection. That the appellant

wrote a letter seeking clarification as to the mileage increment but the respondent did not respond to the letter. Counsel submitted that the appellant went ahead and delivered the material. Further, that the respondent did not dispute, in its pleadings, that they made a request for material beyond the 3km range and an additional 54.662.5 tons of rock fill, which was delivered. The conduct of the parties shows that there was a variation of the sub-contract.

Counsel relied on the decision in **Buildtrust Construction (U) Limited Vs Martha Rugasira HCCS No. 288 of 2005** in which the parties entered into a written contract for renovation of the defendant's house and agreed to a total of 115,000,000/=. The defendant however, continued to give oral instructions for variations thus altering and increasing the scope of work. The trial Judge held that the defendant had, in her pleadings and her testimony conceded that she did sanction some additional works which meant that the contract was indeed varied. Counsel argued that in this case, the respondent benefited from additional rock fill supplied by the appellant and should therefore pay consideration for the work.

On ground 5, counsel submitted that there was a variation of the original contract but the contract price was not agreed upon for the additional haulage of rock. The amount of UGX 338,559,240/= claimed by the appellant was for additional rock fill that was provided to the respondent. Counsel submitted that the respondent's Managing Director and project Manager, Mr. Melvin England, admitted during cross examination that the appellant was entitled to

an additional payment for the additional haulage. Whereas the price of the additional haulage was not agreed upon, court could award what is reasonable in the circumstances of the case. Counsel relied on the Supreme Court decision in **Consultants Ltd Vs Empire Insurance Group S.C.C.A No. 9 of 1994** in which it was held that the principle of *quantum meruit* is applied as a possible measure of restoration in case of unjust enrichment or measure of payment where a contract has no fixed price.

Counsel contended that the applicable rate was UGX 1500/= per ton per kilometer, for the additional rock fill. The evidence of PW1, an expert and transport economist stated that the recommended government rate was UGX 4400/= per ton per kilometer and he concluded that the fait rate for the extra costs was between 1240 and 1719. Counsel argued that this extra haulage and rock fill involved being transported from distances outside the 3km range and the award of the trial Judge of UGX 20,658,909/= was not founded on the expert evidence.

While arguing ground 3, counsel submitted that the appellant was entitled to UGX 123,000,000/= as special damages being the cost of the excavated rock fill material. The appellant produced a number of photographs of the stock piles at Kitagobwa, Budo and Kyengera. The testimony of the appellants Managing Director was the stock had no alternative market because it was customized to meet the respondents strict specifications until the appellant was forced to sell it off as ordinary marram at a cost of UGX 4,000,000/=.

**Respondents' arguments**

In reply, counsel for the respondent submitted that the learned trial Judge properly found that the appellant had not adduced any evidence to prove that the terms of the sub contract had been varied. That the appellant only came up with the additional claim for extra haulage of rock fill beyond the 3km range at the cost of per ton per kilometer more than a year after the contract was completed with no evidence of variation.

Counsel relied on sections 91 and 92 of the Evidence Act Cap 6 for the proposition that where terms of a contract are in writing, its variation can only be by written agreement and not oral agreement. Counsel relied on the decisions in **Mujuni Ruhemba Vs Skanska Jensen (U) Ltd Civil Appeal No. 56 of 2000** and **Deo Mabiiho Vs Fred Kaijabwangu Civil Appeal No. 56 of 1971** in which the courts declined to fault the trial court who had ruled against oral agreements intended to alter written agreements. Counsel submitted that the sub-contract, under clause 3, provided that the agreed rate per ton was fixed and not subject to any price variations or fluctuations.

Counsel argued that the invoices generated and adduced in evidence at the trial were for UGX 10,000 per ton as specified under the sub contract. The appellant continued to invoice at the rate of UGX 10,000 per ton of delivered additional rock fill beyond the 3km range and as such, the price rate per ton as contracted in the sub contract was the same as that applicable to aby additional rock fill delivered

since it was a mere continuation of what had originally been agreed to and could not attract a different price rate.

Counsel argued that whereas the appellant relied on the Section 67 of the Contract Act, the arrangement between the parties was before 2010 when the Contract Act came into force and as such is not applicable. Further, that the case of **Buildtrust Construction (U) Limited Vs Martha Rugasira H.C.C.S No. 288 of 2005** relied on by the appellant is distinguishable from the present case. In the instant case, the same quality and additional quantity of rock fill was to be delivered but for an additional mileage and that the invoices presented by the appellant included those for the additional rock fill beyond 3km range, which were fully paid.

In the alternative counsel submitted that the appellant is estopped, under **Section 114** of the **Evidence Act**, from asserting a different position by setting up variation of the contract after a year when the deliveries and payment had been concluded. Counsel submitted that the agreement between the parties had not been varied in absence of a written contract and the delivery of the additional rock fill was made during the course of performance of the sub contract.

While arguing ground 5, counsel submitted that the learned trial Judge correctly found that the UGX 338,559,240/= should not be paid as costs for the additional haulage of rock to the appellant. Counsel argued that the appellant's letter dated 11th July 2005 did not include a request for a new price but only sought for clarity on the additional mileage to be covered. That what was adduced were

invoices for additional rock fill based at the rate of UGX 10,000/= per ton.

Counsel argued that the learned trial Judge put the principal of quantum meruit and directed that both parties to retain expert witnesses' advice on the transport rate applicable for the delivery of the additional rock fill material from the Kyengera Quarry site to the distance beyond 3 km. the appellant's claim for UGX 338,559,240/= was based on the rate of 1,500/= per km per ton which rate was not proved by the appellant.

Counsel submitted that the appellant was not entitled to UGX 123,000,000/= because there was no proof of the above sum. Counsel argued that there was no variation of the original contract and no agreement and there was no amount due for the additional rock fill. In addition, that an award of interest is at the discretion of the court depending on the circumstances of the case.

**Consideration of the grounds of appeal**

I recall that this is a first appeal and as such, the law enjoins this court to review and re-evaluate the evidence as a whole, closely scrutinize it, draw its own inferences, and come to its conclusion on the matter. This duty is recognized in **Rule 30(i) (a)** of the Rules of this Court.

> *30. Power to reappraise evidence and to take additional evidence.*

*(1) On any appeal from a decision of the High Court acting in the exercise of its original jurisdiction, the court may—*

*(a) reappraise the evidence and draw inferences of fact; and*

*(b) in its discretion, for sufficient reason, take additional evidence or direct that additional evidence be taken by the trial court or by a commissioner.*

The cases of **Pandya v R [1957] EA 336** and **Kifamunte Henry v Uganda SCCA No. 10 of 1997** have also succinctly re-stated this principle. I have borne these principles in mind in resolving this appeal and have put into consideration the submissions of both parties and the authorities cited.

**Ground 1**

The appellant's case is that the respondent varied the terms of the sub contract for the appellant to supply additional rock fill material in excess of the 30,000 tons beyond the 3km range.

The appellant's claim of an oral variation of the sub-contract between the appellant and the respondent has to be proved on the balance of probabilities. Therefore, an oral contract is not legally enforceable unless it is provable in court. In such cases, court must extract key terms of the agreement to enforce, which may prove to be difficult if the two parties did not agree on those terms. ***See Katalemwa Traders Ltd vs Attorney General SCCA No. 2 of 1987 [1997] VI KALR 32***

From my analysis of the pleadings at the trial court and the submissions of the respondent, there was an oral agreement between both parties, that the appellant would supply additional rock fill material to the respondent in excess of 30,000 tons initially agreed upon. The original contract marked Exhibit P1 indicates that the appellant was to supply 30,000 tons of rock fill material and the agreed rate was Ushs 10,000/= to transport the materials to any designated areas within 0-3km for rock fill along Kampala Northern Bypass. It was also stated that the rate was fixed and not subjected to any price variations/fluctuations.

The appellant's case is that by oral instructions, the respondent requested for the supply of additional rock fill material beyond the 3km range. The respondent, in its written statement of defence paragraph 6(b) stated that;

> *"... in the course of execution of the contract, the plaintiff and defendant verbally agreed that the plaintiff was to supply additional rock fill material to the defendant in excess of the 30,000 tons initially agreed upon and on similar terms;"*

The respondents conceded to the fact that there was a verbal agreement to supply additional rock fill material. However, the agreement marked Exh. P.1 clearly stated that supply was for 0-3km range, which was supplied by the appellant and paid for by the respondents according to the invoices.

The learned trial Judge based her finding on the fact that there was no written contract variation of the initial sub-contract between the parties. She held at page 207 – 209 that:

> *"As already pointed out above, the sub-contract between the plaintiff and the defendant was in writing and all the terms were specifically laid out therein including the amount of rock fill that had to be supplied by the plaintiff. The law relating to written contracts and variations to them was considered by the Court of Appeal in* ***Mujuni Ruhemba v. Skansa Jensen (U) Ltd Civil Appeal No. 56 of 2000****, a case whose facts were quite similar to the instant one but in which the contract was for the supply of sand. The court based its decision on the provisions of S. 6 of the Sale of Goods Act (which is now S.5 of the Act) which provides as follows:*
>
> > *"5. Contract of sale for goods with a value of 200 shillings or more.*
> >
> > *(1)A contract for the sale of any goods of the value of two hundred shillings or more shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive them, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract is made and signed by the party to be charged or his or her agent for that purpose.*

*(2)This section applies to every such contract, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of the contract be actually made, procured, provided, or fit or ready for delivery, or some act may be requisite for making or completing the goods or rendering them fit for delivery.*

*(3)**There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognizes a preexisting contract of sale whether there is an acceptance in performance of the contract or not. (My Emphasis)***

*I am mindful of the fact that in the instant case, the defendant/ buyer accepted the goods and so the pre-existing sub-contract (Exh. P.1). She also paid something in earnest to bind her that is the price of UGX 10,000 per km as agreed in the pre-existing contract. But there was nothing extant in writing in terms of a variation of the terms and conditions contained in Exh.P1.*

*..... I am of a similar view in the instant case. There was not an iota of evidence that the terms of the original contract were varied. I am mindful of the additional distance that the plaintiff had to deliver the rock fill to but it is also not contested that she accepted payment on the basis of the initial contract at shs 10,000/= per tonne..."*

In the Ruhemba case relied on by the learned trial Judge, it was held that it was incumbent upon the appellant to establish by written evidence that the contract was varied.

In the instant case, the parties had a written agreement marked Exhibit P.1 which indicated that:

"***SALINI CONSTRUCTTORI S.P.A***

*CAP.SOCINTER.VERSE 12480.000*

*22,VIA DELLADATARIA 00187 ROMA*

*Our reference Bisons/01*

*To*

*M/s Bisons Consult International Ltd*

*Diamond Trust Building*

*P.O Box 10820*

*Kampala*

*Dear Sir,*

***COSTRUCTION OF THE KAMPALA NORTHERN BYPASS***

***Sub: - construction of Kampala Northern Bypass-Supply of rock fill material***

*With reference to our discussions, we are pleased to place an order on you to supply 30,000 tons of rock fill material (0-250mm) amounting to Ushs 300,000,000/= (Uganda shillings Three Hundred Million Only) as per the following terms and conditions:*

1. *Agreed rate per ton is Ushs 10,000/= (Uganda Shillings Ten Thousand only)*

2. *The material to be transported to any areas designated (km 0-km 3) for rock fill along Kampala Northern Bypass project.*
3. *The above rate is fixed and is not subjected to any price variations/fluctuations.*
4. *Rate of conversion for cubic meter to tons will be 1.6*
5. *Quantity is subjected to increase or decrease to any extent according to the Resident Engineer's instructions.*
6. *Quality of rock fill materials to be as per the specification of the main contract and all the stock piles at quarry should be approved by RE's representative prior to supply to the site.*
7. *Payment shall be made within 15 working days based on your invoices for the supply of material for every weeks.*

*You are requested to acknowledge the copy of this order as a token of acceptance.*

*Yours Faithfully*

*From Salini Costructorri S.p.a*

*(Mel England)*

*Project Manager*

*Agreed and accepted the above terms and conditions*

*For Bisons Consult International Ltd"*

The evidence of PW3 is that the respondent made a verbal request to PW3 to continue supplying rock fill to further distances. PW3 wrote a letter to the respondent dated 11th July 2005 requesting for

clarification on point of delivery for rock fill materials to chainage 5km on Hoima road intersection. In this letter, the appellant accepted to take up the instructions and sought a clarification as at the mileage increment to the new point. The respondent did not respond to the letter but continued to receive the rock fill to the areas from Busega to Bweyogerere, Bwaise, Hoima road junction, Kalerwe, Kawala, Kyebando and Kisalosalo each with different miles chainage from the 3 km earlier agreed upon. The terms of Exh. P.1 were fulfilled and the contract was concluded. The subsequent instructions from the respondents, which the respondent does not deny, were separate and distinct from the initial sub-contract agreement. In my view, these instructions did not amount to a variation but a separate oral contract between the parties.

That notwithstanding, at common law, a contract can be varied by an oral agreement or by its parties' conduct, even where the contract itself contains a "no oral variation" clause. This position has been recently clarified and confirmed by Her Majesty's Court of Appeal in a case between **Globe Motors Vs RW Lucas Varity Electric Steering Ltd [2016] EWCA Civil 396,** Lord Justice Beatson held that;

> *"The general principle of the English law of contract is that to which I referred at [64] above. The parties have freedom to agree whatever terms they choose to undertake, and can do so in a document, by word of mouth, or by conduct. The consequence in this context is that in principle the fact that the parties' contract contains a clause such as Article 6.3 does not prevent them from*

*later making a new contract varying the contract by an oral agreement or by conduct.*

*(ii) Authority: It should be recalled that, even in the case of deeds, since the Judicature Acts it has been possible to vary a deed orally: see Chitty on Contracts (32nd ed.) paragraph 1-143. Chitty on Contracts also states (paragraph 22-045, note 196) that "the better view would appear to be that it is possible for parties to waive compliance" with such a clause; that is, that oral variation is possible notwithstanding the clause. There is, moreover, positive support for this proposition in World Online Telecom v I-Way Ltd [2002] EWCA Civ 413, in the statements in the recent first instance decisions relied on by the judge, and in other decisions.*

I reiterate that the learned trial Judge relied on Section 6 of the Sale of Goods Act (now Section 5) and the Ruhemba case (supra) to make a decision that the respondent was not in breach of the sub-contract when she did not pay any monies for the supply of rock fill beyond the 3km range agreed upon in the written agreement.

I find the facts of the ***Mujuni Ruhemba v. Skansa Jensen (U) Ltd (supra)*** case quite peculiar from the present case. In that case, the appellant and the respondent executed a contract of sale of sand. Under the contract the appellant was to supply to the respondent natural sand at its construction site in Mbarara at the agreed cost of shs.3200 per cubic meter inclusive of VAT at the prevailing rate during the delivery period. The respondent was to provide transport

for the first calendar month of the contract from the initial date of delivery.

Thereafter, the appellant was to assume responsibility for the provision of a suitable vehicle for the purpose of delivering the material and was to continue to do so throughout the supply period. Where the appellant provided transport, he was to be entitled to shs.8000 per cubic meter of the material for its transportation for the duration of the supply period. However, where the respondent provided his own transport for the delivery of the material, then the appellant was not entitled to charge for any transportation costs.

The appellant alleged that after two days of the first calendar month of the contract the respondent failed to provide the transport and that by an oral agreement the parties varied the contract whereby the appellant was to provide transport for delivering the material at the cost of shs. 60,000 per trip. The appellant supplied the material using his own transport. Receipts of the goods were acknowledged by the respondent's agent. Payments were made on account. A dispute later arose between the parties on a balance of payment amounting to shs.18, 760,130. Appellant sued the respondent in High Court Civil Suit No. 104/99 to recover that amount.

The suit was dismissed at the trial court and on appeal, this court held that since there was a written contract between the parties, its variation could only be by written agreement if such agreement was adduced. That case, as opposed to the case before us, had a variation

of the terms of the main contract between the parties on the transport costs for sand delivery.

In the present case, the terms of Exh. P.1 were fulfilled and the rock fill to that description supplied and paid for. I am unable to agree with the learned trial Judge on the finding that there was no evidence that the original contract was varied. The respondent made an oral agreement with the appellant to supply additional rock fill to areas outside the 3km range, which is an agreed fact between the parties.

**Grounds 2 and 5**

Ground two faults the learned trial Judge for finding that UGX 338,559,240/= should not be paid to the appellant as costs for the additional haulage of rock.

The appellant, after the variation in the original contract, wrote to the respondent requesting for a new price for the additional rock fill but there was no response to this letter. The evidence of DW1, Mr. Melvin England, for the respondent, was that the appellant actually supplied the additional haulage which was 54.662.5 tonnes. At page 97 of the record of appeal, DW1 admitted to court that the appellants were entitled to payment for the additional haulage. He stated that;

> *"**Alunga**: you have just told court that you agree the plaintiff is entitles to payment for the additional haulage?*
>
> ***DW1**: yes*
>
> ***Court:** what was haulage was 54.662.2 tonnes?*

***DW1**: I don't want to say yes but for memory my lord.*

***Court**: it's in Exh. P4 of the plaintiff's documents at page 34, there is a summary of haulage and under payment, so that is not disputed?*

***DW1:** that's correct 54.662.5"*

From the evidence of DW1, it is clear that the appellant actually supplied the extra haulage. What should be in dispute is how much was to be paid for the extra haulage, since there was no agreement between the parties on the cost of the extra haulage. It is an agreed fact that the appellant delivered a total of 54.662.5 tons of rock fill beyond the 3km range. From Exh. P.4, the additional distance to which Haulage was delivered included Hoima Road- Namungoona to which an extra 2.5 km was delivered 24,714.8 tons, Kawaala Road Junction, an extra 3.7km to which 5864.2 tons was delivered, Bwaise Bombo Road Junction was delivered an extra 4.7 km being 8,249.6 tons, Kalerwe Gayaza Road, an extra 6.0km with 9,356.6 tons being delivered, Kyebando an extra 7.0 km with 5,493.4 tons delivered and finally, Kisalosalo an extra 9.0km with 983.9 tons. This added up to 54,662.5 tons of haulage delivered to the respondent, which the respondent does not dispute.

Regarding the issue of payment, the appellant demanded shs. 1500 per ton per extra kilometer which ought to have covered the transport costs of hiring machinery to the delivery point. The appellant adduced evidence of PW1, a transport Economist and PW2, Eng. Dans Nshekanabo. PW1 made a report marked Exhibit P15 and

stated that the reasonable transport rate ranging between shs. 1,240 – 1,719. For the respondent, it was stated that the transport rate ranged from shs. 199 – 692 as per Exh. D24. However, DW1 confirmed during cross examination that the fuel prices at that time were 1750 and that 2 litres were used per kilometer per truck.

The appellant's counsel referred to Volume 1 of Chitty on Contracts pages 1483 to 1492 that where no price or remuneration has been fixed by the parties themselves but the work is done, then the principle of quantum meruit imposes an obligation on the defendant to pay a reasonable amount. Quantum meruit being an equitable remedy targets unjust enrichment and therefore covers actual services rendered or materials supplied.

In my view, the burden of proving the fair rate was discharged by PW1, an expert and transport economist who stated that the recommended government rate was shs.4400/= per ton per kilometer and concluded that a fair rate for the extra costs for one ton per kilometer was between shs. 1240 and 1719. I find the claim for shs.1500/= not excessive in the circumstances of the case. I therefore find for the appellant on ground 5 and find that the shs. 338,559,240/= was payable as costs for the additional haulage of rock fill supplied to the respondent.

Grounds 2 and 5 succeed in that respect.

**Ground 3**

Ground 3 faults the learned trial Judge for finding that the appellant was not entitled to the shs. 123,000,000/= as special damages for the excavated rock fill piles at Kitagobwa, Buddo and Kyengera.

The appellant's contention is that the excavation of these piles was done under the supervision and approval of the respondent taken on 23rd March and tested on 24th March 2006. On 29th March 2006 after testing the rock fill, the respondent's Project Manager wrote to the appellant indicating that the sample rock fill was no longer required. The appellant's Managing Director testified that at that point, the stock pile had no alternative market since it was customized to meet the respondent's strict specifications and that it was not until 2009 when they managed to sell it off as marram for shs. 4,000,000/=.

For the respondent, it was contended that the appellant did not provide any particulars to show how it had computed the sum of shs. 123,000,000/= as the total cost incurred in excavating the material stock piled at Kitagobwa, Buddo and Kyengera.

The appellant attached pictorial evidence marked D1, D2 and D3 of the stock piles that was not put to use by the respondent. I recognize the fact that the stock piles were prepared after testing the rock fill and it is at this point that the respondent's Project Manager wrote to the appellant indicating that the sample rock fill was no longer required. In addition, the stock pile had no alternative market since it was customized to meet the respondent's strict specifications and was sold as marram. However, I agree with the respondent's counsel

that the appellant did not adduce any evidence of how they arrived at the shs. 123,000,000/= for the stock piles. It is trite that special damages must be strictly pleaded and proved by the claimant. For the claim for the shs.123, 000,000/= to succeed, the appellant ought to have proved how they arrived at the amount particularly owing to the stockpiles. In the absence of such proof, special damages would not be granted. In this regard, I would decline to grant the Shs. 123,000,000/= as special damages.

The trial Judge's order for the respondent to pay the appellant 20,000,000/= for the re-instatement of the quarries is untampered with.

Regarding the issue of failure to award interest on the monies owed, it is trite that an award of interest is at the discretion of court under Section 26(2) and (3) of the Civil Procedure Act. I agree with the finding of the learned trial Judge that no award of interest at the commercial rate was applicable herein, considering the peculiar circumstances of this case. I would therefore uphold the decision of the trial judge and grant interest on the monies owed at the court rate from the date of filing the suit till payment in full.

Al in all, this appeal partially succeeds and I make the following orders:

1. The respondent pays to the appellant UG. shs. 338,559,240/= for the additional haulage of rock.
2. The respondent pays to the appellant 20,000,000/= for the re-instatement of the quarries.

3. Interest at the court rate on (1) and (2) above from the date of filing the suit till payment in full.
4. Since the appeal has succeeded in part, I award the appellant $^{2}/_{3}$ costs of this appeal, and costs of the lower court.

Dated this 2nd day of March 2022

**Stephen Musota**

**JUSTICE OF APPEAL**

**THE REPUBLIC OF UGANDA**

**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**

**CIVIL APPEAL NO. 77 OF 2013**

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**BISONS CONSULT INTERNATIONAL LTD::::::::: APPELLANT**

**VERSUS**

**SALINI CONSTRUTTORI S.P.A::::::::::::::::: RESPONDENT**

(Arising from H.C.C.S No. 790 of 2006)

**JUDGMENT OF CATHERINE BAMUGEMEREIRE, JA**

I have had the privilege of reading the draft opinion of my brother Stephen Musota JA. I agree with the reasoning, decision and orders made.

3rd March 2022

**Catherine Bamugemereire**

**Justice of Appeal**

**THE REPUBLIC OF UGANDA**
**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**
**CIVIL APPEAL NO. 077 OF 2013**

**BISONS CONSULT INTERNATIONAL LIMITED::::::::::::::APPELLANT**

**VERSUS**

**SALINI CONSTRUTTORI S.P.A::::::::::::::::::::::::::::::::RESPONDENT**

*(Appeal from the decision of the High Court of Uganda at Kampala (Commercial Division) before Mulyagonja, J (as she then was) dated 10th May, 2012 in Civil Suit No. 790 of 2006)*

**CORAM: HON. LADY JUSTICE ELIZABETH MUSOKE, JA**
**HON. LADY JUSTICE CATHERINE BAMUGEMEREIRE, JA**
**HON. MR. JUSTICE STEPHEN MUSOTA, JA**

**JUDGMENT OF ELIZABETH MUSOKE, JA**

I have had the advantage of reading in draft the judgment prepared by learned brother Musota, JA. I agree with it and would substantially allow the appeal and make the orders he proposes.

As Bamugemereire, JA also agrees, the appeal is substantially allowed and judgment entered for the appellant on the terms proposed in the judgment of Musota, JA.

Dated at Kampala this .....30..... day of.....March.....2022.

.....

**Elizabeth Musoke**

Justice of Appeal