IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA

APPEAL No: 206/2012
SCZ/8/293/2013

(Civil Jurisdiction)

BETWEEN:

MULTIPACK ENTERPRISES LIMITED **APPELLANT**

AND

FR. GEORGE CHALESSERY **RESPONDENT**
(Suing in his capacity as
Chairman and Provincial Superior of Salesian
Society of don Bosco)

Coram: **Mwanamwambwa DCJ, Malila and Mutuna, JJS**

on 14th July, 2016 and 30th September, 2016.

For the Appellant: Mr. K. Chenda and Mr. Y. Yosa of Messrs Simeza Sangwa & Associates

For the Respondent: Ms. M. Mukuka of Messrs Ellis and Company

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JUDGMENT

Malila, JS, delivered the Judgment of the Court

Cases referred to:

1. *Nkhata and 4 Others v. The Attorney-General [1966] ZR 124*
2. *Kelvin Hang'andu & Company v. Webby Mulubisha [2008] ZR 82 Vol.2.*
3. *Wilson Masauso Zulu and Avondale Housing Project Limited (i982) ZR 172.*
4. *Zambia Revenue Authority v. Dorothy Mwanza and Others (2010) Vol. 2 ZR 177.*
5. *Simwanza Namonsya v. Zambia State Insurance Corporation Limited (2010) Vol. 2, ZR 339.*
6. *Attorney-General v. Kakoma (1975) ZR 216.*

Other works referred to:

1. *Chitty on Contracts by H. G. Beale (Editor) 28th Ed. Vol.1 (1999)*
2. *Halsbury's Laws of England, 4th Ed. Vol.2*

The present appeal is against a judgment of the High Court given on the 28th January, 2013 in favour of the respondent, directing the appellant to pay an amount of money representing costs in remedial repair works in respect of a building structure constructed by the appellant for the respondent under a building contract. The said costs were to be assessed by the Deputy Registrar. The court also awarded the respondent an amount of K685,702.44 (un-rebased), being the estimated value for the replacement cost of scaffolding and framework that the appellant allegedly removed from the construction site, contrary to an oral agreement.

The background to the dispute, from the respondent's perspective, is that the respondent and the appellant had entered into a contract under which the appellant was to construct phase one of the Novitiate for Selesians of Don Bosco and other works specified in the contract. Further works were agreed to in an addendum for phase two. It was alleged that

the parties also verbally agreed that the appellant would purchase scaffolding and formwork to be retained by the respondent upon the respondent's reimbursing the cost of the scaffolding and formwork to the appellant.

While the appellant was in the process of undertaking the works contracted to be done, the respondent identified some defects in the construction works owing to, what it considered as, poor workmanship to which the appellant was alerted. Later, the respondent terminated the contract on account of the appellant's failure or refusal to remedy the defects. An independent Engineer and Quantity Surveyor was engaged to analyse the building and to prepare an estimate of costs for the remedial works, which costs were estimated at K742,288,745.90 (un-rebased). In the lower court, the respondent claimed this sum. The respondent further claimed that the appellant had wrongfully removed the formwork and scaffolding from the construction site upon termination of the contract contrary to the agreement. The replacement cost of such formwork and scaffolding was K685,702,442 (un-rebased). Furthermore, it was alleged that the respondent had caused the appellant to purchase excess steel bars in the sum of

US$12,411.82 which the appellant subsequently sold to a third party without the authority of the respondent. The respondent also claimed interest on the said sums, damages and costs.

The appellant admitted that some defects were brought to its attention, but denied being liable for the cost of remedial repairs as well as the cost of formwork and scaffolding, arguing that it did effect the necessary remedial repairs; and that the Engineer engaged by the appellant to make an assessment to the remedial cost of repairs was not an independent engineer, but the design and supervising structural engineer who biasely covered up his mistakes; and that there was no agreement regarding the formwork and scaffolding as alleged, and that the appellant procured all the formwork.

The appellant counter claimed the sum of K210,826,343 (un-rebased) for works executed to the construction of phase one of the Novitiate for Selesians of Don Bosco before the contract was terminated. The respondent disputed owing this sum and claimed that the bill of quantity drawn by the appellant in October, 2010 was not credible and that the claim for labour costs in the region of K76,000,000 (un-rebased) had

no basis as the respondent was not privy to contracts relating to employees.

After hearing the witnesses of the parties and assessing the evidence, the learned High Court judge gave judgment for the respondent as follows:

(1) For the payment of the costs of remedial repairs to be assess before the Deputy Registrar.

(2) The sum of K685,702,442 (un-rebased) being the cost of supply of scaffolding and formwork.

She also gave judgment in favour of the appellant on the counter claim for works executed in the construction of the phase prior to termination of the contract, adding that the said sum for the works shall be assessed by the Deputy Registrar. The court further awarded costs to the appellant to be taxed in default of agreement.

Aggrieved by that judgment the appellant now appeals on three grounds formulated as follows:

"(1) That the court below erred both in law and fact when it held that the repair works carried out were unsatisfactory and that the defendant is liable for the costs of remedial repairs.

(2) That the court erred both in law and fact when it held that there was an oral agreement for the respondent to return the formwork and scaffolding and that the respondent had proved its claim in respect of the estimated value of the formwork and scaffolding in the sum ofK685,702,442.

(3) That the court erred both in law and fact when it rejected the appellants claim that the residual cost for formwork and scaffolding amounted to K78,500,000."

When the appeal came up for hearing, Mr. Yosa, learned counsel for the appellant, indicated that he would rely on the heads of argument filed on 14th February, 2014, which he augmented orally. The main point taken by the learned counsel for the appellant in respect of ground one was largely evidentiary. He questioned the lower court's acceptance of the evidence of PW1 that the defects, which formed the subject matter of the respondent's claim, were brought to the appellant's attention. According to the learned counsel, the court erroneously concluded that DW1 had admitted that there were defects in the works and that the issue to be determined by the court was whether the said defects were remedied. In so doing, according to Mr. Yosa, the lower court failed to consider the full import of DW1's testimony and instead misconstrued

DW1's acceptance of some of the defects as acceptance of the defects claimed by the respondent wholesale.

According to Mr. Yosa, a perusal of DW1's statement at pages 435 to 445 of the record of appeal, and his oral testimony before the court shows that there was no such admission or acknowledgement of the defects to the extent suggested by the lower court. All that DW1 did in his statement was to acknowledge that before termination of the contract there was no refusal on the part of the appellant to take remedial measures to identified defects. It was the learned counsel's further argument that the lower court glossed over the undisputed evidence that the engineer engaged to assess the defects in the building, a Mr. Sabelo Moyo, is not an independent engineer since he was a structural engineer employed by the respondent throughout the duration of the project. Furthermore, that the said Sabelo Moyo designed, supervised and approved all structural aspects of each phase of the project before the appellant progressed to the next stage. The same person who approved the works before the appellant progressed to the next stage subsequently condemned the works which he had earlier approved. This, in Mr. Yosa's view,

was significant evidence which the lower court failed to consider in its judgment as it casts doubt on the credibility of the respondent's claim for defects.

Mr. Yosa, further argued that the claim for defects came from PW1, Fr. Leszek Aksamt and PW2 Mathew Ngulube. Mr. Yosa also took issue with the fact that Sabelo Moyo's report formed the primary evidence for the alleged defects for which the appellant was held liable and yet Sabelo Moyo was not called as a witness before court. In Mr. Yosa's view, the primary evidence of the defects to the building was, therefore, hearsay evidence and inadmissible and it was a misdirection on the part of the lower court to have accepted hearsay evidence on the alleged defects from PW1. Equally the lower court erred in law when it relied on PW2's report as evidence of existence of defects and, therefore, accepting the valuation of the cost of the remedial repairs. According to Mr. Yosa, the existence of defects not having been approved it follows that PW2's evidence has no foundation. Mr. Yosa, urged us to reverse the lower court's finding that defects existed to the building and that the appellant admitted to the existence of those defects. We were urged to hold by logical and necessary implication that the

respondent was not entitled to claim any monies or repairs to the building. We were implored to uphold ground one of the appeal on the foregoing basis.

In regard to ground two, the learned counsel for the appellant attacked the trial court's holding that there was indeed an oral agreement between the parties under which the respondent was to retain the scaffolding and formwork. The learned counsel submitted that it was a misdirection by the trial court to make such a finding because the court ought to have compared the bills of quantities prepared prior to the commencement of works and which had estimated values of materials to be supplied by the appellant, with the valuation claims prepared by the appellant for the work done. Such a comparison would have revealed that the value of formwork, scaffolding and shuttering material supplied by the appellant and used in the construction, was in fact consistent with the contract executed by the parties.

Additionally, a comparison of the bills of quantities and the bills appearing in the valuation claim showed that the materials for which the respondent was involved by the

appellant were only those which were to be supplied by the appellant as per clause 5 of the contract. This included building sand, cement, binding wire and such other items. The respondent had made no clam to these items despite being invoiced for these things. And in fact that all these items appear both in the bills of quantities as well as valuation claims. This, according to Mr. Yosa, is consistent with DW1's testimony that the respondent was invoiced for labour and the amount for scaffolding and formwork use during the carrying out of the works. The learned counsel referred us to the testimony of DW1 where he stated that the scaffolding and formwork was purchased by the appellant and that the respondent was invoiced for labour and the amount of scaffolding and formwork was for use during the carrying out of works. This explanation for the existence of amounts of formwork and scaffolding in the bills referred to by the lower court in its judgment, was totally ignored by the lower court.

It was Mr. Yosa's further argument that Clause 2.2 of the contract provided for the manner in which the appellant was to render its bills. Under the provision of that clause the appellant was to provide monthly claims based on the value of

actual works executed less 5% retention. It was a further term of the said agreement that the respondent would supply the materials in Appendix 2 of the contract to the appellant and that the cost of such material would be deducted from the contract sum at rates indicated in the Costed Bill of Quantities. According to Mr. Yosa, it was clear that the inclusion of amounts for formwork and scaffolding in the bills rendered to the respondent in no way constitute evidence of an oral agreement. He maintained that the perusal of the bills numbered 1 to 14 and 16 to 21 in the final valuation claim issued by the appellant to the respondent showed that the said bills were in fact a tabulation of the cumulative bills issued by the appellant to the respondent in line with the obligations under the agreement.

The learned counsel accused the lower court of having ignored the appellant's evidence that there was formwork left on site when it held that the appellant removed the formworks and scaffolding from the site. We were referred to the statement by DW1 which Mr. Yosa, claimed was clear on this issue. It was further submitted that the evidence upon which the finding of the existence of the alleged oral contract was premised by the

lower court does not in fact support the said finding. What the evidence does not show is that there was a variation of the contract between the parties but rather a unilateral imposition of a variation by the respondent.

The learned counsel maintained that there was no agreement alleged between the appellant and the respondent regarding the retention of the formwork and scaffolding by the respondent. In any case any variation of a contract must be supported by consideration. To this end, the learned counsel referred us to **Chitty on Contracts**. It was his view that there was no evidence of an alleged oral agreement and that the respondent never charged for the formwork and scaffolding in line with the said agreement. It follows, therefore, that the respondent provided no consideration for the variation of the contract and there could have, accordingly, been no variation of the contract as alleged. It followed that as there was no variation agreement the respondent was not entitled to claim the sum of K685,702.44 (unrebased) being the estimated value for the replacement of formwork and scaffolding that the appellant removed from the construction site.

Under ground three of the appeal, the appellant took issue with the lower court's rejection of the appellant's claim that the residual cost of the formwork and scaffolding amounted to K78,500,000 (unrebased). Mr. Yosa, expressed the view that the lower court might well have misunderstood what formwork and scaffolding really are and how they are used in the construction industry. In this regard he contended that the value of formwork when it is purchase cannot be same after it has been used as its character is altered during use. We were referred to the learned authors of **Halsbury's Laws of England** on the definition of scaffolding. We were also referred to an internet source regarding the definition of formwork. The learned counsel submitted that the scaffolding and formwork used in the Noviciate building was made of timber and this is clear from the correspondence exchanged with the parties, particularly the letter dated 28th June, 2010 from the appellant to the respondent and which appears on page 255 of the record of appeal. Mr. Yosa, further argued that there is, on record, a letter written by the appellant to the respondent in which the appellant clarifies why the cost of formwork and scaffolding cannot be as alleged by the respondent. In this regard we were

referred to page 295 of the record of appeal. In this particular case, according to Mr. Yosa, the scaffolding and formwork were all made of wood, and after their use the character and value of the same naturally depreciated. It was, therefore, a misdirection for the lower court when it attached the value of K685,702,442 (unrebased) as the value to this scrap material. The learned counsel contended that the award of this amount to the respondents could lead to unjust enrichment as it was in no way the true value of the said formwork and scaffolding. Furthermore, there was evidence, according to Mr. Yosa, that the appellant had, in fact, left formwork and scaffolding on the site and that the appellant paid the respondent the sum of K78,500,000 (unrebased) which fact the respondent admitted in a letter dated 2nd September, 2010. This evidence submitted by the learned counsel, appears not to have been taken into account by the lower court.

The learned counsel ended by submitting that even in the event that's there was indeed an agreement to the effect that the respondent would pay for all formwork and scaffolding which on completion of the project would be retained by the respondent, the court erred when it valued the scaffolding and

formwork at K685,702,442 (unrebased) taking into account the entire period that the contract subsisted. The evidence before court was that the alleged oral agreement was made sometime in June, 2010. The agreement between the parties was entered into on 4th June, 2008. The alleged oral agreement cannot, therefore, be made to cover the portion of the contract already performed. The learned counsel referred us to the case of **Nkhata and 4 Others v. The Attorney-General**[1] in regard to instances when this court can overturn findings of fact by a trial court and argued that the present case presented a justified occasion to do so. We were urged to uphold the appeal and reverse the judgment of the lower court.

Ms. Mukuka, learned counsel for the respondent, in her written heads of argument, made fairly brief submissions. As regards ground one, she supported the holding of the trial judge that the repair works carried out were unsatisfactory and that the appellant was liable for the cost to remedial repairs. She contended that, as can be seen from page 2 of the appellant's heads of argument and from the memorandum of appeal, ground one of the appeal relates to the standards of the remedial works to the building. According to Ms. Mukuka,

ground one does not address the findings of the lower court that the appellant's attempt to repair the defects to the building were unsatisfactory, but the finding that the defects in the work were as claimed by the respondent. It was the learned counsel's submission that the latter issue does not appear in the memorandum of appeal and should, therefore, be struck out and ground one dismissed accordingly.

In relation to grounds two and three, Ms. Mukuka, contended that the lower court could not be faulted for holding that there had been an oral agreement for the respondent to retain the formwork and scaffolding and that the respondent had proved its claim in respect of the value of the formwork and scaffolding in the sum awarded by the court. Ms. Mukuka, submitted that in the High Court the appellant went from denying the existence of its defence to admitting it at the trial. We were referred to page 523 to 524 of the record of appeal which show that when asked whether there had been an agreement on the terms alleged by the respondent, DW1, the Managing Director of the appellant replied as follows:

> **"Yes, but not everything. I have conceded that there was an agreement and I retract my earlier statement."**

The second point made by Ms. Mukuka, was that the appellant's argument that the respondent was not charged for the scaffolding and formwork on the valuation claims cannot stand in the face of the clear demarcation of the 'materials' and 'labour' consistently as (a) and (b) respectively in the bills and the earlier written admission by DW1 of the oral agreement.

The final point addressed by Ms. Mukuka, related to a variation of the written agreement requiring consideration. The learned counsel submitted that the argument made in this respect on behalf of the appellant was entirely new as could be seen from the defence and counter claim, the skeleton argument of the appellant in the lower court and the submissions and, therefore, that this argument ought not be entertained. She submitted that this applied equally to the argument relating to the depreciation of the value of the formwork and scaffolding. In support of this submission she relied on the case of **Kelvin Hang'andu & Company v. Webby Mulubisha**[2]. We were urged to dismiss the whole appeal on this basis.

We are grateful to the learned counsel for the parties for their submissions. As we shall show, most of these submissions are extraneous to the real issue determinant of the appeal.

As regards the first ground of appeal we have to answer the question whether the court was on firm ground to hold that the repair works carried out were unsatisfactory and that the appellant was liable for the remedial works. The learned trial judge quite correctly raised the issues that fell to be determined at J.12 as follows:

> **"(i) whether there were defects in the construction of the building.**
>
> **(ii) if so whether the said defects were remedied by the defendant (appellant) and if not the amount recoverable."**

The evidence on record, which is incontrovertible, is that there were defects which were brought to the appellant's attention. The evidence of Fr. Leszek Aksamit, who testified in the trial court on behalf of the plaintiff (now respondent) as PW2, is instructive. He stated in paragraph 6 of his witness' statement that between June and September 2010, the respondent alerted the appellant to a number of construction

defects due to poor workmanship by the appellant and the appellant was requested to effect remedial works.

The appellant failed to effect satisfactory remedial works. This evidence was unshaken in cross-examination. The learned High Court judge found that on the evidence before her, there was no dispute as to the existence of the defects.

On whether or not the defects were corrected, the learned judge, after considering the evidence of PW1 and DW1 in particular made a finding of fact that there was some partial remedying of the defects which were neither complete nor satisfactory.

Before us, Mr. Yosa contended that the lower court's finding should be reversed on the basis that the lower court should not have accepted PW1's evidence that the defects were brought to the appellant's attention and also on the basis that DW1 had admitted that there were defects that required remedial works.

We have already alluded to what PW1 stated in evidence regarding the defects. DW1, Col. Maximo Ng'andwe also

submitted a witness' statement before the trial court. He stated at page 10 of his witness' statement (page 444 of the record) under C(i) as follows:

> **"Prior to the termination of the contract there was no refusal on our part to effect remedial measures to identified defects. There is ample and recorded evidence of us effecting the said work."**

In cross-examination DW1 was asked to confirm that there was poor workmanship in the manner the works were carried out. His response was that:

> **"on a project of the magnitude that we had there are bound to be minor mistakes which are controlled by the supervising structural engineer."**

Even in light of this clear admission, the learned counsel for the appellant submitted with indomitable faith that we should reverse a finding of fact made by the learned trial judge on the premise that she misunderstood the evidence of DW1. We have stated the position of this court in very clear and forthright language when it comes to upsetting a lower court's findings of fact. In **Nkata and Others v. Attorney-General**[1], we stated that:

> **"[a] trial judge sitting alone without a jury can only be reversed on a question of fact if (i) the judge erred in accepting evidence, or (ii) the judge erred in assessing and evaluating the**

evidence taking into account some matter which he should have ignored or failing to take into account something which he should have considered, or (iii) the judge did not take proper advantage of having seen and heard witnesses, (iv) external evidence demonstrated that the judge erred in assessing manner and demeanor of witnesses."

Similar sentiments were strongly carried in **Wilson Masauso Zulu and Avondale Housing Project Limited**[3] where we state that:

"before the court can reverse findings of fact made by the trial judge, we would have to be satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts or that on a proper view of the evidence, no trial court acting correctly could reasonably make."

The same position was reiterated in **Zambia Revenue Authority v. Dorothy Mwanza and Others**[4] and in **Simwanza Namonsya v. Zambia State Insurance Corporation Limited**[5].

To succeed on ground one of the appeal, therefore, it ought to be demonstrated by the appellant that the finding of fact by the trial judge, namely that there was a partial remedying of the defects identified under which remedial works were neither complete nor satisfactory was perverse or made under a misapprehension of facts or improper evaluation of the evidence.

We have gone to great lengths to show the basis and premise of the trial court's finding. It was anchored on the evidence of PW1 and DW1, particularly in the respects that we have highlighted. Mr. Yosa packaged his assault on the learned trial judge finding of fact on the basis that the trial court misapprehended the evidence. We do not agree. With utmost respect to Mr. Yosa, we believe the misgivings he has of the trial court's finding are not well anchored. The finding was made on clear evidence before the trial court as we have pointed it out. We are reluctant to interfere with that finding of fact because, as we pointed out in **Attorney-General v. Kakoma**[6]:

> **"[a] court is entitled to make findings of fact where the parties advance directly conflicting stories and the court must make those findings on the evidence before it having seen and heard the witnesses giving that evidence."**

The lengthy arguments made by the learned counsel for the parties were largely outside the purview of the question whether or not there is justification for this court to interfere with the lower court's finding of fact. It follows, in our considered view, that ground one is destitute of merit and is bound to fail. We dismiss it accordingly.

In regard to ground two of the appeal the issue is whether the evidence before the court sufficiently confirms the existence of an oral contract between the parties in regard to the retention by the respondent of the scaffolding and formwork.

The appellant's learned counsel argued in respect of ground two of the appeal that the factual finding of the lower court that there was an oral agreement that the respondent would be charged for the materials, namely the formwork and scaffolding, was a misdirection as it did not take into account the fact that a comparison of the bills of quantities prepared prior to the commencement of works and, the valuation claims prepared by the appellant for work done. A comparison of the two, according to counsel for the appellant, would have shown to the learned trial judge that the value of formwork, scaffolding and shuttering material supplied by the appellant and used in construction is consistent with the contract executed by the parties.

As in ground one, here too, the appellant impeaches a finding of fact by the trial court. As such, the appellant is duty bound to show in what respect the finding was not borne out of

evidence before the court; or that it was perverse, or that the trial court had taken into consideration extraneous matters. From the appellant's perspective, as we understand it, the trial court's findings of fact should be reversed principally on the following basis:

(i) the court did not do a comparison of the bills of qualities as already alluded to;

(ii) the trial court overlooked or ignored the explanation for the existence of amounts for formwork and scaffolding in the bills which were testified to by DW1;

(iii) the inclusion of amounts for formwork and scaffolding in the bills rendered to the respondent did not constitute evidence of the alleged oral agreement.

We have seen the witness' statement of Fr. Leszek Aksamit tendered in evidence. It says in paragraph 4 that:

"The aforesaid contract was further complemented by an oral agreement by the parties whereby the plaintiff agreed to pay for the scaffolding and formwork which on completion of the project would be retained by the plaintiff."

In cross-examination this statement was never challenged. The maker of the statement was, however, asked as to who entered into the oral agreement on behalf of the parties and who witnessed the agreement. To both questions, the witness gave satisfactory responses. When the appellant's witness DW1, Col. Maximo Ng'andwe, testified he was cross-examined. He was specifically asked whether there was a verbal agreement between the parties with respect to the scaffolding. The witnesses' initial reaction (recorded at page 477 of the record of appeal) was that there was no such agreement. When the same issue was pressed further, the following was recorded on pages 477 and 478 of the record:

> **Q. Was there at any stage a verbal agreement to the effect that formworks scaffolding would be retained by the plaintiff?**
>
> **A. Yes but not everything. I have conceded that there was an agreement and I retract my earlier statement."**

In these circumstances, we find it strange that the learned counsel for the appellant launched his onslaught on the finding by the trial judge that on the evidence before her, there was indeed an oral agreement regarding the scaffolding and

formworks. To us, on the basis of the evidence we have extrapolated from the record and highlighted above, the learned judge was entitled to come to the conclusion that she did, even if we discounted, for good measure, her reference to the bills of quantities. The appellant has not demonstrated that the finding was indeed perverse. We are convinced that it was indeed borne out of the evidence before her. We are not inclined to reverse that factual finding. Ground two has not the lightest merit. It is dismissed.

In ground three, the appellant's grievance concerns the residual cost of the formwork and scaffolding. The respondent had claimed, and was awarded K685,702,442 as the estimated value for the replacement of the formwork and scaffolding as claimed. The appellant had instead maintained that the residual cost of the formwork and scaffolding only amounted to K78,500,000.

The appellant argued before the lower court that the respondent's claim for K685,702,442, being the estimated value for replacement of cost of formwork and scaffolding, was fictitious as the said formwork was donated to the Selesian

Sisters by the respondent and further that their claim was a mere estimate as opposed to the real factual value.

We have already stated that the trial court found as a fact that there was an oral agreement regarding these materials. The court further found that the materials were charged to the respondent by the appellant. In rejecting the appellant's claim that the residual value of the formwork and scaffolding was K78,500,000 the learned trial judge observed as follows at J 15:

> **"The fact is that the plaintiff paid for the materials to be retained by them which the defendant removed from site upon termination of the contract. The bills reflect material cost and not rental charges for the scaffolding. Had the bills been in respect of rental charges, the same would have been reflected as rental charges. On the balance of probabilities, the plaintiff has proved its claim in respect of the cost of the estimated value of the formwork and scaffolding in the said sum of K685,702,442."**

The gist of Mr. Yosa's argument is that with a proper understanding of what formworks and scaffolding are as given in the definitions he recited it is impossible to argue with any force of logic that the value of these materials could remain constant after they have been used. The nature of the

materials, i.e. timbers, decking and shuttering materials, is that they depreciate in value once used. It was, therefore, erroneous to maintain their values at cost.

From a commonsense point of view, it is easy to appreciate the weight of Mr. Yosa's argument. We, however, have a strictly contractual issue here. The parties agreed that the respondent would be charged for those materials which was be retained by the respondent upon the completion of the works. The court found that the respondent was indeed costed for the materials but that the appellant did not allow the respondent to retain them. The question is not one of the values involved, but one purely of contractual principle. The issue that emerges is one of either having the formwork and scaffolding available to the respondent regardless of their actual cost, or failing this, a fair replacement cost. In our considered view, the trial court cannot be faulted for its finding in this respect. Ground three is also bound to fail, and we dismiss it accordingly.