

IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

2021/HP/0578



BETWEEN:

RELiance TECHNOLOGY LIMITED

PLAINTIFF

AND

NEMERIT CONSTRUCTION LIMITED

DEFENDANT

BEFORE HON. JUSTICE ELITA PHIRI MWIKISA

For The Plaintiff: Mrs. M.C Chilufya of Messrs Mosha & Company

For The Defendant: Mrs. Z.C Kakunka of Messrs J&M Advocates

JUDGMENT

Cases Referred To:

1. *Kapansa Mwansa v Zambian Breweries PLC Appeal No. 153/2014*
2. *Tryson Mtonga v Warren Ng'ambi SCZ Selected Judgment No.8 of 2016*
3. *Andrew Tony Mutale v Crushed Stone Sales Limited (1994) S.J 98 (S.C)*

Other Works Referred To:

1. *Clerk and Lindsell on Torts, 22nd Edition, Sweet and Maxwell*
2. *Halsbury's Laws of England 4th Edition Volume 4(2), Reissue, Butterworths, 1992*
3. *I.N. Duncan Wallace, Hudson's Building and Engineering Contracts, Volume 1, 11th Edition, Sweet & Maxwell, 1995*

1. INTRODUCTION

1.1. This action was commenced by way of writ of summons and statement of claim dated 24th May, 2021. The Plaintiff commenced this action seeking the following reliefs:

- i. damages for negligence;**
- ii. payment of the sum of ZMW 77,406.28 being the total outlay for the replacement of roof tiles on the property;**
- iii. special damages in the sum of ZMW 25,000**
- iv. any other relief as deemed appropriate under the circumstances;**
- v. interest on all sums found due as provided at law; and**
- vi. costs of and incidental to these proceedings.**

2. PLAINTIFF'S CASE

2.1. The statement of claim shows that both the Plaintiff and Defendant are companies incorporated under the Companies Act No. 10 of 2017 of the Laws of Zambia. That the Defendant primarily carries out the business of building project management, property improvement and generally is a building contractor.

2.2. The Plaintiff pleaded that on a date unknown but in the last week of July, 2020, the Plaintiff, through its Managing Director, contacted the Defendant regarding the replacement

of one side of the roof at the Plaintiff's premises situate at House No. 2, Plot No. 19070, Lukasu Road, Lusaka ("the property"). It was stated that the Defendant's Managing Director, his quantity surveyor and a foreman went to inspect the said property and advised that the aged roofing tiles could be replaced and that the Defendant company could do an excellent and satisfactory job of replacing the aged tiles. That the Defendant, through its Managing Director, represented that once the roofing tiles were replaced, there would be no leakage inside the property for at least 20 years and that on the backdrop of the assurances rendered by the Defendant, the Plaintiff was satisfied that the Defendant Company could expertly replace the aged roofing tiles on the property.

2.3. The Plaintiff went on to plead that the Defendant issued a quotation amounting to K77,406.28 being the total amount required for the repair of the aged roofing tiles and that the Plaintiff paid K38,703.14 representing 50% of the total repair cost as quoted. Further that the Defendant advised the Plaintiff to get 400 roofing tiles from Harvey tiles which it did at the beginning of September, 2020.

- 2.4. It was pleaded further that the Defendant went on to remove the old tiles and replaced them with the 400 new tiles as recommended which work was completed by the Defendant at the end of September, 2020. The Plaintiff stated that upon completion of works, it noticed that the roof replacement was not done to perfection as the roof had spaces/gaps in between. The Plaintiff averred that it got in touch with the Defendant's Managing Director to formally complain of the poor workmanship. That the Plaintiff, however, went ahead to make final payment of K38,703.14 being the outstanding balance based on the representations made by the Defendant's Managing Director that the Defendant would correct any defects regarding the contract.
- 2.5. It was the Plaintiff's plea that when the rainy season started, the property flooded with rain water seeping through the replaced roofing tiles. That the floods were caused by the negligent acts of the Defendant and their failure to exercise due care and skill in the reparation of the roofing tiles. The Plaintiff pleaded that it was an express or alternatively an

implied term and condition of provision of services by the Defendant that the Defendant warranted:

- a) that it would exercise all reasonable care and skill, as a building contractor in and about the replacement of the aged roofing tiles on the Plaintiff's property;**
- b) that it would prepare all necessary plans and specifications for the replacement of the aged roofing tiles;**
- c) that for the purposes of such preparations, that it would carry out all the usual and necessary surveys, examinations and inquiries;**
- d) that it would superintend the carrying out of the work of replacement of aged roofing tiles on the Plaintiff's property.**

The Particulars of the negligence include:

- a) failure to close or in any professional way prevent numerous gaps in the adjoining roofing tiles;**
- b) failure to provide any proper or sufficient, means of preventing leakages;**
- c) failure to superintend the replacement of the aged roofing tiles or to remedy the absence thereof;**
- d) failure to exercise the required skill and care in the replacement of the roofing tiles.**

2.6. The Plaintiff went on to plead that upon informing the Defendant of the flooding, it proceeded to send its carpenters to re-work the roof, but that every time it rained the roof still leaked. That as a result of the Defendant's negligent acts and the failure to exercise due care and skill, the Plaintiff has

suffered damage to its property. The particulars of damage include:

- a) damaged ceiling boards on one side of the property;**
- b) damaged interior walls;**
- c) stains on the walls of one side of the property;**
- d) washed out mortar.**

The particulars of special damage include:

- a) replacement of damaged ceiling board in the sum of ZMW 17,000**
- b) repainting of the damaged interior walls in the sum of ZMW 8000.**

2.7. The Plaintiff averred that the Defendant has refused to accept liability for the poor workmanship of the newly fitted 400 tiles and has instead put blame on the Plaintiff's refusal to enlarge two valley gutters on the veranda extension and the slope of the roof on the property being below the recommended average as per Harvey Tile specifications. That the aforementioned problems were never and have at no point been indicated to it by the Defendant at the outset of the works. That the Plaintiff has lost various opportunities business or otherwise by loss of use of the property in a manner that would represent to potential interested parties

that it is safe and purpose worthy. The Plaintiff pleaded that the Defendant's workmanship was never satisfactory and that the Defendant breached its duty of care and skill under the scope of work they were engaged to do.

3. DEFENDANT'S CASE

3.1. The Defendant filed its defence on 22nd February, 2022. It stated therein that the Defendant is well equipped to provide effective and professional property consultancy services. In relation to the case the Defendant averred that the Plaintiff, through its Director, contacted the Defendant company regarding the replacement of the roof tiles on the property in issue in the last week of May, 2020, and not July as alleged. That after assessing the said roof top, it was discovered that the roof had been renovated and worked on before the Defendant was engaged to replace the roof tiles. Further that the Plaintiff approached Harvey Tiles who advised it to replace the roof by purchasing 400 roofing tiles from Harvey Tiles. The Defendant pleaded that the Plaintiff also engaged it to check and adjust as necessary the bearer timbers to ensure that any depressions on the roof were corrected.

3.2. The Defendant denied making any warranties to the Plaintiff and further averred that no instructions were ever given in writing or verbally by the Defendant's engineer or any other person duly authorised by the Defendants for any work, labour or materials. The Defendant also denied having advised the Plaintiff to buy 400 roofing tiles as that advice was sought from Harvey Tiles. The Defendant went on to state that the works done on the project were perfect and that there were no spaces as alleged by the Plaintiff. That the Defendant exercised due care and skill in the reparation of the roofing tiles and even went as far as advising the Plaintiff that the cause of the leakages was attributed to valley gutters but that regrettably, the Plaintiff refused to adhere to the advice given to them. Further that the Plaintiff's Director was also advised that the property needed bigger downpipes for serious storms or heavier than usual rainfall over short periods. The Defendant stated that it informed the Plaintiff that the two valley gutters on the veranda extension would be a constant source of leakages and therefore there was need for them to be enlarged. That the Plaintiff did not heed

any of the advice given to it by the Defendant. The Defendant averred that its carpenter did attempt on several occasions to rectify the valley gutters which were a source of the leakage.

- 3.3. The Plaintiff denied liability and averred that the Plaintiff is not entitled to any of the claims sought as it refused to adhere to the professional advice that the Defendant gave. That the services of the Defendant company were performed to perfection and that the workmanship was professionally and satisfactorily done with due care and skill.

4. PLAINTIFF'S REPLY

- 4.1. The Plaintiff in the Reply dated 15th March, 2022, pleaded that the Defendant was engaged as an expert to carry out the works in issue and that it was on their recommendation that 400 roofing tiles were purchased. It was averred that during cosmetic repairs to the roof, the Defendant's technician advised that the leakages were due to gaps between the adjoining tiles and did not have anything to do with the valley gutters which had been in existence since 2014. That there were no leakages through the valley gutters since its

existence. The Plaintiff also pleaded that the leakages were not as a result of the valley gutters, small collection boxes or small down pipes as the same have no relevance to the leakages and are away from the ending walls.

5. EVIDENCE AT TRIAL

- 5.1. The Plaintiff's witness statement was filed on 20th July, 2022. PW1, Rajagopalan Kothandaraman, the Managing Director in the Plaintiff company, testified that he occupies the property in question and that during his stay at the premises, he noticed that the roofing tiles on one part of the house were aged and needed to be replaced. PW1 stated that prior to engaging the Defendant, there was no leakage or flooding at the property. The witness gave evidence that around July, 2020, he contacted the Defendant to inquire about roof replacement at his premises. He stated that the Defendant, through its Managing Director, agreed to visit the premises to conduct an assessment to ascertain what was required for repairs. Upon inspection, PW1 testified that the Defendant made recommendations and issued a quotation amounting to K83,206.29 which was finally negotiated to K77,406.28.

That a 50% down payment was made by the Plaintiff to the Defendant amounting to K38,703.14, on 7th August, 2020. Further that the Plaintiff proceeded to buy 400 tiles from Harvey Tiles relying on the advice given it by the Defendant.

5.2. PW1 went on to testify that after the 1st instalment was paid, the Defendant undertook works to the premises and that on 19th August, 2020, the Defendant's carpenters stated that they had completed the job and requested that a senior staff member inspect the works to check if all roofing tiles were fixed firmly and to ensure that there were no gaps. It was his further evidence that on 8th October, 2020, the Plaintiff proceeded to make the second payment on the backdrop that the works had been completed to perfection. That, however, the roof began leaking during the rainy season on the side where the roofing tiles had been replaced by the Defendant. PW1 testified that this was communicated to the Defendant and that the Defendant's carpenter tried to rectify the problem but in vain. The witness stated that he was then informed that the flooding was due to blocked down pipes which were consequently cleaned but that even after cleaning

them, the flooding to the property continued. PW1 testified that the fixing of the tiles was not properly done by the Defendant resulting in the leakages as shown in the Defendant's bundle of documents. That the Defendant has continued to attribute the leakages to different problems as seen in its defence. PW1 testified that the said problems were never indicated to the Plaintiff and that the Defendant is merely using them as excuses for the poor workmanship exhibited by it and its persistent failures to rectify the problem. PW1 testified that the Defendant owed it a duty to replace the roofing tiles in a professional manner especially that the full amount was paid. He prayed that the claims sought by the Plaintiff be granted by the Court.

- 5.3. When the matter came up for trial on 12th January, 2023, PW1, applied for his witness statement and bundle of documents to be produced as part of his evidence. There was no objection from the Defendant.
- 5.4. Under cross-examination, PW1 told the Court that he is a mechanical engineering graduate with a post graduate in cost and management accounting. He also told the Court that he

is the Managing Director in the Plaintiff company. He stated that the Plaintiff is not involved in the construction business.

5.5. In relation to the case, PW1, testified that although he noticed that the roofing tiles on one side of the property were aged, he did not produce any evidence to show that. PW1 admitted that quotation No. 2020/15 dated 5th June, 2020, at page 22 of the Defendant' bundle of documents dated 12th August, 2022, shows that it included the supply and installation of valley gutters at the cost of K 1426.91. PW1 also conceded that his witness statement, in paragraph 5, states that a quotation was issued at a cost of K 83, 206.29 and finally negotiated to K77, 406.28. That the said quotation was addressed to Mr Raman's residence. Further, PW1 testified that page 1 of the Plaintiff's bundle of documents also shows a quotation received from the Defendant addressed to Mr Raman's residence for the replacement of aged roofing tiles dated 7th August, 2020. He admitted that the said quotation did not include valley gutters and was quoted at K83, 206.29. He conceded that the 2nd quotation did not refer to valley gutters and admitted that there was a

recommendation that valley gutters be included for the whole roof in the 1st quotation. PW1 testified that the Defendant did undertake the works and installed 400 roofing tiles as agreed. PW1 admitted that the messages dated 25th November, 2020, were from him. PW1 read the message at 14: 32 which read as follows:

“If rate of discharge from collection box is not high enough then you will get back up of water in the valley gutter and it will enter under the tiles. Anyway its your decision so I have told them.”

5.6. PW1 went on to testify that the cause of the leakages and flooding was because the fixing of the tiles was not done properly by the Defendant. PW1 conceded that he did not accept the Defendant’s advice to enlarge the downpipes. When referred to paragraph 3 of the letter dated 1st April, 2021, at page 17 of the Defendant’s bundle of documents, PW1 testified that he was never advised that the two valley gutters on the veranda extension would be a constant source of trouble as stated in the contents of the said letter. He, however, admitted that under paragraph 6 of the same letter, the Defendant did advise him on the importance of valley

gutters but that the contents of the said letter are still incorrect. PW1 conceded that there was no proof that the floods were caused by the negligent acts of the Defendant and their failure to exercise due care and skill in the reparation of the roofing tiles as pleaded in the statement of claim. He also testified that he had no evidence to quantify the damages.

5.7. In re-examination, PW1 testified that from Mid-November, 2020, to the end of March, 2021, there was flooding and that he had to engage third parties to work on the leakages. The Plaintiff closed its case.

5.8. In its defence, the Defendant filed two witness statements dated 12th August, 2022. DW1, Festus Ntinda, a quantity surveyor in the Defendant company told the Court that he had worked in the Defendant company for 26 years. With regards the case, DW1 testified that he was aware that sometime in 2021, the Plaintiff's Director contacted the Defendant's Managing Director to replace roof tiles on the Plaintiff's property situate at House No.2 Plot 19070, Lusaka. He stated that on 29th May, 2020, he, in the company of Mr

Ian Thurai Ratnam, the Director in the Defendant Company and Mr Kingsley Makala, a carpenter and building foreman in the Defendant Company, went to assess the requirements of the roof replacement works to be undertaken on the property in issue. That after the assessment, Mr Makala issued a quotation to PW1 dated 5th June, 2020, which quotation included the supply and installation of a gutter valley which brought the estimated cost to K311,616.36. The witness testified that PW1, however, requested for another quotation for fixing the roof to existing timber patterns based on a portion of the roof with only 400 tiles as opposed to the items indicated in the first quotation. That after the 2nd quotation was issued, the Defendant's carpenters moved onto the premises to fix and install the 400 roofing tiles. He stated that PW1 requested the Defendant's senior staff to inspect and check if the carpenters had fixed all the roofing tiles firmly after the installation. DW1 testified that he inspected the roof works and they were properly done but that PW1 did not inspect the roof after the Defendant completed the work.

5.9. DW1 testified that it came as a shock when the Defendant received a call that the property was flooded with water. The witness told the Court that PW1 was advised by the Defendant on numerous occasions to the effect that the main cause of the floods was attributed to the valley gutter which needed to be enlarged. That by letter dated 26th April, 2021, the Defendant explained the cause and expressed its intention to repair. DW1 explained that the Defendant advised PW1 that the slope of the roof at preparation of the roofing tiles was below recommended slope as per Harvey Tiles specification and to rectify the same, they needed to seal the gutter together with surrounding tile edge to prevent any backflow occurring. That the Plaintiff, however, rejected the advice.

5.10. At trial, during cross-examination, DW1 testified that the first quotation issued by the Defendant was addressed to PW1 although there is nothing to show that it was received by PW1 as it was sent by email. DW1 conceded that of the emails documented on record, none show the first quotation. DW1 testified that after assessing the premises the issue of

valley gutters was included in the quotation and communicated to PW1 but that there was no evidence that the said quotation was received by PW1. The witness testified further that the Defendant commenced works after they were paid. That works were commenced despite PW1 rejecting works to be done on the gutters and that the Plaintiff only paid for the replacement of the tiles and not the valley gutters. He testified that he did not know that the failure to enlarge the gutters would cause problems in the future. DW1 testified that according to the first quotation, the Defendant was to supply and install angle ridges at K1,272.51 and supply and install valley gutters at K1426.91 bringing the total to K 2,699.42. DW1 testified that he did not know whether or not PW1 would pay that nominal amount. He also admitted that the failure to supply and install these two items led to the leakages. The witness re-iterated that PW1 was supposed to inspect the works upon completion but that he did not.

5.11. Under re-examination, DW1 testified that the 2nd quotation was re-negotiated to remove the valley gutters which the Defendant had advised the Plaintiff to put.

5.12. DW2, Kingsley Makala, in his witness statement stated that he is carpenter and building foreman and that he has been working for the Defendant for 10 years. DW2 testified that he went to the Plaintiff's premises to assess the roof and determine what would be required to successfully install the roofing tiles. DW2 proceeded to give evidence of how they replaced the roofing tiles. He testified that after removing the old roofing tiles, the Defendant's personnel proceeded to straighten and change some timber members where the tiles were to sit, insulated the roof with sisalation thermal insulation which helps to cool the house. That they then laid the tiles which job took them two weeks to finish.

5.13. DW2 testified that on 18th November, 2020, he received a call from PW1 informing him that there was a flood in the house. That when he went to the property to check, he found that the gutter and downpipe were unable to discharge the water fast enough. He testified further that the Defendant's

director, whom he had gone with, advised PW1 to get bigger downpipes for serious storms or heavier than usual rainfall. DW2 further stated that he also advised PW1 to redress the gutter valley by making an opening so that the water can discharge faster but that PW1 refused. DW2 testified that he went back the following day to seal the roof with silicon sealants, roof sealants and place membranes to redress the gutter. That PW1, however, asked them to remove the membrane and silicon sealant that was placed on the roof on grounds that it was a temporary solution to the problem as they would only protect the roof for a week. He testified that PW1 advised the Defendant to just clip the side sheets and that he would ask a former employee of the Defendant to do the job. That they removed the membranes as instructed.

5.14. DW2 testified that he continued to receive calls from PW1 about the leaking roof and that the Defendant tried to rectify the defects on several occasions. That despite all the advice given, PW1 was still adamant about the solutions given.

5.15. Under cross-examination, DW2 testified that he had worked as a carpenter for 21 years and that he worked on the

property in issue. He testified that the roof was not leaking when they started the works although he did not have proof to that effect. DW2 told the Court that before they started the works, they assessed the premises and after the assessment there were a number of requirements to do the works. The witness told the Court that the roofing tiles were not replaced because they were old, but because there were leakages and membranes in each joint. He testified that there is a sealant that is used when the roof is leaking to cover and seal leakages and the membrane was old and made the roof look old. That when they went to assess the premises, there were no leakages because there was no rain at the time. He reiterated that the Defendant was engaged because there were leakages on the roof so they could change the roofing.

5.16. DW2 testified further that he was not the purported engineer that went to inspect the works afterwards although he was the one referred to in messages dated 19/08/2020 at 16:38 and 22/08/2020 at 09:04, in the defendant's bundle of documents. He testified that the Defendant's Director, who is an engineer, went to inspect the works. That he was not

aware that the Court did not have the Defendant's Director's credentials.

5.17.DW2 testified that the leakages were attributed to the flooding of rain water after the roofing tiles had been replaced. DW2 testified that he did not notice gaps in the roofing or that the bitumen had melted. DW2 re-emphasised that the leakages were as a result of the valley gutters which were flooding as they had an abnormal length. He testified that the valley gutters were in the sitting room where there is a verandah joined to the main roof. That the roof tiles were replaced around the bedroom, sitting room and dining room areas.

5.18.DW2 went on to testify that according to paragraph 14 of the witness statement, he sealed the roof and placed membranes to redress the gutter. The witness conceded that redressing the gutters should have fixed the leakage problem. DW2 testified that the leakages continued because PW1 asked them to remove the membranes they had placed to redress the gutters. That PW1 asked them to remove the said membranes on grounds that it was a temporary measure.

DW2 explained that when there is a heavy down pour, the down pipes fail to discharge the water, and as a result, the water overflows into the house which is why they redress the valley gutters on the edges with membrane roof seal to stop the water from leaking into the house. That from experience, he could tell that the leakage was coming from the valley gutters. DW2 conceded that it was true that the Plaintiff had suffered damage as a result of the flooding. He stated that he did not know why the Defendant went ahead to undertake the works when the Plaintiff had refused the advice given it; namely to have the valley gutters and downpipes enlarged. DW2 also conceded that there was not only one defect attributable to the valley gutters. That he did not try to rectify the defects owing to his poor workmanship. That although he (DW2) referred to a Mr Njobvu going to fix the leakages, the said Mr Njobvu was not going to be called as a witness.

5.19. When re-examined, DW2 testified that the leakage problem persisted because the Defendant could not rectify the problem on the valley gutters.

6. WRITTEN SUBMISSIONS

6.1. Both parties filed written submission which I have taken note of.

7. ANALYSIS AND DECISION

7.1 I have carefully considered the evidence on record as well as the written submissions filed by Counsel from both sides. The Plaintiff commenced this action seeking, inter alia, damages for negligence. It is trite law that in order for a claimant to succeed in a claim for negligence, three (3) elements must be established, namely that the Defendant owed a duty of care to the Plaintiff; that that duty had been breached by the Defendant and that as a result of the breach, the Plaintiff suffered damage. I am fortified by the case of **Kapansa Mwansa v Zambian Breweries PLC Appeal No. 153/2014**¹ in which the Supreme Court went on to state that the law of negligence places the burden on the claimant to prove every element of the tort. Thus, the plaintiff in this case must prove that the Defendant owed it a duty of care in the exercise of its duties, which duty was breached and that the Plaintiff has suffered damages as a result of the Defendant's

negligence. The Plaintiff must also lead evidence that allows the Court to proceed beyond pure guesswork to allow it reach an appropriate legal inference.

In relation to building contracts, the learned authors of Halsbury's Law of England 4th Edition (reissue) volume 4(2) at paragraph 499 have stated that the professional people who may be engaged in building contract work are architects, engineers, surveyors and quantity surveyors. In paragraph 524 the learned authors went on to state that:

“Although in general the duty of an architect or engineer is only to exercise reasonable skill and care, a higher duty may be imposed exceptionally if the circumstances show that it was common intention of the parties that the architect or engineer design a building which would be fit for its purpose.”

In cases such as this, reasonable skill and care must, therefore, be exercised for a party not to be found liable in negligence.

7.2 The facts not in dispute are that the Plaintiff contracted the Defendant company to renovate a part of a roof of its property, by replacing aged tiles. The Defendant Company agreed and conducted renovations. Following the said renovations, the Plaintiff's roof started leaking during the rain season and the

Defendant attempted to fix it a few times but to no avail. The Plaintiff attributes the leaking roof to the Defendant Company's alleged poor workmanship while the Defendant Company attributes the leaking roof to the failure of the Plaintiff to follow its advice to replace the valley gutters.

7.3 By virtue of the relationship between the Plaintiff and the Defendant, the Defendant owed the Plaintiff a duty to exercise care and skill in renovating the Plaintiff's roof. Arising from the foregoing, the crucial issue I need to resolve is whether the Defendant Company was negligent in the manner it renovated the Plaintiff's roof. In other words, whether the Defendant breached its duty of care to the plaintiff, to exercise care and skill and exhibited poor workmanship in the manner it executed the renovations on the Plaintiff's roof thereby leading to leakages.

7.4 I note that there was no written contract governing the parties herein. Quotation No. 2020/15A, which both parties are relying on, had notes which included estimated construction period, advance payment amongst others as shown at page 1 of the Plaintiff's bundle of documents. In most building contracts, however, it is the drawings, specifications or bill of quantities

which will normally define the quality and type of materials to be used as well as the workmanship to be employed. The learned authors of Halsbury's Laws of England, supra had this to say on obligations as to workmanship at page 326 paragraph 374:

“The drawings and the specification or bill of quantities will normally specify the quality and type of materials to be used, the workmanship to be employed and sometimes also the method of work to be adopted. They may also specify the purpose or purposes for which the completed works are to be fit. The contractor may thereby become under an express obligation to furnish or be responsible for the design of the works. Such a specification is sometimes called a ‘performance specification’, particularly for mechanical, electrical, or other engineering works or services but also for building works generally.”

7.5 Pursuant to the above, where the workmanship of a party is brought into question as is the case in casu, the standard to benchmark performance will be on the drawings, specifications and the bills of quantities. The said technical documents are absent in this case. I therefore find that the contract between the Plaintiff and the Defendant was an oral one and will, in the circumstances, resort to the implied conditions of the said oral contract.

7.6 The learned authors of Hudson's Building and Engineering Contracts, 11th Edition at page 561 paragraph 4.124 had this to say on workmanship:

“In the absence of any special term or direction in the contract specifying the manner in which work is to be done, there is an implied condition in all contracts for work and labour that the described work will be carried out carefully and skilfully or as it is sometimes expressed, in good and workmanlike manner”.

At page 518 paragraph 4.065 the learned author's stated that:

“Thus, the workmanship obligation, as it is usually called, will in its primary sense mean care and skill in the physical execution of any specified or described work processes.”

7.7 In its defence, the Defendant averred that it has managed building projects all over Zambia, including major earthworks, new industrial and residential facilities, amongst other specialised works. With such a background, the Defendant was expected to replace the Plaintiff's roofing tiles professionally and with reasonable care and skill.

7.8 It seems to me that the Defendant's main defence is that it advised the Plaintiff's Director that the replacement of the valley gutters was cardinal in the reparation of the roofing

tiles at the Plaintiff's property. I say so firstly because Counsel for the Defendant, in the written submissions, submitted that the Defendant offered its professional advice to the Plaintiff that there was need for the valley gutters to be enlarged on the Plaintiff's veranda to allow water to discharge on the downpipes. Secondly, DW1, in his witness statement, testified that after assessing the works to be done on the roof, a quotation was issued to the Plaintiff which quotation included the supply and installation of valley gutters bringing the estimated cost to K311,616.36. DW1 also testified that PW1 was advised by the Defendant's personnel on several occasions that the main cause of the flooding was attributed to the valley gutters which needed to be enlarged. DW2 also gave evidence, during cross-examination, that the leakages were as a result of the valley gutters which were flooding due to an abnormal length.

Thirdly, the Defendant's bundle of documents shows correspondence between Raman and Ian Ratnam, the Managing Directors in the Plaintiff and Defendant companies respectively, at pages 3-16. The said correspondence is from

August 2020, to 1st April, 2021. It is clear that the Plaintiff herein started complaining of the leakages in November, 2020, as shown below:

24/11/2020, 19:00- Raman: The whole sitting room is flooding. Very bad roofing job.

24/11/2020, 19:37- Raman: Mr Banda said that some roofing sheets were lo[o]se and he nailed them.

24/11/2020, 19:38- Raman: But nailing those lo[o]se sheets did not help resulting in the flooding again now.

24/11/2020, 19:45- Ian Ratnam: You may need bigger downpipes for serious storms or heavier than usual rainfall over short periods for e.g. 50mm per hour storm for 10minutes will mean downpipes cannot discharge at same rate and gutters will retain water and overflow.

25/11/2020, 14:32- Ian Ratnam: If rate of discharge from collection box is not high enough then you will get back up of water in the valley gutter and it will enter under the tiles. Anyway, it's your decision.

25/11/2020, 14:48 Raman: What we need is a permanent solution of fixing the side tiles neatly, nicely and uniformly. They didn't do that earlier and that caused all these problems.

01/12/2020, 15:46, Raman: Good afternoon, it is flooding so much in the same place. You need to come tomorrow morning and sort this out.

01/12/2020, 15:57, Ian Ratnam: Mr Raman you stopped them from doing what I said to do. Your gutter is backflowing. You seem to know better what should be done. Kingsley was told not to seal off between gutter and roof.

01/12/2020, 15:58, Raman: All the rooms are now flooded. It is not only at the gutter but everywhere.

01/12/2020, 15:58, Raman: All over the house where the tiles were changed.

07/12/2020, 11:42- Ian Ratnam: ...The valley gutter is now ok but water was entering from the interface

between the old and new Harvey tiles as the old ones had some cracks...when removed...most areas are dry as shown by dust...but one place has traces of water in the dust...

08/12/2020, 10:38- Raman: No improvement after yesterday's work. The water still drips down to the living room. Can you please send your team to sort out the problem urgently.

09/12/2020, 06:49- Raman: Good morning. We have been experiencing the rain water entering in the living room since 17th November. You need to put some extra efforts in sorting out the mess urgently. I am 100% confident that your people didn't do the correct job around the valley gutter that is resulting in all th[is] mess.

11/12/2020, 14:11- Ian Ratnam: I was extremely concerned...we had 100mm rain in less than 30 minutes...even in my house gutters were overflowing but we have no valley gutters and our gutters are outside the house...

In any case even one leak is not good...I will inform them to come.

09/01/2021, 22:08- Raman: Ever since you changed the roof tiles, both living and dining rooms have been flooding. It is now two months but you have failed to handle this job properly. Lack of supervision and lack of seriousness that caused all th[is] mess.

01/04/2021, 11:53- Raman: What time [are you] coming to fix the roof problems.

- 7.9 I note that the Defendant's Director stopped responding to the said whatsapp messages from around December, 2020, according to the messages produced by the Defendant. The Defendant, however, sent a letter to the Plaintiff's Director, dated 1st April, 2021, which letter was drafted as follows:

"Dear Mr Raman

Roofing Works

We write regarding your several messages alleging that the continued leakages from your roof are a result of our poor workmanship and respond as follows:

- 1. Our brief was to replace existing Harvey Tile roof tiles with new as supplied by you.***
- 2. We were to check and adjust as necessary the bearer timbers to ensure that any depressions on the roof were corrected***
- 3. We informed you that the two valley gutters on the veranda extension were going to be a constant source of trouble and would need to be enlarged. You rejected the advice and chose not to have this done.***
- 4. After the on set of heavy rains, the gutters overflowed and backed up under the new tiles and this problem has persisted.***
- 5. Our MD himself inspected the problem by getting on the roof and advised that the valley gutters be enlarged but also that the discharge on the downpipes be corrected to allow a higher discharge rate. You rejected this advice as well.***
- 6. Gutters are a means of collecting rainwater runoff and holding the same until discharges either by natural flow or by downpipes. If the discharge rate is lower than that of the collection rate, the gutters will have to hold the water for some time. The capacity of holding the water will dictate the size of the gutter. The current valley gutters are totally ineffective in large storms of say more than 25mm per hour rainfall intensity. We have experienced many instances of rainfall far in excess of this during the current season.***

- 7. To further complicate issues, the current slope of the roof is also below the recommended slope as per Harvey Tile specifications.**
- 8. One option that you have now is to seal the gutter together with the surrounding tile edge so as to prevent any backflow occurring. i.e the water will back up and stay on top of the roof until it discharges. We have advised on this and yet you continue to reject all our advice.**
- 9. We are at a loss to know what to do next as we do not have a magic wand to fix this problem.**
- 10. We are getting quote for the derbigum seal and will let you know how much this will cost and you may choose to go this route or reject it as well.**
- 11. Insisting that we “physically check each and every tile of 540 tiles and refix is not going to resolve this problem.**

You are at liberty to seek alternative professional advice on this and revert to us.

Yours

FSD NTINDA

7.10 Although the Defendant has insisted that the Plaintiff was advised to change the valley gutters, I have not found any evidence on record to prove that the said advice was given to the Plaintiff before the Defendant commenced the renovation works. In fact, the Plaintiff in paragraphs 18-19 of the statement of claim pleaded that:

“The Plaintiff shall aver at trial that the Defendant has refused to accept liability for the poor workmanship of the newly fitted 400 no. roof tiles and has instead put the blame on the Plaintiff’s refusal to enlarge two valley gutters on the veranda extension and the slope of the roof on the property being below the recommended average as per Harvey Tile specifications.

The Plaintiff categorically states that the aforementioned problems were never and have at no point been indicated to it by the Defendant at the outset of the works and is mere excuse making based on the persistent failures to rectify the problem. The Defendant undertook the roof tile replacement jobs having known the above. If he had known the roof was going to leak after the replacement with new Harvey tiles, he should not have undertaken the job.”

In defending itself, the Defendant averred, in paragraph 20, that the contents of paragraph 18 of the Plaintiff’s statement of claim is denied and shall aver that it did not deny any liability but advised the Plaintiff that the cause of the leakages was the shallow valley gutters which needed to have been worked on. The Defendant then relied on the letter dated 26th April, 2021. The Defendant also merely denied not having indicated the problems to the Plaintiff at the outset of the Works. The Defendant did not plead or even advance any evidence that it advised the Plaintiff before it commenced the works.

Furthermore, PW1, in his witness statement, testified that the Defendant continued to attribute leakages to the downpipes, which the Defendant advised needed to be enlarged for serious storms or heavier than usual rainfall, after the replacement of the roofing tiles was done. PW1 went further to state that the aforementioned problems were never indicated to the Plaintiff by the Defendant from the initial assessment and that if the Defendant had known that the roof was going to leak, it should not have undertaken the works. This evidence was never rebutted, and even during cross-examination, PW1 testified that he was never advised that the two valley gutters on the veranda extension, would be a constant source of trouble.

I find that the letter that the Defendant referred to, dated 1st April, 2021, at page 17 of the Defendant's bundle of documents, in trying to show that the Plaintiff was advised that the valley gutters would be a constant source of trouble and needed to be enlarged, was only written by the Defendant after the works were commenced and completed. I hold the

view that the said advice was therefore a reaction to the leakages after the works were completed by the Defendant.

7.11 The Defendant seems to rely on the first quotation that was sent to the Plaintiff to prove that they had recommended the supply and installation of valley gutters. In fact, Counsel for the Defendant, in the written submissions, contended that there was an inclusion of the supply and installation of valley gutters in the 1st quotation and that the 2nd quotation did not have the supply and installation of valley gutters. That Mr Raman, regrettably, refused to have the valley gutters installed on the Plaintiff's property and instead requested for another quotation only replacing the roofing tiles.

7.12 It is important to state here that although the record shows that the Defendant witnesses were questioned on whether or not the 1st quotation was in fact delivered to PW1, I have observed that the quotation shows that the initial estimated cost for the roof construction and covering, was K311,616.36, as shown at page 22 of the Defendant's bundle of documents. A perusal of the subsequent quotation No. 2020/15A, dated 7th August, 2020, shows that the estimated

cost of the roof construction and covering was reduced to K83,206.29. What seems to be the difference between the two quotations is that in the 2nd quotation, the client was to supply 400 pieces of Harvey tiles, whilst in the 1st quotation, there was no such specification made by the Defendant, which indicates that the Defendant was to supply the roofing tiles as shown in the 1st quotation. The foregoing seems to suggest that the reason the estimated cost reduced significantly from K311,616.36, in the 1st quotation to K83,206.29 in the 2nd quotation, was not because of the removal of the valley gutters and angle ridges from the quotation but rather, the supply of the roofing tiles. The roofing tiles were to be supplied by the Defendant at the sum of K245,935.37 in the 1st quotation but not in the second. The other difference was that the 1st quotation included the supply and installation of angle ridges at K1,272.51 and the supply and installation of valley gutter at K1,426.91. During cross examination, DW1 gave evidence that according to the 1st quotation, the Defendant was to supply and install angle ridges at K1,272.51, and supply and install valley gutters at

K1,426.91, bringing the total to K2,699.42. DW1 testified that he did not know whether or not PW1 would pay that nominal amount although he re-iterated that the failure to supply and install those two items led to the leakages.

I wish to state here that I find it odd that the Plaintiff would refuse to take advice to install valley gutters at a minimal sum of K1,426.91 and risk damaging his property. In the final submissions dated 26th January, 2023, Counsel for the Plaintiff submitted that:

“The Defendant in advancing this argument relied on a quotation issued to the Plaintiff and appearing at page 22 of the Defendant’s bundle of documents. However, during cross-examination, DW1 failed to show this Court that the said quotation was delivered to the intended recipient as there was no acknowledgment of receipt. The said quotation had an entry addressing the installation of valley gutter and angle ridge at a combined total of K2,699.42 which we contend is an amount that could have been settled by the Plaintiff if only this issue was brought out during the initial assessment.”

7.13 To borrow the thinking of Counsel for the Plaintiff, I do not think that the Plaintiff herein would have failed to pay such a nominal amount on the valley gutters especially if the plaintiff was advised that without the two items, there were

going to be leakages on the roof. DW1 actually conceded, during cross-examination, that he did not know that failure to enlarge the gutters would cause problems in the future. This suggests to me that the Defendant's employees themselves, did not think that the replacement of the valley gutters was important issue to consider at that stage, although as professionals, I expect them to have known better. I find that the Plaintiff was not advised to replace valley gutters at the start of the contract as there is no evidence of the same. I opine that had the Plaintiff been advised of the importance of the addition of the valley gutters at inception, the Plaintiff would not have risked having a leaking roof over paying a nominal sum of K2,699.42.

7.14 For the reasons stated, I find that the advice to replace valley gutters came late, after the Defendant had completed its works and the roof started leaking.

7.15 The learned authors of Hudson's Building and Engineering Contracts, 11th Edition at page 526-527 paragraph 4.077-4.078 had this to say:

“In one of the earliest cases relating to the design obligations of the contractor in a contract for work and materials, and one still frequently cited at the present day, it has been said: “Where a person is employed in a work of skill the employer buys both his labour and his judgment; he ought not to undertake the work if it cannot succeed and she should know whether it will or not; of course it is otherwise if the party employing him chooses to supersede the workman’s judgment by his own.” The following Australian dictum similarly states the principle: “Unlike a warranty of good workmanship, a warranty that the work will answer the purpose for which it is intended is not implied in every contract for work. The essential element for the implication of such a term is that the employer should be relying, to the knowledge of the contractor, upon the contractor’s skill and judgment and not upon his own or those of his agents.”

It follows that, for any such term to be implied in a building or engineering contract, the owner must be relying, to the actual or presumed knowledge of the contractor, upon the latter’s skill and judgment and not upon his own or those of his agent.”

I have already stated that I have not found any evidence where the Defendant advised the Plaintiff to change the valley gutters before the works were commenced. I therefore hold the view that the Plaintiff herein relied on the Defendants skill and judgment when it engaged it (the Defendant) to work on its roof especially that the Defendant refers to itself as well equipped to provide effective and professional property consultancy service. Since the Defendants are professionals, it is expected that they should have known, at

inception, that the refusal to install valley gutters would cause leakages. They should not have therefore, gone ahead to work on the Plaintiff's roof, as rightly pleaded by the Plaintiff in paragraph 19 of the statement of claim. As stated by the learned authors of Hudson's Building and Engineering Contracts above, where a person is employed in a work of skill, the employer buys both his labour and his judgment; he ought not to undertake the work if it cannot succeed and he or she should know whether it will or not. The record shows that DW1, during cross-examination, gave evidence that the Defendant commenced works despite the Plaintiff's Director rejecting works to be done on the gutters. The Defendant cannot now be seen to deny liability when it went ahead to work on the roofing tiles when it should have known the results of proceeding with the works without replacing the valley gutters. The learned authors of **Clerk and Lindsell on Torts, 22nd Edition, Sweet and Maxwell, 201**, at page 439, paragraph 8-17 stated as follows:

“The criterion of reasonable foreseeability focuses on the knowledge that someone in the defendant's position would be expected to possess. The greater the awareness of the potential for harm, the more likely it is that this criterion will be satisfied. If the risk of harm is far-fetched, a duty will not arise.”

7.16 The evidence also shows that the Defendant attempted to repair the defects but the said repairs did not work overtime as shown by the whatsapp messages produced as evidence. For example, the message from the Defendant's Director on 07/12/2020 at 11:42 at page 10 of the Defendant's bundle of documents, shows the Defendant's Director stating that the valley gutter was ok and that water was entering from the interface between the old and new Harvey tiles as the old ones had some cracks. However, despite this, when it rained the following day, the Plaintiff's roof still leaked. This suggests to me that the Defendant was playing guesswork in trying to repair the defects on the Plaintiffs roof.

7.17 Further, in its written submissions dated 9th February, 2023, Counsel for the Defendant contended that the Plaintiff has not provided any evidence to show that the Defendant was negligent in the manner in which it installed 400 roofing tiles that it was contracted to undertake. I am, however, of the considered view that the roof started leaking two months after the Defendant completed its works. Whether or not the roof used to leak before the Defendant was contracted, is

irrelevant as it was expected that after the Defendant worked on it, there would be no leakages at all. The leakages and failure to remedy the defects are enough proof that the installation of the roofing tiles was not properly, skilfully or competently done. I find that the leakages and failure to repair the defects after many attempts, as shown earlier in my judgment, shows that the Defendant did not exercise care and skill when replacing the roofing tiles.

7.18 Counsel for the Defendant, in the written submissions, further submitted that the Plaintiff is not entitled to recover the sum of K77,406.28 from the Defendant as the Defendant did perform the obligation for which it was engaged, namely; replacing the 400 roofing tiles. I am of the considered view that even though the Defendant replaced the roofing tiles, I find that it did not exercise care and skill in replacing the said roofing tiles resulting in more damage to the Plaintiff's property.

7.19 In light of all the evidence highlighted above, I am of the considered view that the Plaintiff herein has demonstrated that the Defendant failed to exercise care and skill and also

exhibited poor workmanship in the replacement of the Plaintiff's roof as was evidenced by the continued leakages despite several attempts to rectify the defects. I am, therefore, satisfied that the Plaintiff herein has, on a balance of probability, proved its case.

7.20 The Plaintiff was however, duty bound to mitigate its loss. It is trite that the duty to mitigate loss exists whether liability arises in contract or tort. The Supreme Court in the case of **Tryson Mtonga v Warren Ng'ambi SCZ Selected Judgment No.8 of 2016²** cited the learned authors of McGregor on Damages, 14th Edition at paragraph 209 as follows:

“The first and most important rule is that the plaintiff must take all reasonable steps to mitigate the loss to him consequent upon the defendant's wrong doing and cannot recover damages for any such loss which he could have avoided but failed, through unreasonable action or inaction, to avoid, put shortly, the plaintiff cannot recover for avoidable loss.”

7.21 In the case in casu, the record shows that during cross-examination, PW1 testified that he did not accept the Defendant's advice to enlarge the downpipes. DW2, also testified that PW1 asked him to remove the membrane and silicon sealants that were placed on the roof on grounds that

it was a temporary solution to the problem. This evidence was not rebutted by PW1. In fact, in the letter dated 26th April, 2021, to the Plaintiff's advocates, at page 20 of the Defendant's bundle of documents, the Defendant stated:

“We have not refused to carry out repair works but these were short term temporary interventions during the peak of the recently ended rainy season....”

7.22 Although I have found that the Defendant herein did not exhibit care and skill in the renovation of the Plaintiff's roof, I also find that the Plaintiff in this case did not mitigate its losses as I am of the considered view that the temporary solutions would have reduced the damage to the property during those heavy rains. It is for that reason that I award the Plaintiff general damages. I also order the Defendant to pay the Plaintiff a sum of K38,703.14, which is half of the claimed K77,406.28 for failure to mitigate its loss.

7.23 In relation to special damages, it is trite that there is need for satisfactory proof to be provided before special damages can be awarded by the court. I am fortified by the case of **Andrew Tony Mutale v Crushed Stone Sales Limited (1994) S.J 98 (S.C)**³. In this case, although the Plaintiff has pleaded special

damages, PW1 conceded that he had no evidence quantifying the special damages claimed. In addition, even the images produced in the bundles of document are not clear to see the damage claimed. It is for that reason that this claim fails.

7.24 I award costs to the plaintiff to be taxed in default of agreement. In the circumstances, I refer the matter to the Honourable Deputy Registrar for assessment.

7.25 Leave to appeal is granted.

Dated at Lusaka this.....29th.....day of.....October.....,.....2025



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ELITA P. MWIKISA
HIGH COURT JUDGE