IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D 2021

CORAM: BAFFOE-BONNIE JSC (PRESIDING)
AMEGATCHER JSC
OWUSU (MS.) JSC
LOVELACE-JOHNSON (MS.) JSC
KULENDI JSC

CIVIL APPEAL
NO. J4/38/2020

10TH NOVEMBER, 2021

CHARLES A. NYARKO ..... PLAINTIFF/RESPONDENT/RESPONDENT

VRS

BARCLAYS BANK GHANA LTD. ..... DEFENDANT/APPELLANT/APPELLANT

JUDGMENT

KULENDI JSC:-

INTRODUCTION:

This is an appeal against the judgment of the Court of Appeal dated 25th July, 2019 with reasons delivered on 24thOctober, 2019. In the said judgment, the learned Justices of the Court of Appeal affirmed the judgment of the High Court in favour of the Plaintiff/Respondent/Respondent (hereinafter referred to as "the Respondent") dated 28th February, 2017 but varied the quantum of damages awarded by the trial judge.

The Appellant invokes the appellate jurisdiction of this Court pursuant to an amended Notice of Appeal filed on 18th November, 2020 pursuant to leave granted by this Court on 12th November, 2020.

FACTS OF THE CASE:

By a Writ of Summons and Statement of Claim dated 10th November 2014, the Respondent, trading under the name and style of Diplomatic Wear Designs, commenced an action at the High Court (Commercial Division) Accra and sought the following reliefs against the Appellant;

i. Recovery of the sum of Thirty-Five Thousand United States Dollars ($35,000.00) representing the dollar component of special damages suffered as a result of Defendant's breach of its contract with Plaintiff herein for the supply of office wear for Defendant's staff in the year 2011 and which amount Defendant has failed and/ or refused to pay to Plaintiff in spite of several and repeated demands made there for.
ii. Recovery of the sum of Seventy-Three Thousand, Six Hundred Cedis (GH¢ 73,600.00) representing the Cedi component of special damages suffered as a result of Defendant's breach of its contract with Plaintiff for the supply of office wear for Defendant's staff in the year 2011 and which amount Defendant has failed and/or refused to pay to Plaintiff in spite of several and repeated demands made there for.
iii. Interest on relief (i) at the prevailing dollar rate from the 1st day of October 2011 to date of final payment.
iv. Interest on relief (ii) at the prevailing dollar rate from the 1st day of October 2011 to date of final payment.
v. General Damages for breach of contract
vi. Costs.

The allegations upon which the Respondent grounded the above reliefs are as follows:

The Appellant Bank, in 2011, contracted the Respondent through Appellant's Procurement and Human Resources Office to supply corporate wear for Appellant's employees. The Respondent took measurements of 786 employees of the Appellant and the said employees were to get their individual corporate wear between March 2011 and August 2011. Email correspondence between the Appellant and Respondent confirmed the measurement for the cooperate wear and Respondent thereafter submitted his invoice to the Appellant. For the sole purpose of executing the contract, the Respondent placed an order for fabric from China and made a deposit payment ofThirty-Five Thousand United States Dollars (US$ 35,000.00) towards the purchase of thefabrics with the hope of paying off the outstanding balance when he received advance payment from the Appellant. After the Respondent had performed about thirty percent (30%) of the contract, he was told that the contract had been re-assigned. The Respondent says the breach of the contract by the Appellant resulted in his inability to pay the outstanding balance on the fabric ordered and therefore he had to forfeit the fabrics. The Respondent also could not pay off his contracted workers and the said workers seized 4 of his machines in settlement. The Respondent contended that while the Appellant picked and paid up few of the items already sewn, the greater portion of the items remained abandoned causing the Respondent to suffer special damages to the tune of US$ 35,000.00 and GH¢73,600. Respondent contended that the Appellant had failed to pay for the losses he incurred.

The Appellant filed a Defence to Respondent's Writ and Statement of Claim on the 3rd of December 2014. In its Defence, the Appellant denied contracting the Respondent for the supply of office wear save that it made measurements of some of its employees available to the Respondent.

The Appellant further claimed that it had no contract with the Respondent because its established contracting procedure requires the execution of a formal written contract setting out the terms and conditions.

It further claimed that email correspondence confirming and approving final measurements for uniforms and the submission of an invoice by the Respondent to the

Appellant could not have constituted a valid contract between them. The Appellant therefore denied the Respondent's claim for special damages and put the Respondent to strict proof.

On the 22nd day of January 2015 the Respondent filed a Reply to the Defence of the Appellant essentially denying all the allegations stated in the Appellant's Statement of Defence.The Respondent averred that there had been previous occasions where purchase orders were raised and/or invoices issued and paid for only upon execution of the contracts and delivery of the goods to the Appellant.

The High Court, after trial, delivered its said judgment of 28th February 2017 stating that it was granting the Respondent all the reliefs sought in his Writ of Summons and Statement of Claim. The said judgment of the High Court can be found at pages 236 to 269 of the Record of Appeal. The High Court held that the Respondent had been able to prove his claim of breach of contract against the Appellant and accordingly awarded the Respondent the amount of Thirty-Five Thousand United States Dollars ($ 35,000.00) and Seventy Three Thousand Six Hundred Cedis (GH¢73,600) less cost of the loss of sewing machinesas special damages and further award of cost of Ten Thousand Cedis (GH¢ 10,000).

Aggrieved by the judgment of the High Court, the Appellantappealed to the Court of Appeal. On 25th July 2019, the Court of Appeal delivered its brief decision but reserved the detailed reasoning to be delivered on 24th October 2019.

The Court of Appeal, in delivering its reasons on 24th October 2019, held in part as follows:

> "*Courts award damages to injured parties to place them in the place [they would have been] had the breach not occurred or if the contract had been performed……. In this contract the Plaintiff was to pre-finance the cost of sewing corporate wear for the Defendant Staff. The Plaintiff in his witness Statement claimed for special damages the sum of GH¢ 73,600 being his losses……. the unit price of the damaged clothing amounts to GH¢ 15,000. For the 200 damaged*

clothes sold at half the price of GH¢ 30,000.This Court will therefore interfere with the compilation of the Trial Judge, set aside GH¢ 15,000 and substitute it with GH¢ 30,000. Also the cost of four industrial sewing machines seized by workers must be excluded from the total sum as rejected by the trial Judge. Thus the damages awarded here to the Plaintiff is 43,600 less cost of industrial machines"

Appellant contends that the brief ruling of the Court of Appeal given on 25th July 2019 is at variance with the reasons delivered by the Court on 24th October 2019. The variation, according to the Appellant is that, whereas on the 25thof July, 2019, the Court of Appeal dismissed the Appeal in its entirety, in the detailed judgment delivered on 24th October 2019, the Court of Appeal had allowed the appeal in part.

As much as we would like to interrogate the above plaint, the Record of Appeal does not bear out the above contention of the Appellant. In fact, the proceedings of the Court dated 24th July 2019 are not part of the Record of Appeal, which would haveenabled this Court independently to verify this allegation of the Appellant. For this reason, we shall concern ourselves with the judgment of the Court of Appeal which can be found at pages 489 to 503 of the Record of Appeal and which from the processes filed before us, is the subject of this Appeal.

GROUNDS OF APPEAL

The grounds of appeal as contained in the Amended Notice of Appeal filed by the Appellant on 18th November 2019 pursuant to leave granted on 12th November, 2020 are as follows:

a. The judgment is against the weight of evidence;
b. The Court of Appeal erred in affirming the finding of the trial Judge awarding the sum of US$35,000.00 to the Plaintiff/ Respondent as special damages for the "forfeited deposit for undelivered fabric from China", utilizing the general

standard of proof in civil cases instead of the established standard of proof of special damages;

c. The Court of appeal was in breach of the principle of stare decisis when it ignored the binding decisions of the Supreme Court on proof of special damages, in arriving at its decision;
d. The Court of Appeal further erred in affirming the finding of the trial judge awarding the Plaintiff/Respondent GH¢ 73,600;
e. The Court of Appeal totally erred in failing to consider the finding of the trial judge that the Defendant/Appellant had an equal burden to call a witness, who was on the evidence a material witness to the Plaintiff/Respondent's case;
f. The Court of Appeal further erred in its failure to determine the effect of the wrong application of the principle of failure to call a material witness as determined by the trial judge and the trial judge's application of the decision in **Oppong v Anarfi (2011)SCGLR 506**, thereby occasioning a grave miscarriage of justice to the Appellant;
g. The Court of Appeal failed to adequately consider the case of the Appellant.

We shall consider grounds (a) and (g) together since they are essentially the same.

Where, as in ground (a), an Appellant alleges that a judgment of the Court below is against the weight of evidence,this Court is mandated to review the entire record of Appeal and to ascertain whether the Court below has misapplied any piece of evidence or has failed to give due consideration to any piece of evidence on record which failure has occasioned a miscarriage of justice.

His Lordship, Dotse JSC stated the above principle in the case of **Abbey & Others v. Antwi [2010] SCGLR 17 at 34**, as follows:

"It is now trite learning that where the appellant alleges that the judgment is against the weight of evidence, the appellate court is under an obligation to go through the entire record to satisfy itself that a party's case was more probable than not. As was

held by their Lordships in ***Tuakwa v Bosom [2001-2002] SCGLR 61 (****Per Sophia Akuffo JSC****),***

"an appeal is by way of re-hearing, particularly where the Appellant alleges in his notice of appeal that the decision of the trial court is against the weight of the evidence… In such a case, it is incumbent upon an appellate court, in a civil case, to analyse the entire Record of Appeal, take into account the testimonies and all documentary evidence adduced at the trial before arriving at its decision, so as to satisfy itself that on a balance of probabilities, the conclusions of the trial judge are reasonably or amply supported by the evidence".

Similarly, in the case of **Djin v Musah Baako[2007-2008] SCGLR 686** this Courtheld that:

"Where an appellant complains that judgment is against the weight of evidence, then he is implying that there were certain pieces of evidence on the record which if applied in his favour could have changed the decision in his favour, or certain pieces of evidence have been wrongly applied against him. The onus is on such an appellant to clearly and properly demonstrate to the appellate court the lapses in the judgment being appealed against."

Again, in the more recent case of **Atuguba and Associates Vrs Scipion Capital (UK) Ltd and Another[Civil Appeal NO. J4/04/2019**; Judgment delivered on 3rdApril 2019] this Courtper Amegatcher JSC expounded on the omnibus ground in the following terms;

"The omnibus ground has been a hideout ground. The responsibility in even minor appeals is shifted to the appellate judges to comb through the records of appeal, review the evidence and identify the specific areas the trial judge erred before coming out with the court's opinion on the merits or otherwise of the appeal. The situation is worrying where no viva voce evidence is proffered and a judge is called upon to exercise judicial

discretion, such as in applications for injunction, stay of execution, amendment, joinder, judicial review, and consolidation, just to mention a few. In our opinion, though the rules allow the omnibus ground to be formulated as part of the grounds of appeal, it will greatly expedite justice delivery if legal practitioners formulate specific grounds of appeal identifying where the trial judge erred in the exercise of a discretion. A proper ground of appeal should state what should have been considered which was not and what extraneous matters were considered which should not have been. We believe this approach will better serve the ends of justice and lessen the use of the omnibus ground particularly in interlocutory matters and in the exercise of judicial discretion."

We note that this appeal turns on the findings of the trial court and the Court of Appeal which are to a large extent in tandem. In order to sustain its complaints on grounds (a) and (g) the Appellant has a duty to properly demonstrate the lapses complained about in the findings made by the Court of Appeal. These lapses could be apparent wrongful inferences drawn from evidence on record, erroneous applications of principles of law to the facts and evidence on record and findings which are inconsistent with the evidence adduced at the trial.

These principles were expressed in the case of **Agyenim-Boateng Vrs. Ofori &Yeboah(2010) SCGLR 861 at page 867 where it was held** that :

> *"…The appellate Court can only interfere with the findings of the trial Court where the trial court : (a) has taken into account matters which were irrelevant in law; (b) has excluded matters which were critically necessary for consideration; (c) has come to a conclusion which no court properly instructing itself would have reached ; and (d) the court's findings were not proper inferences drawn from the facts…However, just as the trial court is competent to make inferences from its specific findings of fact and arrive at its conclusion, the appellate court is also entitled to draw inferences from findings of fact by the trial court and to come to its own conclusions".*

In any event, it must be noted that to warrant an interference with the findings of a trial court, the misapprehensions of the evidence, wrongful applications of the law to the evidence on record and the arrival at findings which are unsupported by the evidence on record must be substantial and not trivial. The totality of the court's errors, lapses and misapprehensions complained of must occasion a grave injustice or a grave miscarriage of justice. In such a situation, the justice of the case would justify appellate interference to avert an unjust result.

Where the findings of a trial court complained against are affirmed by afirstappellate court, this Court is generally reluctant to interfere with the concurrent findingssavein very exceptional circumstances.

The instances where this court may justifiably interfere with concurrent findings of the Court of Appeal and the High Court were set out in the case of **Koglex Ltd v. Field (no 2) [2000] SCGLR 175**,as follows: -

i. Where the findings of the trial court are clearly unsupported by evidence on record or the reasons in support of the findings are unsatisfactory.
ii. Where there has been improper application of a principle of evidence or where the trial court has failed to draw an irresistible conclusion from the evidence.
iii. Where the findings are based on wrong propositions of law and, if that proposition is corrected, the finding disappears and
iv. Where the finding is inconsistent with crucial documentary evidence on record.

In the instant case, the Appellant contends that the Court of Appeal failed to properly evaluate its case. The contention of the Appellant was that there was no valid contract between the Appellant and the Respondent. On the issue of whether or not there was a valid contract between the parties, both the trial High Court and the Court of Appeal found in the affirmative. Is the finding by the trial court and the Court of Appeal supported by the evidence on record? We think so.

In the witness statement of the Respondent, he testified that the Appellant had previously been contracting him to sew corporate wear for its staff across the country since 2007. By the established manner of dealingor trade custom between the Appellant and Respondent, Appellant sometimes commissioned him to work without a purchase order or written contract but upon the provision of the measurements of employees. On some occasions purchase orders were raised and/or invoices issued and paid for only after execution of the contracts and delivery of the goods to the Appellant.

According to the Respondent, sometime in 2011, theAppellant's Procurement and Human Resource Department provided the Respondent with measurements of Seven Hundred and Eighty-Six (786) of its employees and Respondent was to sew their individual corporate wear. Prior to the Appellant furnishing the Respondent with the measurements, the parties met and agreed on the price for the uniforms. The Appellant confirmed and approved the final measurements for the said uniforms based on which the Respondent promptly furnished the Appellant with the invoice amount of Four Hundred and Seven Thousand, Four Hundred Cedis (GH¢ 407,400.00). The Respondent was asked to commence work in earnest. The Respondent then placed an order for the production of materials from China and paid a deposit of Thirty-Five Thousand Dollars ($35,000.00) on the materialsto aid him deliver on the contract. The evidence of payment of the deposit was in evidence as Exhibit F1 and same can be found at page 120 of the Record of Appeal. When the Appellant purported to cancel the contract, the Respondent wrote to the Appellant to appeal to it to maintain the contract and the letter was tendered in evidence as Exhibit F. Exhibit F can be found at page 119 of the Record of Appeal. Exhibit F reads as follows:

> "The Head of Procurement
>
> Barclays Bank Ghana Ltd.
>
> Accra
>
> 10th October, 2011

Dear Sir,

APPROVAL FOR MAINTAINING CONTRACT-CORPORATE 2011.

We wish to appeal for your outfit not to take away from us the job concerning Corporate Wear-2011.

Since the go-ahead for the job was communicated to us in August, 2011, we have already finished sewing 30% of the job in Ghana here and have additionally paid US$ 35,000.00 to our Asian manufacturers to supply us fabrics.

Sir, if the job is taken away from us, we will lose the US$ 35,000.00 and our business will be heading for collapse. We are therefore kindly appealing to you to consider us continue the job.

Thank you for your support.

Please find attached receipt from our Asian manufacturers covering the US$ 35,000.00 we have already paid.

Yours faithfully

…"

It is instructive to note that the Appellant did not dispute ever receiving Exhibit F from the Respondent. In fact, another letterthat the Appellant did not dispute receiving was Exhibit G and G1 which can be found at pages 121 and 122 of the Record of Appeal. Exhibit G was a reminder letter dated 7th December, 2011 in which the Respondent appealed to the Appellant to pay for the stock of 30% he had produced to enable him fund the balance payable on the materials ordered from China lest Respondent loses the deposit of US$ 35,000.00 already paid to the Chinese manufacturers.

Although the Appellant did receive the letters, nowhere is it contended that the content of the letters tended as Exhibit G and F were ever denied. The Appellant did not tender

any evidence by way of written responses to the letters disputing the existence of a contract as alleged in those letters of the Respondent.

The Appellant contends that the Respondent failed to establish at trial that it indeed submitted an invoice of Four Hundred and Seven Thousand, Four Hundred Cedis (GH¢ 407,400.00) to the Appellant after the parties had concluded negotiations and the Respondent was asked to start work. It is apparent from the Record of Appeal that the Appellant itself confirmed the receipt of an invoice from the Respondent in respect of the uniforms. At page 187 of the Record of Appeal, the Head of Shared Services of the Appellant, testified on behalf of the Appellant as follows:

> "*Q: I am putting it to you that at those meetings, the pricing and negotiation were based on the cost of a set of uniform for a staff member and not on measurement taken, I am putting it to you.*
>
> *A: My Lord I am unable to confirm that, however it is possible for the Plaintiff to know the cost of a uniform for the staff since he had been with the Bank since 2007 and the said service was a routine activity he performed before previously for the Bank. Again, we provided the Plaintiff with the sizes of the staff,* ***the basis upon which he provided the Proforma Invoice to the Defendant."***

From the above, it is apparent that the Appellant itself acknowledges receipt of a proforma invoice from the Respondent. The non-tendering of the said invoice by the Respondent in evidence is not fatal in proving whether or not such an invoice was ever served on the Appellant.

The Appellant sought to suggest that because it did not issue out purchase orders for the uniforms as it had done previously, there was no valid contract. This cannot be wholly accurate; a contract need not be in written form to be enforceable. Additionally, Exhibit 4, which was tendered by the Appellant as a sample Purchase Order previously issued to the Respondent shows that, the Purchase Orders of the Appellant were, in some instances issued only to put in writing what the verbal or prior agreement of the parties herein was.In Exhibit 4, one can see that the terms of delivery as indicated on

the Purchase Order is indicated to be ***"As Agreed***" between the parties. The specifics or details of the delivery is not indicated on the Purchase Order.

The absence of a purchase order alone, is not adequate proof of the absence of an enforceable agreement between the parties.

We wish to reiterate that a party, in a civil suit, need not prove his case with mathematical distinction. To otherwise require a party, in a civil suit, to prove his case with absolute certainty to the maximum extent plausible is to amend the statutory burden placed on such a party by the Evidence Act, 1973 (NRCD 323). We dare say that any such suggestion is an invitation to disregard statutes, re-legislate what Parliament in their sacrosanct wisdom, has set as standard of proof in civil cases.

The Appellant fails to appreciate that in coming to a conclusion on whether or not an enforceable agreement exists between the parties, the Courts were to answer only one question: whether or not on the basis of the available evidence and having regard to the respective circumstances of the parties, the case of the Respondent was more probable than not. This is what is commonly and statutorily referred to as proof on the balance of probability. There is enough evidence on record, both documentary and oral, to support the concurrent finding reached by the trial court and the Court of Appeal, that there was a valid enforceable agreement between the parties.

In view of the foregoing, we hold that the Appellant has not adduced any cogent submissions to warrant a variation of the concurrent findings of the trial High Court and theCourt of Appeal on the existence of a valid contract or agreement between the parties. The evidence on record, coupled with the relative levels of sophistication of a tailor and a Multinational Bank supports the conclusions reached by the trial High Court and affirmed by the Court of Appeal. This ground of appeal therefore fails and we affirm the findings of the Court of Appeal.

GROUND (B) AND (C)

In similar fashion, we will resolve grounds(b) and (c) together as they both relate to the question of special damages, the applicable standard of proof and whether or not the Court of Appeal followed precedent on special damages.

The grounds (b) and (c) of appeal involve an examination of the standard of proof for special damages and to ascertain whether or not the Respondent proved the claim for special damages to the requisite degree to justify the award of US$35,000.00 made in his favour.

It is trite law that he who alleges bears the burden of proof in relation to the allegation made. This principle is no different when claiming for special damages. The law requires that special damages be specifically pleaded and once pleaded, same must be strictly proved. This court has held in the case of **Peter Ankomah V City Investment Company Limited Civil Appeal J4/13/2011 30th May 2012)** on special damages as follows:

> "The traditional view which is supported by a litany of authorities is that, ***if the plaintiff expects the court to award him the amounts specially pleaded in the statement of claim, then he ought to strictly prove the amounts so claimed.***
>
> ***This is so because the plaintiff specifically mentioned the amounts of loss per day. One would therefore expect that, those claims would be strictly proved by not only mounting the witness box to repeat the figures but by the production of documentary evidence as proof of payment of those amounts.*** *We believe that there should have been some element of seriousness on the part of the plaintiff to convince the court about the genuineness of the claims he had brought to court.* ***In the absence of proper proof, the trial court was right in doubting the amounts quoted and using his discretion to award the amounts."***

In the case of **Eastern Alloys v. Chirano Gold Mines[2017-2018]SCGLR308,** his LordshipGbadegbe JSC**,**(as he then was), emphasized the necessity to strictly prove special damages. His Lordship held as follows:

> *"The requirement to prove special damages strictly has been emphasised in a collection of cases by our courts and we refer to the statements made by Dr Twum JSC (as he then was) in the course of the judgment in the case of Delmas Agency Ghana Ltd v Food Distributors International Ltd [2007-2008] SCGLR 748 at 760 as follows:*
>
> *"… Where the plaintiff has a properly quantifiable loss, he must plead specifically his loss and prove it strictly. If he does not, he is not entitled to anything unless general damages are also appropriate."*

Again, in the case of **BISI V. TABIRI ALIAS ASARE [1987-88] 1 GLR 360** it was held that:

> *"The standard of proof required of a plaintiff in civil action was to lead such evidence as would tilt in his favour the balance of probabilities on the particular issue. The demand for strict proof of pleadings had however never been taken to call for an inflexible proof either beyond reasonable doubt or with mathematical exactitude or with such precision as would fit a jig-saw puzzle."*

In this instant appeal, the parties have put forward different interpretationson the requirement of strict proof in special damages. Whereas the Appellant postulates that strict proof for special damages requires a higher degree of proof than prevails in ordinary civil suits, the Respondent contends otherwise.

To make its point, the Appellant has urged on this Court in its submissions as follows:

> *"Without meaning any disrespect, we are of the humble view that the standard of proof deployed by the Court of Appeal as establishing the basis of proof of the special damages claimed by the Respondent herein was flawed. It was*

flawed because, in our submission, the court completely disregarded the yardstick set and laid down for the proof of special damages by the supreme court in its decisions illustrated by cases such as Delmas Agency v. Food Distributors International LIMITED[2007-2008] SCGLR 748 AND EASTERN ALLOYS CO. LIMITED vrs. CHIRANO GOLD MINES [2017-2018]SCGLR 308
In our submissions, it was clear from those binding decisions cited above that proof of special damages goes beyond the usual civil law burden of proof in that it must be proved strictly and furthermore that it cannot be presumed."

We have had recourse to the two decisions of this Court cited by the Appellant as well as the plethora of judicial decisions which propound that special damages must be strictly proved. We do not think that the authorities propose or articulate a burden of proof higher than that imposed by statute and case law in civil cases. We wish to clarify that strict proof does not mean that a plaintiff who claims special damages must meet a higher legal burden of proof than proof on the preponderance of probabilities. Strict proof as used in relation to special damages requires that the damages must be specifically pleaded with specificity and proved at trial. Strict proof means more than mere guess or repetition under oath of the specifically pleaded facts. This implies proof by clear, cogent and convincing evidence. The Plaintiff must prove the damage as well as the value or amount pleaded to warrant the award of special damages. This would require proof to a reasonable degree of certainty as distinct from prooftoabsolute certainty. It is wrong for a Court to require special damages to be proven beyond reasonable doubt.

For the avoidance of doubt, it is our considered opinion that the standard of proof applicable under Ghanaian law is as provided in the Evidence Act, 1975 (NRCD323). Specifically, the standard of proof in civil cases has been set out in section 10 as follows:

"10(1) for the purposes of this decree

(1) For the purposes of this Act, the burden of persuasion means the obligation of a party to establish a requisite degree of belief concerning a fact in the mind of the tribunal of fact or the Court.

(2) The burden of persuasion may require a party
(a) to raise a reasonable doubt concerning the existence or non-existence of a fact, or
(b) to establish the existence or non-existence of a fact by a preponderance of the probabilities or by proof beyond a reasonable doubt.

Further, the standard of proof in civil cases such as the present action has been emphasized in **section 12 of the Evidence Act** which provides that:

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

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

According to Brobbey JSC (as he then was) in his book, **Essentials of the Ghana Law of Evidence**, Datro Publications, 2014 at page 41, paragraph 5 thereof,

"... 'preponderance of probabilities' which is used synonymously with balance of 'balance of probabilities' is the standard of proof required in all civil cases and very rarely in some criminal trials (...) in connection with proof of certain crimes raising issues of diminished responsibilities. The two expressions simply means that the existence of the fact is more likely than its non-existence. It is referred to in some text books as the 'more likely than not' test. Sometimes it is rendered thus: the facts is more likely to be true than being untrue"

The only exception to the rule that a civil case must be proved by the balance of probability is contained in **section 13(1) of NRCD 323** which provides as follows:

> *"13 (1) In a civil or criminal action, the burden of persuasion as to the commission by a party of a crime which is directly in issue requires proof beyond a reasonable doubt."*

This exception relates to situation where it is alleged in a civil case that a crime has been committed. That allegation should be proved to the same standard or degree as the burden of proof on the prosecution in ordinary criminal cases. It is therefore not the law, and indeed, a fallacy by the Appellant to contend that: *it was clear from those binding decisions cited above that proof of special damages goes beyond the usual civil law burden of proof in that it must be proved strictly and furthermore that it cannot be presumed."*

It cannot be overemphasized that both under the Evidence Act as well as in decisions of our Courts, there is only one standard of proof in all civil cases and it is proof on a preponderance of probabilities which is also variouslytermed as proof on the balance of probabilities or the more likely than not test. Consequently, special damages in issue in the context of civil proceedings ought to be proved this standard and no more. Indeed, strict proof of special damages does not mean prove by a standard other than proof on the preponderance of probabilities.

Courts in other jurisdictions have had the chance to consider whether or not special damages must be proved beyond reasonable doubt. The consensus of judicial decisions in other Common Law countries with similar statutory provisions as Ghana on the burden of proof are agreeable that strict proof of special damages does not mean proof beyond reasonable doubt. The Supreme Court of Appeal in Malawi, in considering whether or not proof of special damages must be beyond reasonable doubt, had this to

say in the case of **KNIGHT FRANK V BLANTYRE SYNOD AND ANOTHER ((MSC CIVIL APPEAL NO.38 OF 2000) [2001] MWSC 3 (23 AUGUST 2001):**

> *"The point is that special damages are damages that have already crystallized before a case come to court, and the plaintiff must therefore be able to prove such damages strictly. This poses the question of what is meant by saying that special damages must be "proved strictly". **Does it mean that special damages must be "proved beyond reasonable doubt"? We would answer this question in the negative. The standard of proof in civil cases is on a balance of probability and not beyond a reasonable doubt as is the standard generally in criminal cases. Rather, what it means is that special damages cannot be presumed as is the case with general damages.** The plaintiff who claims special damages must therefore adduce evidence or facts which give satisfactory proof of the actual loss he alleges in his pleadings to have suffered."*

See also the Nigerian cases of:**BENJAMIN OBASUYI. V. BUSINESS VENTURES LTD, SC.104/1994. 5 NWLR, Ibrahim & Ors v. Obaje; Momodu v. University of Benin (1997) 7 NWLR (Pt. 512) 325, Orient Bank (Nig.) Plc. V. Bilante Int. ltd. (1997) 8 NWLR (pt. 515) 37,]**

It must also be noted that a claimant who proves the damage occasioned him consequent upon breach, but is nonetheless unable to prove with reasonable certainty, the quantum of damages suffered, will be entitled to an award of general damages.

In Sweet & Maxwell on Damages, 18TH Edition at page 325, Chapter 8, the learned authors opined as follows:

> *"a claimant claiming damages must prove his case. To justify an award of substantial damages, he must satisfy the court both as to the fact of damage and as to its amount. If he satisfies the court on neither, his action will fail or at the most he will be awarded nominal damages where a right has been infringed. If*

the fact of damage is shown but no evidence is given as to its amount so that it is virtually impossible to assess damages, this will generally permit only an award of nominal damages; the situation is illustrated by the old cases of Dixon vrs. Deveridge and Tuyman VRS. Knowles.

On the other hand, ***where it is clear that some substantial loss has been incurred, the fact that an assessment is difficult because of the nature of the damage is no reason for awarding no damages or merely nominal damages. ...the fact that damages cannot be assessed with certainty does not relieve the wrong doer of the necessity of paying damages.*** *...where precise evidence is obtainable, the court naturally expects it; but where it is not, the court must do the best it can. Generally therefore, although it remains true to say that "difficulty of proof does not dispense with the necessity of proof" the standard demanded can seldom be that of certainty. Even if it is said that the damage must be proved with reasonable certainty, the word "reasonable" is really the controlling one and the standard of proof only demands evidence from which the existence of damage can be reasonably inferred and which provides adequate data."*

In this appeal, Appellant contends that the Exhibits F, G and G1 are not conclusive proof of the fact that Respondent indeed lost the deposit that he advanced for the fabrics. Appellant contends that the said exhibits only showthat the Respondent "may" lose the deposit made. The said exhibits do not themselves show that the Respondent did lose the deposit of US$ 35,000.00. Appellant therefore contends that the Respondent was not able to proof the special damages of US$ 35,000.00. The Appellant says that both the High Court and the Court of Appeal filled in the gap in the evidence led by the Respondent by imagining that the Chinese manufacturers actually did take the deposit and therefore the Respondent had no refund. For this proposition, counsel for the Appellant cites a plethora of authorities on the burden of proof and the requirement on parties who claim special damages to prove the actual loss. Appellant also says that both the High Court and Court of Appeal erred in their application of the

rules of balance of probability as the evidential burden on the Respondent in proving the special damages.

The Respondent says that in the circumstances of this case, it should not take a writing from the manufacturers to establish the fact that Plaintiff lost his deposit, not having received the goods or any part thereof. The Respondent argues that the circumstances of this case only lead to one conclusion, the loss of his deposit. The Respondent relies on circumstantial evidence to prove that he indeed lost the amount of US$ 35,000.00. He says an inference can be made from the facts, circumstances and evidence adduced at trial to demonstrate that Respondent did lose the US$ 35,000.00 deposit. The Respondent says that such inference from circumstantial cases is permitted even in criminal cases where the burden of proof is 'proof beyond reasonable doubt.

In the circumstances of this case, and considering the respective contentions of the parties, can it be said that the Respondent to this appeal introduced clear, cogent and sufficient evidence to substantiate the claim of special damages with reasonable certainty that satisfactorily proves the actual loss of the US$ 35,000.00 ? We think not. The evidence on record shows that indeed the Respondent did in fact advance the amount of US$ 35,000.00 as advance payment for fabrics consequent upon the greenlight the Respondent received from the Appellant to commence the production.Exhibit F, and G and G1 which were tendered in and unchallenged offer enough proof of the fact that the Respondent did advance the said US $ 35,000.00 as deposit payment for fabrics. Exhibit F is a letter dated 10th October, 2011 written by the Respondent to the Appellant. Exhibit F has the receipt of payment given the Respondent for the payment of the amount of US$ 35,000.00 attached to it. Exhibit G is also a letter from the Respondent to the Appellant dated 7th December, 2011. In Exhibit G, the Respondent was appealing to the Appellant and said that the Asian Manufacturers had written to the Respondent and given the Respondent two months ultimatum to pay the outstanding amount on the fabrics or lose the deposit already

advanced. Exhibit G1 is the letter from the Chinese manufacturers to whom the Respondent had made the advanced payment of US$ 35,000.00.

Proof of payment of deposit, however, is not satisfactory that the US$ 35,000.00 was actually lost by the Respondent. The Respondent may or may not have lost same. In particular, the ultimatum letter, Exhibit G1, written by the Suppliers to the Respondent that if the Respondent was unable to pay up the balance on the fabrics the deposit will be forfeited is not satisfactory proof that the balance was not **actually**paid. It is also not proof that the deposit was **actuallyforfeited**. The Respondent ought to have provided a more direct evidence in proof of the actual loss of the deposit and not leave it to the court to presume that the threat of loss of deposit was eventually carried out as was stated in the letter. Unlike general damages, special damages are deemed to have crystalized and cannot therefore be presumed. That is why special damages must be strictly proved albeit on a preponderance of probabilities or balance of probabilities or more likely than not standard. To accept exhibit G and F as sufficient or satisfactory proof of actual loss and for that matter proof of special damages of US $ 35,000.00 will be to substitute the presumption or suspicion of loss as satisfactory proof of an actual loss of the deposit.

Therefore, on the totality of evidence adduced, we are of the considered opinion that the Respondent failed to strictly prove the special damages of US $ 35,000.00.Consequently, the award made in his favour by the Trial High Court and affirmed by the Court of Appeal is hereby set aside.

The next ground that we shall consider is the Appellant's ground (d). Under this ground of appeal, the Appellant contends that the award of special damages of GH¢73,600 is without basis as the Respondent failed to strictly prove the said damages.

The Respondent is opposed to the above contention of the Appellant. Reference is made by the Respondent to Exhibits H,J,K and L to justify the award of the special damages of GH¢ 73,600.

These Exhibits H,J, K and L are pictures of abandoned uniforms.

The special damages of 73,600 comprised of four sewing machines, the cost of the uniforms and other clothing, the breakdown of which is as follows:

"PARTICULARS OF SPEICIAL DAMAGES

…

	UNCLAIMED CLOTHING	UNIT PRICE GH¢	TOTAL
ii.	600 Diamond prints(shirts) (10 damaged)	25	15,000
iii.	600 Diamond shirts(240 damaged)	25	15,000
iv.	800 shea blue shirts for ladies(680 damages)	25	20,000
v.	80 pieces mufflers	10	1,800
vi.	200 pieces suits for men/sold at half price	75	15,000
vii.	80 ladies trousers (damaged)	50	4,000
viii.	Four industrial sewing machines seized by workers	700	2,800
	TOTAL	GH¢ 73,600.	

The Court of Appeal, reviewed the special damages awarded by the trial court from GH¢ 73,600 to GH¢ 40,800

At page 502 and 503 of the record of Appeal, the Court of Appeal held as follows:

"Plaintiff in his witness statement claimed for special damages of GH¢ 73,600 being his losses. Plaintiff tendered what the trial judge termed "pictorial evidence" of the damaged clothing.Defendant agrees that the Plaintiff under the head numbered vi, the

unit price of the damaged clothing amounts to GH¢ 15,000. For the 200 damaged clothes sold at half the price of GH¢ 30,000.

This Court will therefore interfere with the compilation of the trial judge, set aside the GH¢ 15,000 and substitute it with GH¢ 30,000. Additionally, the cost of four industrial machines seized by the workers must be excluded from the total sum as rejected by the trial judge. Thus, the damages awarded here to the plaintiff is GH¢ 43,600 less cost of industrial machines." The cost of machines as indicated in the table above is GH¢2,800. This brings the special damages awarded to GH¢ 40,800.

We are unable to come to terms with how the Court of Appeal arrived at the figure ofGH¢ 40, 800. This is because, the entire cost of items under item number VI is GH¢ 15,000. Therefore, we do not find the justification for substituting the figure of GH¢ 15,000 for GH¢ 30,000 as was done by the Court of Appeal.

We note however that the Respondent could not prove any special damages for the industrial machines. This was duly acknowledged by the trial court in its judgment at page 313 of the Record of Appeal and by the Court of Appeal at page 503 of the Record of Appeal.

With the Appellant having denied the components of each of the items stated in the particulars of special damages, the Respondent had a duty to specifically prove the components therein. However, we find no evidence on record to substantiate the number of dresses sewn, save for the narrative account given by the Respondent. The pictorial evidence, Exhibits H,J,K and L are not helpful in ascertaining the number of the clothes sewn. The pictorial evidence does not meet the threshold of practical or reasonable certainty on the quantum of the alleged loss set out in the particulars of special damages. This is moreso because the damages so alleged are capable of being strictly or specifically proven in other practical ways. For instance, the undelivered stock of clothing could have been tendered in court as physical or real evidence and the

quantities counted at the trial. We are therefore of the view that the Respondent failed to establish the claim for special damages in this regard.

Failing the strict proof of the special damages above, we depart from the High Court and the Court of Appealand find that although the Respondent proved the existence of some damage, by virtue of Exhibits H, J, K and L, this does not meet the threshold of cogent, credible, and sufficient evidence on the quantum of loss.The award of special damages of GH¢ 73,600 is therefore set aside. The Respondent will however be entitled to general damages which shall be considered in the course of this judgment.

The Appellant's grounds (e) and (f) bother on the same subject matter and we shall therefore consider them together.

We must observe that the said ground (e)in this Appeal is similar to ground (f) in the Court of Appeal (which may be found at page 414 of the Record of Appeal). Also, ground (f) in this appeal is similar to ground (g) in the Court of Appeal (which may be found at page 415 of the Record of Appeal).

Consequently, the simple election of the Appellant in its statement of case to rely on the argument canvassed in the Court of Appeal in support of these grounds leaves us with the burden of sifting through the Record of Appeal to find and march the arguments to these grounds. This is not an appropriate, let alone a recommended, practice given the inconvenience of cross-referrals it imposes on this Court. However, given that an appeal is by way of rehearsing, we have no option than to embrace this rather tedious task in order to achieve substantive justice.

Indeed, it appears on the face of the judgment of the Court of Appeal that the Court of Appeal did not refer to, and/or consider the additional grounds of appeal that were subsequently filed by the Appellant. This seems to be inadvertence than deliberate and even thoughit is a regrettable oversight, the materialconsideration for us is whether or not this omission has occasioned a substantial miscarriage of justice to the Appellant.

In order to put the plaint of the Appellant in context, we wish to reproduce in extenso, the portion of the judgment of the trial HighCourt which provoked the amendment to the grounds of Appeal and the argument relating thereto which may be found at page 253of the Record of Appeal as follows:

> *"That the Plaintiff alleged in his evidence in court that the head of procurement at the defendant bank, Mr. Emmanuel Appiagyei instructed him to orally start work, an assertion the Defendant categorically denied. Again, the burden of proof was for the Plaintiff to call Mr. Emmanuel Appiagyei as it was oral. Mr. Appiagyei had left the Defendant's employment several years ago so it should not have posed a problem from him to give evidence to support the Plaintiff's case if it was indeed the truth.* ***The Court holds a contrary view, in that Defendant as well could have called the said Mr. Appiagyei whom it seems apart from Plaintiff was the other person involved in the transaction. The Defendant witness called was made the head of shared services in July 2016 and did not have personal knowledge of the particular transaction which ended up in court. In Oppong v Anarfi [2011]1 SCGLR 556, the court commented on the failure to call a material witness whose evidence would have benefitted the court immensely.*** *"*

It is important to note that this mention of Mr. Appiagyei, the description of him as a material witness, which of the parties should have called Mr. Appiagyei to testify as such, and the reference to the case **of Oppong vrs. Anarfi [2011] 1 SCGLR 556**is the only occasion that this features in the 34 page judgment of the trial court. From the full text of the context in which Mr. Appiagyei was mentioned as a material witness and the allusion to the case of Oppong vrs. Anarfi, it is obvious that this reference to the concept of a material witness and the import of the said case was an *obiter dictum*. This statement was by the way and did not form part of the *ratio decedendi* that

informed the various findings and conclusions reached by the trial court. The trial judge's appreciation of the partywho bore the burden to call Mr. Appiahgyei as material witness did not in any way form the basis or any part of thereof of the conclusions he reached on the burden of proof and the satisfactory discharge of that burden by the Plaintiff on the preponderance of probabilities. Consequently,the trial Judges misapprehension or otherwise as to which of the parties carried the burden of calling a material witness and his understanding of the ratio in Oppong v. Anarfi (supra) did not occasion the Appellant any miscarriage of justice, let alone, a substantial miscarriage.

Thestatement did not occasion any miscarriage of justice or mistrial to the Appellant. There is abundant evidence on record to substantiate the findings of the court that indeed there was a valid enforceable contract existing between the parties.
That said, even though the Appellant's plaint about the omission of the Court of Appeal to refer to and/or consider these two grounds of appeal one way of the other is valid, it does not for the reasons aforesaid go to the root of the judgment and/or result in any substantive injustice to the Appellant. The omission is therefore not fatal to the judgment and cannot amount to a reason why we will be inclined to disturb the findings and conclusions of the Court of Appeal.

For these reasons, grounds (e) and (f) also fail.

We note that among the reliefs the Respondent was seeking before the High Court was a claim for 'general damages for breach of contract" which is endorsed as relief (v) in the statement of claim. Having found that there was a valid contract between the Appellant and the Respondent and having found that the Appellant breached the said contract, the trial judge was required to at the least make a pronouncement on the claim for damages for breach of contract. We believe the failure of the trial Court to specifically make an award in respect of Respondent's relief (v) was a mere oversight. By their nature, as already pointed out, appeals are by way of rehearing. For the purpose of doing justice, we shall exercise the powers vested in this Court under article

129(4) of the Constitution and section 2(4) of the Courts Act, 1993(Act 459) to correct the inadvertence of the trial Court in failing to make a specific awardin respect of Respondent's relief (v).

Article 129(4) of the Constitution states as follows:

> "For the purposes of hearing and determining a matter within its jurisdiction and the amendment, execution or the enforcement of a judgement or order made on any matter, and for the purposes of any other authority, expressly or by necessary implication given to the Supreme Court by this Constitution or any other law, the Supreme Court shall have all the powers, authority and Jurisdiction vested in any court established by this Constitution or any other law"

As has been cited above in Sweet & Maxwell on Damages, 18TH Edition at page 325, Chapter 8, the learned authors opined that

"...where it is clear that some substantial loss has been incurred, the fact that an assessment is difficult because of the nature of the damage is no reason for awarding no damages or merely nominal damages. ...the fact that damages cannot be assessed with certainty does not relieve the wrong doer of the necessity of paying damages"

We note that in respect of the claim for special damages of GH¢ 73,600 for uniforms sewn and unclaimed, the Respondent successfully proved the damage but failed to prove the quantum of loss. The pictures of unclaimed uniforms which were tendered during the trial as Exhibits H,J,K and L, offers sufficient proof of the damage suffered by the Respondent. The said Exhibits were however not helpful in assisting the court ascertain the quantum of damage and to meet the criteria for the award of special damages.It is trite that in such circumstances, the Court may award general damages in the stead of special damages to compensate for the injury or loss to the Respondent. Also, the evidence on record shows that the Respondent had performed 30% of the

contract before same was terminated by the Appellant. The fact that the Respondent had performed 30% of the contract before the purported termination was not disputed or denied by the Appellant at trial. During the cross-examination of the Respondent, the only query on the 30% part performance of the contract which can be found at page 173 of the Record of Appeal is as below:

"Q: You told this Court that you completed 30% of the alleged contract.
A: My Lord that is true
Q: Does it mean that you already had some of the fabrics in stock
A: Yes my Lord, we always keep buffer for the next contract."

From the above, it is evident that the Respondent suffered unquantifiable damage as a result of the breach of the contract.

Having affirmed the findings of the trial Court and the Court of Appeal that there was a valid contract between the parties and having come to the decision that the Appellant failed and or neglected to uphold the terms of the said contract which had been partly performed by the Respondent, we believe that a case has been made to warrant the award of general damages for breach of contract.

Consequently, we award general damages of One Hundred and Eighty Thousand Ghana Cedis (GH¢180,000) against the Appellant and in favour of the Respondent for breach of contract.

The Appeal therefore succeeds in part. For the avoidance of doubt, the Appellants succeeds as follows:

1. The award of special damages of GH¢ 73, 600 by the High Court which ward was varied by the Court of Appeal is set aside.
2. The award of special damages of US$ 35,000.00 is also set aside.

3. The Respondent is however awarded general damages of GS¢ 180,000.00 for breach of contract and interest on same till date of final payment.

E. Y. KULENDI
(JUSTICE OF THE SUPREME COURT)

P. BAFFOE-BONNIE
(JUSTICE OF THE SUPREME COURT)

N. A. AMEGATCHER
(JUSTICE OF THE SUPREME COURT)

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