IN THE MAGISTRATE COURT OF RIVERS STATE OF NIGERIA

IN THE PORT HARCOURT MAGISTERIAL DIVISION

HOLDEN AT PORT HARCOURT

BEFORE HIS WORSHIP NNEKA E. EZE-OBUZOR

SITTING ON THE 7TH DAY OF MAY 2024

AT THE SMALL CLAIMS COURT 4 PORT HARCOURT

SUIT NO: PMC/SCC/229/2023

BETWEEN

MR GOGO ENEYOK ------ CLAIMANT

AND

ORAZULIKE STEEL COMPANY LIMITED ---------- DEFENDANT

PARTIES: Absent

APPEARANCES: Burabari Sunday Esq. and S.S. Oluwanusan Esq. for the claimant

J.Elumeze Esq. for the defendant

JUDGEMENT

By an amended particulars of claim dated 18/4/2024, the claimant's claim against the defendant are as follows:

1. N5, 000,000.00 being the current price of Hi Tech TMT reinforcement rods not delivered to the claimant by the defendant.

PLEA

From the records of the court, upon the service of the summons on the defendant, on the 24/11/2023, defence counsel entered a plea of not liable for and on behalf the absent defendant and case was adjourned to the 13/12/2023 for hearing.

SUMMARY OF EVIDENCE

The claimant in proof of his case called a lone witness, the claimant himself and tendered eleven exhibits marked Exhibits A-G.

The defendant also called a lone witness and tendered nine exhibits marked Exhibits H to J.

The relevant facts from the case of the claimant as presented by the claimant himself is that he contracted the defendant to supply materials for his building and they acted outside their contract and are still owing him about 4.6 tons of rod outstanding and 7 tolls of binding wire yet to be delivered. The claimant in proof his case tendered the whatsapp correspondence with the defendant marked Exhibit A2, the waybill marked Exhibit A3, correspondence between the defendant and the claimant's counsel marked Exhibits B1 and B2, defendant's quotation and sales invoice marked Exhibit C and D, letter of instruction from claimant to counsel marked Exhibit E, Receipt from defendant to claimant marked Exhibit F, whatsapp correspondence between claimant and defendant marked Exhibit G2.

For their defence, the case of the defendant was presented by Johnson Kaabari, an employee of the defendant appearing as defence witness one (DW1). It was their case that the claimant is a customer that approached their company for steel materials. That a proforma invoice was issued to the claimant, payment was made and thereafter receipt and invoice was issued. DW1 identified Exhibits C, D and F. DW1 also informed the court that they delivered the rod after payment but did not deliver according to the invoice and receipt issued as changes were made to the sizes and make. That there are two makes of rods, the Hitech TMT and Tiger TMT. That the tiger TMT is higher than the Hitech TMT in quality and the changes were made by the claimant and that affected the price and delivery

period but deliveries were eventually made that matched the money that was paid. DW1 told the court that the claimant varied the term and these variations were made via telephone and SMS conversation with the MD Obiora Orazulike. The said whatsapp correspondence was admitted as Exhibit H2, waybill deliveries to the claimant were admitted as Exhibits I (1) to I (5). That after the deliveries, they made some reconciliations and sent same to the claimant who received without objection. Said document was admitted as Exhibit J. DW1 concluded by informing the court that by that analysis, the claimant is still indebted to them to the tune of N55, 300.00. Case was adjourned for cross examination of DW1.

At the end of evidence, on the 17/4/2024 parties adopted their written addresses and case was adjourned for judgement now being read.

In the defendants final address settled by their counsel Jerry Elumeze Esq. a lone issue was raised to wit:

WHETHER THE CLAIMANT HAS PROVED HIS CLAIM

It is the submission of learned counsel that the claimant has failed to prove his claim. That the burden of proof is on the claimant who must prove the claim to succeed. Counsel cited **SECTIONS 131 AND 133 OF THE EVIDENCE ACT 2011 AND FEDERAL MORTGAGE FINANCE LTD V. EKPO (2003) LPELR-5627 (CA).** That the claimant's claim is a shortfall of delivery of the rods he paid for. That if the claimant's claim is that no delivery was made at all it would suffice for the claimant to merely prove that he paid for the rods as he has done but since the claimant's claim is that some rods were delivered and some were not delivered, it behoves on the claimant to prove the rods that were delivered and the rods that were not delivered. That the proforma invoice tendered shows 5 set of rods with varying dimensions and varying prices. Counsel submitted that it is not enough for the claimant to say 4.6 tons of rods were not delivered, he ought to lead evidence of which of the 5 sets of rod was not delivered. That in the absence of such evidence, the claimant has failed to establish his claims since it is open to speculation as to the rods not supplied and courts do not determine dispute based on speculation. Counsel cited the case of **IKENTA BEST (NIG) LTD V. AG RIVERS STATE (2008) LPELR-1476 (SC).** Counsel further opined that by Exhibit H2, the contract in Exhibits D and F was varied by parties and that Exhibits H2 amounts to a novation of the original contract. That Exhibits i1 – i5 tendered by

the DW1 is a further evidence of that novation that 4.5 20mm rods of Tiger TMT rods were delivered while 2.3 tons of Hitech TMT rods were paid for. Counsel further submitted that the claimant having accepted the goods delivered, he is estopped from claiming the original contract when the novation was at his instance and that the claimant has not shown that the price of the rods delivered to him was lower than the price he paid the defendant and that by Exhibit K, the claimant has shown that the price of rods were not static. That the claimant also did not deny receiving Exhibit J where the price of the rods delivered where stated and since he did not dispute it, he must be taken to have accepted it. Counsel in conclusion submitted that the claimant has failed to prove his claims and urged the court to dismiss the suit.

In the claimant's final address settled by his counsel Isah Seidu Esq. three issues were raised for determination to wit:

1. ***Whether having regards to the evidence led in support and documents tendered, the defendant did not breach the contract; the claimant having paid in full for the rods.***
2. ***Whether the claimant is not entitled to the claims as per relief sought Vis a Vis the defendant's failure to deliver the correct specifications in the proforma invoice.***
3. ***Whether the claimant is indebted to the defendant as per Exhibit J***

Claimants counsel in arguing all three issues together submitted that it is not a dispute that parties entered into a contract which is enforceable. That the claimant paid for 33.4 tons of Hitech TMT rods worth N15, 684, 000.00 as shown in Exhibit C, D and F. That the defendant having failed to abide by the terms of that contract in Exhibit C and D has breached the said contract. Counsel also drew the court's attention to Exhibit A2 and Exhibit G2. That the defence counsel has stated that the terms of the contract was varied but during cross examination the claimant informed the court that he was sent an invoice but he did not respond. That assuming but not conceding that parties varied their contract, the prices of both rods in Exhibit J are the same. That the variation did not affect the prices of the rods in quantity and quality. Citing Exhibits C and D counsel opined that the inability of the defendant to deliver the specified rods in due time constitutes a breach of contract as delivery is immediate upon purchase but the defendant took 12 months to deliver the rods to the claimant. Counsel referred the court to

NWAOLISH V NWABUFOH (2011) 8 SCM, 139 (SC). Counsel further urged the court to grant his claim.

RESOLVE

In determination of this suit, I will adopt the lone issue raised by the defendant to wit:

WHETHER THE CLAIMANT HAS PROVED HIS CLAIM?

Before I proceed to the above issue, I will like to point out that the issues as regards the claim for damages and cost of litigation as canvassed by both parties in their written address goes to no issue as per the claimant's amended claim, I have only one relief before me and that is for the sum of N5, 000,000.00 which is the highest monetary jurisdiction of this court.

The case at hand is one of contract. Generally, a contract is a promise or set of promises which the law will enforce. A promise is an undertaking that a certain state of affairs exists, or that something shall happen or not happen in the future. An agreement is a manifestation of mutual assent by two or more persons to one another. An offer, duly accepted, usually constitutes an agreement. It is trite law that the standard of proof in any civil suit is on the balance of probabilities. **SEE SECTION 134 OF THE EVIDENCE ACT 2011**. The proof on balance of probability implies that the case of both parties will be placed on an imaginary scale of justice and the side of the scale which is heavier and tilt down will be on top in the case. The balance of probability also implies the balance of truth. By Exhibit A2, the claimant and MD of the defendant had a mutual agreement for the delivery of steel and payment was made for a specific type of rod in March 2022. On the 31st of July 2022 the claimant confirmed receipt of the rods and asked that the outstanding be delivered. The defendant responded that the estate insisted on Tiger TMT rods and not Hi tech which they have been using for years now and gave him the current price of the said TMT rods to which the claimant responded that he should deliver the TMT Hi tech rod on the agreed sum to be paid out. The defendant also mentioned that anything other than TMT Hi Tech, he will not supply at their initial price. From the exhibits of the CW1 it is clear that there

were variations made to the initial agreed rods to be supplied. This was better enunciated by Exhibit H2 that was tendered by the DW1. The submission by the learned counsel to the claimant that the claimant during cross examination was asked of the variation analysis sent and he said he did not respond to it does not absolve the claimant of the fact that he varied his initial order and agreement with the defendant by asking via his chat for 106 lengths of Y16 to be supplied and it should be TMT Tiger. If the claimant alleges that he was not supplied the amount of rods he paid for, he needs to also proof to this court what and what was supplied and what is outstanding per the variation he made. From the evidence of the claimant and cross examination, it is clear the claimant did not exhibit all the goods he received from the defendant for this court to determine what is outstanding. The law is simple that he who asserts must prove. When a person is bound to prove the existence of facts, it is said that the burden of proof lies on that person. **SEE SECTIONS 131 AND 132 OF THE EVIDENCE ACT 2011.** .It is the submission of learned counsel to the claimant that the inability of the defendant to supply the goods when it was supposed to be supplied constitutes a breach of contract. Unfortunately that is not a claim before me and the small claims only deals with liquidated money demand.

From the plethora of exhibits before me, the court is being pushed into speculating the price of these goods, the rods delivered and the outstanding per what was delivered and the variation by the claimant. As we all know the court cannot work with speculations. The claimant has not been able to make out a clear case for this court to determine.

It is trite law that the claimant will on succeed on the strength of his case and not the weakness of the defence. Flowing from the above, it is my submission that the claimant has not been able to discharge the burden placed on him and in the interest of justice, this suit is struck out.