IN THE SEYCHELLES COURT OF APPEAL

[Coram: F. MacGregor (PCA), M. Twomey (J.A) , J. Msoffe (J.A)]

Civil Appeal SCA 13/2014

(Appeal from Supreme Court Decision CC02/2013)

Labco (Proprietary Limited — Appellant

Versus

Bertine Ah-Kong Hoareau — Respondent

Heard: 04 August 2016

Counsel: Charles Lucas for the Appellant

Frank Elizabeth for the Respondent

Delivered: 12 August 2016

JUDGMENT

M. Twomey (J.A)

[1] The Appellant filed an appeal against the decision of the learned Chief Justice Egonda-Ntende delivered on 21st March 2014 in which he dismissed the Appellant's claim for an unpaid balance of SR 1, 135,740 of a building contract he had entered into with the Respondent.

[2] The Learned Chief Justice in the same decision also dismissed a counter claim for SR 985,177.90 by the Respondent for the cost of remedial work to correct defects, deficiencies and to compete non performed work by the Appellant in breach of the building contract.

[3] The Appeal is based on eight grounds which are redacted repetitiously and do not warrant further rehashing at this stage. It suffices to say that the grounds of appeal can be condensed as follows:

1. That there was no breach of contract on the part of the Appellant.

2. That the fact that the Respondent did not appoint a consultant meant that she could not complain of defects in the work carried out.

3. That an extension of time for the completion of the contract could be implied by the silence of the Respondent when such application was made.

4. That the trial judge did not fully appraise the evidence and came to the wrong conclusion in dismissing the Appellant's claim.

Ground 1

[4] Insofar as the Appellant submits that it did not breach the contract, we can only refer to the record of proceedings to see that evidence adduced both by himself and the Respondent point to the fact that the building contract was not completed by September 2012 which was the date agreed in the agreement. It would appear that the works were never finished. This, as rightly pointed out by the trial judge, is a clear breach of the contract which had a specific date for performance.

Ground 2

[5] Much has been said by the Appellant about the fact that although clause 3 of the contract made provision for the appointment of a consultant, none was ever appointed. The Appellant has submitted that the Respondent can therefore have no one to blame if there was a lack of supervision of the works undertaken under the contract and if the work was not finished on time or if the works were defective.

[6] We have difficulty following this line of argument. The Appellant has never submitted that the appointment of a consultant was a suspensive (precedent) condition of the contract. The failure by the Respondent to appoint a consultant cannot and did therefore not exonerate the Appellant from its responsibilities under the contract.

[7] This would have been the case only if the obligation for the Appellant to perform its obligations had been conditional on the appointment of the consultant (see Article 1169

of the Civil Code). The breach of the contract by the Appellant in not finishing the works on time is not as a result of the Respondent's fault in not appointing a consultant and therefore cannot be used by the Appellant at this late stage to excuse his own breach of the contract.

[8] This ground of appeal also has no merit.

Ground 3

[9] The Appellant has put a lot of emphasis on the silence of the Respondent in relation to its letter to her for an extension of time for the works to be completed. It has submitted that her silence is equivalent to consent. Similarly it has submitted that her lack of complaint at the material time in terms of the work starting late and finishing late and her occupation of the partly completed building is equivalent to a condonation of the same.

[10] In contractual law nothing could be further from the truth. The fact of not replying to a request in French law on which our Civil Ccode is based does not amount to acquiescence. At the very most silence is equivocal.

[11] In *Petite Anse Dev Ltd v Safa* [2015] SCCA 18, Domah J made the following observation which is equally applicable to the present case:

In life, "qui ne dit mot, consent." In love, "un silence vaut mieux qu'un langage." But in law, "qui ne dit mot, ne consent pas"… Il y a des approbations tacites, mais il y a aussi des réprobations muettes sans oublier les silences prudents." (See Francois Terré, Philippe Simler, Yves Lequette Dalloz, 10 e ed. P. 138, para 124.

[12] The Cour de Cassation has decided that consent has to be established without doubt:

"..en droit le silence de celui qu'on prétend obliger ne peut suffire, en l'absence de toute autre circonstance, pour faire preuve contre lui de l'obligation alléguée (Civ. 25 mai1870, DP 70.1.257)

[13] Although there are some jurisprudential exceptions to this rule namely in some circumstances involving professional and commercial circumstances where a letter of confirmation is issued, this certainly is not the case in the present circumstances.

[14] It was therefore imprudent and careless of the Appellant to rely on the silence of the Respondent for acceptance of the extension of time he sought to complete the works.

Ground 4

[15] The Appellant has also submitted that the learned trial judge did not properly appreciate the evidence before it and therefore came to the wrong findings. This submission is made particularly in respect of the fact that a letter issued by the Seychelles Savings Bank to the Respondent demonstrates that her account was frozen.

[16] The Appellant seems to be submitting that the reason it was not paid was not because it had breached the contact for non or late performance but rather because the Respondent had no funds to pay the company.

[17] Again we fail to follow the logic of this argument. The letter from the Savings Band to the Respondent is premised on the fact that the works for which the loan had been approved was way behind time and nowhere near completion. In the circumstances the Bank could not prudently disburse more money.

[18] Since the Appellant itself was the author of such delay we cannot understand how this fact advances his case in any way.

[19] The Appellants' submission in respect of the evidence of Marie Therese Julienne is also unhelpful to its case. We are not persuaded that her evidence in describing the fact that the guesthouse was in partial operation at the material time throws any light on the crucial issues of late performance or breach of the contract by either party.

[20] We are of similar view to the learned trial judge that the crucial and deciding factor in this case was the operation of clauses 5 and 6 of the contract which provide in relevant part:

Clause 5: Practical Completion and Defects Liability…

vi. The works which shall cost SR 3,245,000.00 shall commence on the 15 Jan 2011 and shall be completed by the 15 Sept. 2011.

[1] Clause 6: Consequences on Non-Completion …

[3] Without prejudice to the right of the client to claim damages for breach of contract: ii. The contractor agrees that the client will retain whatever amount of money outstanding and due to the contractor in the event of non-completion of the building works within the time specified in 5(vi).

[21] The provisions are clear and unambiguous and bound the Appellant to complete the works as agreed or face the consequences which in this case was the forfeiture of the rest of the contract price. This is a salutary lesson for lay persons drafting or entering into contracts especially where substantial sums of money are involved. It would have been best to consult a lawyer on the consequences of provisions in the contract. Contracts are freely entered into but as stated in Article 1134 of the Civil Code they have the force of law.

[22] For these reasons and the others stated in this decision the appeal is without merit and is dismissed in its entirely with costs.

M. Twomey (J.A)

I concur:. **…….** F. MacGregor (PCA)

I concur:. **…….** J. Msoffe (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 12 August 2016