

IN THE SUPREME COURT OF SEYCHELLES

ROBERT BANANE

Vs

**1. RAYMOND POOL
2. JUAN POOL**

Civil Side No: 72 of 2006

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Mr. Camille for the plaintiff

Mr. Elizabeth for the defendant

JUDGMENT

Renaud J

The Plaintiff who is a fisherman by profession and trade, entered this amended Plaintiff on 8th November, 2006 claiming a total of **SR99,600.00** being for advance payment of **SR15,000.00**, and, **SR4,600.00** for the materials provided to the Defendant, as well as **SR80,000.00** being for loss of use of his fishing boat for 5 months. This claim arose as a result of the Defendants' alleged failure to repair the fishing boat of the Plaintiff as agreed.

The Defendants entered joint statement of defence and counter-claim on 24th July, 2007, which includes a plea in *limine litis* as follows:

“The Plaint does not disclose a cause of action against the 1st Defendant and ought to be struck off”.

The 1st Defendant averred that the Plaintiff handed over his boat to the 2nd Defendant to effect the said repairs but not to him in accordance with the terms and conditions of a written agreement between the Plaintiff and the 2nd Defendant dated 24th June, 2005.

The 2nd **Defendant** denied the allegation of the Plaintiff and averred that he had carried out the said repairs to the said boat as agreed but the Plaintiff has failed, refused or neglected to effect payment of the outstanding sum due to him. The 2nd Defendant also denied each and every claim, figure, sum, allegation contained in paragraphs 5,6 and 7 of the Plaint and put the Plaintiff to strictest proof of these allegations.

The 2nd **Defendant** counter-claimed that the Plaintiff owed him the sum of **SR3,000.00** for work carried out by him for and on behalf of the Plaintiff on his boat. He also claimed **SR30,000.00** for malicious prosecution. In his response to the counter-claim dated 4th March, 2008, the Plaintiff averred that his boat is still in the possession of the 1st Defendant and put the 2nd Defendant to strict proof of the allegations contained in his counter-claim.

The Plaintiff testified at the hearing and also tendered the evidence of another 4 witnesses. The 1st and 2nd Defendants also testified on their own behalf.

From my analysis of the admissions in the pleadings and evidence laid before the Court I make the following findings.

The Defendants having admitted paragraphs 1 to 5 of the Plaint, I find that it is not in issue that the Plaintiff was and is the owner of a fishing boat known as “Mwano”.

The **1st Defendant** was a Marine Carpenter and also the father of the **2nd Defendant** who has passed the business onto the latter. However, he continued to be present at the place of operation in order to help and advise his son whenever necessary. The Plaintiff owned a fishing vessel called “Mwano”. In June 2005, the Plaintiff brought his boat to the place where the **1st Defendant** operated a marine carpentry workshop to effect repairs as it was damaged during the tsunami disaster in December 2004. The Plaintiff and the **2nd Defendant** entered into an agreement dated 24th June 2005, which is **Exhibit P3** whereby it was mutually agreed that costs for the said repairs will amount to **SR30,000.00**. The Plaintiff gave the **2nd Defendant** a sum of **SR15,000.00** as advance payment for the said works. In addition the Plaintiff gave the **2nd Defendant** some working materials to effect the repairs valued at **SR4,600.00**.

The **2nd Defendant** with the advice, assistance and help of the **1st Defendant** carried out most of the required reparation to the boat as agreed. A dispute arose between the Plaintiff and the Defendants before the

conclusion of the repairs and the Plaintiff did not pay SR3,000.00 being an amount claimed by the 2nd Defendant to be outstanding and due to him. The further and final reparation was therefore not carried out and the boat was not handed over back to the Plaintiff by the 2nd Defendant. I will revert to these issues later on in my judgment.

The 2nd Defendant counter-claimed SR30,000.00 for malicious prosecution which I find to be baseless as there is substance before this Court that necessitates a litigation between the parties. At the time of entering the Plaintiff the boat of the Plaintiff was still in the possession of one or the other of, or, both the Defendants. This counter-claim is accordingly dismissed. I make no award as to cost.

The 1st Defendant was the prior owner of the place of operation of the marine carpentry workshop which he had been operating for quite some time. He is a well known marine carpenter. His son, the 2nd defendant, had also been working with or alongside him for a considerable period of time. To all and sundry, it had all the open appearance of a "father and son" joint operation with the father being in charge. People needing the marine carpentry services would normally be addressed either of the two but more to the "senior" person being the 1st Defendant. It was not and could not be overtly known or apparent that the 1st Defendant had effectively handed over the business to his son at a certain moment in time. When the Plaintiff cited the 1st Defendant he was doing the obvious having been in contact with both of them regarding the repair of his boat. On the basis of

evidence I find that the plea in limine that - "*The Plaintiff does not disclose a cause of action against the 1st Defendant and ought to be struck off*", has no merit. I accordingly dismissed it but again make no award as to cost.

The Plaintiff is 63 years old and is a professional licensed fisherman who has been a fisherman for over 49 years. For the last 15 years he owned his own 30 foot fishing boat known as "Mwano". Unfortunately, he is illiterate apart from being able to sign his name. He knew both the Defendants well. The boat of the Plaintiff was sunk during the tsunami in December, 2004 and thereafter salvaged. At that time the Plaintiff's boat was only about a year old. The two Defendants got in contact with the Plaintiff and offered to repair his boat when all formalities are complete. The Seychelles Fishing Authority (SFA) salvaged the boat from under the sea and had the damage sustained by "Mwano" valued for payment of compensation which was valued at SR50,000.00. The SFA paid the Plaintiff SR50,000.00 as compensation and had the boat transported to the site of the Defendants for repairs on or around 24th June, 2005. The Defendants had however quoted only SR30,000.00 for the repairs with the condition that SR15,000.00 shall be deposited in advance. A written document was drawn up on 24th June, 2005 between the Plaintiff and the 2nd Defendant (**Exhibit P3**) and the SR15,000.00 paid to the 2nd Defendant. Also present were the 1st Defendant, his "wife" PW2 and Representatives from SFA, namely Mr. Payet; Mr. Toussaint (PW5) and Mr. Basset. Both Defendants jointly carried out most of the agreed repairs during the month up to 28th July 2005. The Plaintiff also brought a new engine for the boat which was still in

its box, together with all the other repair materials that were given him by SFA and delivered all to the Defendants for them to fix in his boat. The Plaintiff alleged that on two occasions he paid further sums to the Defendants amounting to SR9,600.00 (SR4,600 on 24th June, 2005 and SR5,000.00 on an unknown date) for repair works and costs of additional materials that were required. He got a receipt when he paid the SR4,600.00 (**Exhibit P 5**). He also alleged that he was told that he will get the receipt for the SR5,000.00 when the Plaintiff comes in two or three days time. PW2 confirmed by her testimony that she was present and witnessed when the SR5,000.00 was paid. When he came for the receipt, the Plaintiff alleged that he was aggressively threatened and chased away by the 1st Defendant. His “wife” (**PW2**) then took up the matter with the 2nd Defendant and was allegedly invited over for negotiation with a view to resolving the problem. They both went together and upon reaching the site they were both physically chased away by the 1st Defendant in the presence of the 2nd Defendant and were told not to come again on their worksite. The 1st Defendant was doing all the interventions and the 2nd Defendant did not talk. For two years the Plaintiff could not approach the site where his boat was because both Defendants chased him away. He enlisted the help of the Police who only advised him to sue them.

I observed the demeanour of the 1st Defendant when he was testifying and how he was reacting to questions put to him by his own Counsel as well under cross-examination, I formed the considered opinion that the 1st Defendant was not candid and was evasive indicating that he had taken a

pre-planned defensive stance. I do not give much credibility to his evidence in particular that he was never involved in any altercations with the Plaintiff and his "wife". I also do not believe him when he said that he was never involved together with his son the 2nd Defendant in the negotiation of the agreement to repair Plaintiff's boat.

The 2nd Defendant in his testimony admitted that he received a total of SR24,600.00 from the Plaintiff being SR15,000.00 as deposit; SR5,000.00 as an installment payment and SR4,600.00 for the purchase of materials. According to him the dispute arose because he had done reparation works which as at 28th July, 2005 was worth SR23,600.00 and had by them received only SR20,000.00 and had asked the Plaintiff for further installment. In response, the "wife" of the Plaintiff phoned him and indicated that there will not be further installment payment until the work is completed. He invited the Plaintiff and his "wife" to come to talk about this. When they came, the situation was not resolved. I do not believe the 2nd Defendant's testimony that it was the Plaintiff that told him to stop work on his boat. The 1st Defendant testified that when he came on site on that day he saw his son discussing money matter with the Plaintiff and his "wife". The 1st Defendant also testified that some years before that, there had been a dispute involving the Plaintiff owing him money for a mast and works carried out on his boat which the Plaintiff had never paid him.

The 2nd Defendant admitted under oath that he received a further SR5,000.00 from the Plaintiff. His claim is for SR3,600.00 being balance due for work done is therefore unsustainable.

I believe that the 1st Defendant intervened in the dispute on that day and physically chased away and threatened to assault the Plaintiff and his “wife” from their site because of their refusal to pay further installment for work completed. It was a case of “once beaten twice shy”. If the Plaintiff was not so treated by physically threatened by one or both Defendants, he would have surely taken or attempted to take his boat away to mitigate his loss.

I find that it was not the Plaintiff who, in breach of the agreement, instructed the Defendants to cease the reparation of his boat but it was rather the 2nd Defendant who ceased all works because the Plaintiff did not pay him the further installment of SR3,600.00 that he had requested for work that he had already completed.

From my observation of the photographs I find that the Defendants had indeed completed quite a substantial amount of the repair works that were contracted to do.

I find that the dispute that gave rise to the Defendants not completing the repair works was about money. The Plaintiffs claimed to have paid another SR5,000.00 for which the Defendants did not give him a receipt and the

Defendants claiming that the Plaintiff did not pay them that sum or any other further sum as if he had done so he would have been given a receipt. For this reason the Defendants stopped working on the boat and did not complete the repairs. The Defendants had chased away the Plaintiff. Even when the SFA and/or the Police intervened to resolve the dispute the matter stayed as it were. At the time of entering this plaint the boat was still on the Defendants' site. Eventually the Defendants were required by the respective Authority to vacate and move away from the site where they were operating and the Defendants left the unfinished boat of the Plaintiff where it was lying. The boat was eventually removed by SFA with the assistance of the SPDF personnel and taken to a place at Providence where it further rotted beyond repair.

According to the Plaintiff, his boat is now rotten beyond repairs and is worthless.

The Plaintiff testified that when he was operating his boat he claimed to earn between SR10,000 to SR30,000. I take these figures to mean his net earnings per month.

Parties to a contract are bound to carry out a contract not only according to its express terms but also according to the consequences implied by fairness, practice or the law and in good faith (See the case of ***Vijay v Ailee Recreations (1983) SLR 91***).

In the case of *Leon v Alvis (1987) SLR 108*, it was held that the workman is responsible if the object which had been entrusted to him by the owners for work or repairs, perished or was lost through his fault and if the workman had been grossly negligent he was liable to the Plaintiff.

The boat was in the care and custody of the Defendants. The 2nd Defendant in particular had a lien on it because according to him he had not been paid the balance due for work done. The Plaintiff having been chased away by the Defendants could not take any action to mitigate his loss as he could not retrieve his boat.

I find that Defendants are liable to the Plaintiff for the boat as they had custody of it. If the Plaintiff did not pay further installment as claimed by the 2nd Defendant, and that such was a condition of the contract - it was not for the Defendant to allow the boat of the Plaintiff to deteriorate beyond repair but to complete the repairs as agreed and claim the Plaintiff for unpaid works. As such the 2nd Defendant has to bear the consequence of his action or omission.

I dismissed the counter-claim of the Defendants and enter judgment in favour of the Plaintiff.

The Plaintiff is claiming a total of SR99,600.00 being for advance payment of SR15,000.00, and, SR4,600.00 being for the value of materials that he

provided to the Defendant. I am satisfied that the Plaintiff has proved these two items of claim and I award him the sum of **SR19,600**.

The Plaintiff is also claiming SR80,000.00 being for loss of use of his fishing boat for 5 months.

The Plaintiff did not adduce conclusive evidence or documentary proof that he used to earn between SR10,000.00 and SR30,000 per month. Despite this lacuna I believe that a fisherman make reasoning earnings which are above the average pay of workers on the lower scale of pay. For the purpose of this claim I fix this at SR5,000.00 per month. For this reason I reduced the claim of the Plaintiff to **SR25,000.00** under that head.

I accordingly dismiss the counter-claim of the Defendants and enter judgment in favour of the Plaintiff as against both Defendants jointly and severally in the total sum of **SR44,600.00** with interest and costs.

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B. RENAUD
JUDGE

Dated this 8 March, 2013