IN THE SUPREME COURT OF SEYCHELLES

Commercial Case No. 24 of 2012

[2013]SCSC

Barry Souffe==========Plaintiff

Versus

Cote D'or Lodge Hotel Limited==========Defendant

Filed: 10 October 2012

Heard: 28 February 2013

Counsel: Basil Hoareau for the Plaintiff
Jean-Marc B Lablache for the Defendant

Delivered: 27 March 2013

JUDGMENT

Egonda-Ntende CJ

[1] The plaintiff is seeking to recover from the defendant the sum of US$ 17,400 and SR320,000.00 together with interest at the rate of 10% per cent and costs. The defendant denies that the said sum or any portion thereof is due and owing to the plaintiff and contends that this claim should be dismissed with costs.

[2] The plaintiff contends that on 24 March 2008 he entered into a written contract with the defendant in which it was agreed that the plaintiff would undertake coastal protection work at Cote D'or Praslin for the benefit of the defendant at the price of US$87,000.00. The terms of payment were 40% of the contract amount to be paid to the plaintiff at the commencement of the work by the plaintiff. 30% was to be paid on the completion of 50% of the works. And the balance of 30% was to be paid on completion of the works.

[3] The plaintiff further contends that in discharge of his obligations he purchased all the

necessary materials at a cost of SR320,000.00, including timber logs, stones, coral fill and filter cloth, which he kept on the property of and under the custody of the defendant. The defendant in breach of its obligations under the contract has failed to take the necessary steps to allow the plaintiff carry out the said works. Following which failure the plaintiff has been unable to commence performance of the contract and neither have the materials he supplied been returned to him.

[4] The plaintiff therefore claims from the defendant loss of profit that he would have made on this contract in the sum of US$17400.00 and the sum of SR320,000.00 being the value of materials supplied, interest at 10% per cent annum and costs of this suit.

[5] The defendant admits that it entered the said contract with the plaintiff but that it was subject to environmental and planning approvals. It denied that the plaintiff brought any materials at all on the defendant's property as alleged in the plaint. The materials in question, in particular the wood and stones belonged to the defendant who had agreed that the plaintiff could use the said materials in its work. The defendant agreed that the plaintiff had never commenced execution of the said contract and contended that it had orally been agreed in April 2009 that the agreement be terminated. At the signing of the contract the defendant paid to the plaintiff US$5,000,00 which the plaintiff has not paid back to the defendant.

[6] The defendant prayed that this suit be dismissed with costs.

[7] The plaintiff called 3 witnesses including himself in support of his case. He testified that he signed the agreement in question with the defendant. The defendant was supposed to obtain environmental permission for him to be able to start performing the contract. In the meantime he started to mobilise materials and delivered them to the defendant's premises. He had to engage labour to cut the wood, debark it, and then transport it to the defendant's premises.

[8] In cross examination he admitted that he paid no one any money. The wood was cut from government land. He claimed to have had permission of a government officer but he did not have or produce documentary proof for this permission or any receipts. The defendant failed to allow him to start execution of the contract. Instead he found

out that the materials he had delivered onto the defendant’s premises were sold to Joe Rose of Praslin.

[9] PW2 was Leonard Lesperance who stated that he was a wood cutter. He was engaged by the plaintiff to cut wood for him in March 2008. The exercise took him 30 days. The trees that he cut were pulled by an excavator and later transported by a pick up to Cote D'Or Lodge. There were 1800 pieces of wood. In his estimation all this work was worth SR320,000.00. The plaintiff had never paid him for his work. They had agreed that the plaintiff would pay him SR35,000.00 to SR40,000.00.

[10] PW3 was Walter Constance. He was a pick up driver. He testified that he was hired by Mr Rose to transport wood from Cote D'Or Lodge to Rose's place. Mr Rose was a charcoal maker. This was in 2008. The plaintiff saw him doing this work and asked him what he was doing. He told him.

[11] Mr Marco Zina, DW1, testified on behalf of the defendant. He was the manager of the defendant from March 2008 to today. He signed the agreement in question. The agreement was subject to environmental permission being granted for the project. As they waited for the permission the defendant paid the plaintiff US$5,000.00 on account of this contract. It was agreed with the plaintiff that work would only start when all the components necessary for this to happen were in place, which had not yet happened.

[12] The plaintiff did not bring any materials on to the defendant's premises. The wood and stone he had found already in place. It must have been left there after phase one. For any thing to be brought into the premises permission would have had to be granted which was not done in this case. The plaintiff had not delivered any materials on to their premises since DW1 had assumed office.

[13] It is not in dispute that the parties hereto signed an agreement for carrying out certain works. It appears that the parties understood that this was subject to the granting of the necessary statutory permissions for such works. On the evidence before me it is not clear whether such permissions were sought and obtained or refused. It was the duty of the defendant to seek for such permissions and it must be the duty of the

defendant to disclose how far they had gone in this regard, if, as was contended on the written statement of defence that the contract could not be performed because environmental and planning permission had not been granted.

[14] Where the non-performance of a contract cannot be imputed to a defendant but is due to a third party the defendant cannot be liable for damages for non performance. See Article 1147 of the Civil Code of Seychelles. It states,

> 'The debtor shall be ordered to pay damages, if any, either by reason of his failure to perform the obligation or by reason of his delay in the performance, provided that he is unable to prove that his failure to perform is due to a cause which cannot be imputed to him and that in this respect he was not in bad faith.'

[15] The defendant has failed to prove that his failure to perform this agreement was due the actions of a third party. In that regard I can come to no other conclusion other than that he is liable to pay damages for its failure to perform its part of the contract which would have allowed the plaintiff commence performance of the contract agreed between the parties.

[16] Article 1149 of the Civil Code of Seychelles provides,

> 'The damages which are due to the creditor cover in general the loss that he has sustained and the profit of which he has been deprived, except as provided hereafter.'

[17] The plaintiff in this instance is entitled to recover from the defendant the loss that he has been put to by the breach of the defendant as well as the profit he has been deprived of. To do so the plaintiff has to prove the loss that he has suffered and the quantum thereof. Similarly he also has to prove the quantum of the profit that he has been deprived by the breach of the defendant. The burden of proof lies upon the plaintiff.

[18] This obligation was discussed in Ebrahim Suleman and others v Marie-Therese Joubert and others SCA No.27 of 2010 in which Twomey, JA, stated,

> '12. In such circumstances applying evidentiary rules we need to find that the Respondents discharged both their

evidentiary or burden of proof as is required by law. The maxim “he who avers must prove” obtains and prove he must on a balance of probabilities. In Re B [2008] UKHL 35, Lord Hoffman using a mathematical analogy explaining the burden of proof stated:

> “If a legal rule requires a fact to be proved (a fact in issue), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates on a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened.”

[19] As I consider the evidence before me it is worthwhile having in mind the words of Lord Goddard, C.J. in Bonham-Carter v Hyde Park Hotel Ltd. (1948) 64 TLR 177 at page 178, that:

> "Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying: 'This is what I have lost; I ask you to give me these damages.' They have to prove it."

[20] Similarly it may be important to bear in mind the words of Bowen LJ in Ratcliffe v Evans (1892) 2 QB 524 at page 532:

> "As much certainty and particularity must be insisted on both in pleading and proof of damages as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage was done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."

[21] With those principles in mind I turn to the plaintiff’s claim for loss and damages. The plaintiff has claimed in the plaint that he spent SR320,000.00 on the purchase of wood, stone and coral fill which he had delivered to the defendant's premises. The plaintiff has failed to prove that he spent the said sum at all. In fact the plaintiff's position in evidence differed from what was pleaded in the plaint. While in the plaint

it was claimed that this money had been spent on wood, stone, coral fill and filter cloth, in his own testimony he conceded that he had not spent any money on the purchase of the wood, having taken government wood without payment. The wood cutter he purportedly employed was not paid to date.

[22] Whereas the plaintiff was able to bring a witness who transported the wood from the defendant's place to Mr Rose a charcoal maker, he was not able to bring the testimony of the person who transported the said wood from the forest onto the defendant's premises. He did not testify at all about how he delivered the stones, coral fill and filter cloth or their cost, all of which was referred to in the plaint as costing SR320,000.00. The evidence was restricted to wood which he attempted to portray without success as being of the value of SR320,000.00 only.

[23] Even if one believed the plaintiff's evidence it was so far apart from the version in the plaint that it falls short of proving that he spent SR320,000.00 on procuring all the necessary materials for performance of this contract. If he is believed he stole Government wood or at least helped himself to it, without paying for it. He spent no money procuring it.

[24] However, I have come to the conclusion that the plaintiff is not credible as a witness. Though he produced a witness who claims to have cut wood he could not produce a person who delivered it to the defendant's premises. He has no invoice from Government for the wood supplied. He has no idea of the cost of the wood. He did not testify as to how the stone was procured, and transported to the defendant’s premises. Neither did he provide what the stone cost. He did not testify as to where he collected the coral fill from or what the coral fill cost. He did not testify at all with regard to the filter cloth. There is just no evidence to support his claim in the plaint for SR320,000.00.

[25] When it comes to the claim for loss of profits the plaintiff testified as follows,

> **'Q:** Before I finish asking you questions Mr Souffe can you explain the $17,400 represents what?
> **A:** It was supposed to be the profit that I was supposed to make by the end of the job.

Mr Chetty: My Lord I have no further questions at this point.'

[26] Now that is the only evidence in support of the claim for loss of profits. All the plaintiff does is to say: 'This is what I have lost. Give it to me.' This does not amount to proof that the plaintiff lost the said sum as profit. It is not in question that he lost the profits to that contract. But he has not shown that the sum of US$17,400.00 was the profit on that contract. He needed to show what his expenses would have been and the profit element in the contract sum. He made no effort to do this. He has failed to prove the quantum of his loss in this regard. I therefore award him nothing.

Signed, dated and delivered at Victoria this 27th day of March 2013

FMS Egonda-Ntende
Chief Justice