

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CC02/2013

[2014] SCSC

LABCO (PROPRIETARY) LIMITED

Plaintiff

versus

BERTINE AH KONG HOARAEU

Defendant

Heard: 23 January 2014 & 14 February 2014

Counsel: Charles Lucas for plaintiff

Frank Elizabeth for defendant

Delivered: 21 March 2014

JUDGMENT

Egonda-Ntende CJ

[1] The plaintiff is seeking to recover from the defendant a sum of SR1,135,750.00 which it contends is the unpaid balance on account of a building contract between the parties with interest at the commercial rate of 10% per annum and costs. It is contended for the plaintiff that the parties entered a written contract for expansion of the defendant's guest house known as Villa Authentic at La Passe, La Digue. The total cost of the project was SR3,245,000.00. Works commenced in January 2011 and were completed on 17 January 2012.

- [2] On 27 February 2012 the plaintiff issued a letter confirming completion of works and demanded payment of the outstanding balance of SR1,135,750.00. The defendant failed to heed the notice of demand hence this action to recover the same.
- [3] The defendant opposes this claim and in addition filed a counter claim against the plaintiff. She states in her defence that the claimed sum is not due to the plaintiff on the contract and that she is not liable for the same. She admits the contract of 8 April 2011 and contends that the plaintiff was in breach of the said agreement as it commenced work well after the start date and it never completed the contractual works. The works were of poor quality, with sub standard materials used and had several defects.
- [4] The plaintiff failed to provide furniture and materials such as ward robes, curtains, beds and wooden floorings which it had agreed to provide. The plaintiff failed to complete the works in question and failed to remedy defective works and provide furniture fixtures and fittings. The plaintiff provided cheap quality and sub standard wardrobes and other accessories and fittings not fit for the purpose they were required. Mirrors in the bathroom were not aligned with mirror lights, toilets were not fixed properly. The sliding doors contained 4mm glass which was unsafe and dangerous. It was susceptible to breakage and well below the required thickness and quality acceptable in the industry.
- [5] The plaintiff failed to provide any water gutters, curtains, fixtures and fittings and left the site without completing work on the agreed date or at all. The defendant contends that she is not in breach of the contract at all but it is the plaintiff who is in breach thereof. The defendant, in its counter claim, exercised her rights under clause 6 of the agreement in respect of consequences for non-completion within the time specified in clause 5(vi). Secondly by reason of the plaintiff's breach of the contract the defendant suffered loss and damage.
- [6] The particulars of loss and damage were particularised as follows:

‘cost of remedial work to correct defects, deficiencies and to complete the non performed work	SCR985,177.90
Loss of revenue as a result of the Plaintiff's non performance and non completion of the contract at SCR100,000.00 per month and continuing	SCR 300,000.00

(a) Cost of replacing all glass in the sliding doors	SCR48,000.00
(b) Sum paid to Quantity Surveyor	SCR6,000.00
(c) Moral damages for inconvenience, anxiety, emotional distress and mental trauma	SCR300,000.00
	SCR 1,639,177.90

The defendant counter claims from the plaintiff the aforesaid sum of SCR 1,639,177.90 with interest at 10 percent per annum and costs of the suit.

The Plaintiff's Claim

- [7] The plaintiff called 2 witnesses to testify and the defendant called 4 witnesses to testify. There are facts that are not really in dispute. There are facts which are in dispute. It appears to me that this case can be resolved on the facts that are not in dispute. The parties entered into a written building contract. It was admitted in evidence as exhibit P2. It is dated 8 April 2011 and it was signed on that date. However it appears that the contract had started being implemented earlier with 2 payments from the defendant to the plaintiff being made before 8th April 2011. Construction work was to start on the 15 January 2011 and end on the 15 September 2011.
- [8] It appears that construction works started and continued through to January 2012. On 5 September 2011 the plaintiff's Mr Lablache wrote to the defendant asking for an extension of time to complete the project. The plaintiff did not respond in writing to this letter. The letter is short and I will set it out.

'Ref: Extension for Project Completion – Second Phase

As per our conversation (Gerald Lablache / Bertine Hoareau) of Monday 5th September 2011, I am requesting an extension for the completion of the second phase of the project at La Passe, La Digue.

I anticipate the project to be completed by 30th December 2011.
Thank you.'

- [9] In his testimony before this court, Mr Lablache stated that he assumed that the defendant had consented to the extension. The defendant, in her testimony denied that she had granted any extension. She acknowledged receiving the letter, exhibit P11.

[10] The plaintiff's invoices no.1 to no.3 were paid though it is disputed who paid them. Whether it was the defendant's bankers or the defendant herself was contested by either party. Invoice no.4 was submitted by the plaintiff upon 80% completion of work on 6 January 2012 for SR649,000.00. This was not paid. On 27 February 2012 the plaintiff sent another invoice on 100% completion of work, demanding payment of SR1,135,750.00 excluding the 5% retention fee. The plaintiff did not pay the said amount. Hence the current action.

[11] The defendant asserts that she was entitled to retain this money in accordance with the agreement as the plaintiff had defaulted on completing the works on time. She cites clause 6 of the agreement. I shall set it out in full together with clauses 5 (vi) and 7 which are relevant to this point.

'Clause 5: Practical Completion and Defects Liability

- i.
- ii.
- iii.
- iv.
- v.

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.

Clause 6: Consequences on Non-Completion

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).

Clause 7: Extension of Time

A claim for extension of time by the Contractor shall not be allowed by the client unless evidence is produced by the Contractor to prove that all possible attempts have been undertaken to avoid a delay and such extension is approved by the consultant.'

[12] The client did not appoint a consultant to this project. So the question of approval by a consultant will not arise. The letter requesting for extension of time makes no reference at all to any evidence 'to prove that all possible attempts have been undertaken to avoid a delay' by the Contractor. The client, the defendant, in this case was under no obligation to accept this request without such evidence being provided. It was incumbent on the

plaintiff, the contractor to provide such evidence at the time the request for extension of time was made. It would appear therefore the request for extension submitted was not in accordance with the contract and not one upon which the defendant could act.

- [13] This may be a rather odd provision in a contract of this kind but it is a term that the parties chose to include in their agreement. In accordance with article 1134 of the Civil Code of Seychelles it forms the law for the parties in this case. The defendant is entitled to say that the plaintiff has forfeited, in accordance with their agreement, all outstanding sums of money due to it on account of failure to complete the agreed works in time. The plaintiff's action in this regard cannot be maintained.

Counter Claim

- [14] The defendant has counter claimed from the plaintiff a total sum of SR1,639,177.90 grounded in different heads of claim, the most significant of which is the claim for SR985,177.90 for cost of remedial work to correct defects, defecencies and to complete non-performed work. The plaintiff's answer to this claim is that according to the agreement the defendant had six months [the defects liability period] from date of practical completion within which to draw the attention of the plaintiff to these defects so that the plaintiff could rectify the same. The defendant did not do so at all.

- [15] A Quantity Surveyor, Mr Nigel was retained by the plaintiff to evaluate work defects and non completion of contracted work on the Guest House. He inspected the premises on 8 March 2013 and produced a report dated 1 April 2013 that concluded that SR985,177.90 was needed to rectify defects and complete non-completed work. This, as the plaintiff pointed out, happened 2 years after the plaintiff left the site.

- [16] I think the plaintiff has a point. The agreement of the parties set out how the parties would deal with any defects or items not completed. The provisions of clause 5 below refer.

Clause 5

- (ii) The 'defects liability period' shall be defined as six (6) months from the Practical Completion of the works.
- (iii) The Contractor shall be liable upon the request of the Client

for demolishing, rebuilding, repairing and making good any defects of any nature with the building which shall appear either during the construction works or within the 'Defects Liability Period' due to materials and workmanship not in accordance with the contract.
iv. The Contractor hereby agrees that the Client retains a sum amounting 5% of the Total Contract Amount during the construction period and one half (2.5%) to be released on Practical Completion and the other (2.5%) to be retained for the period of six (6) months from the date of practical completion of all building works.'

- [17] The defendant has provided no explanation as to why it did not comply with the agreement in this regard. This claim is simply an after thought arising simply because the plaintiff brought an action against the defendant and is merely a ground of attack or offence against the plaintiff's claim. It is arising only after the defendant was served with summons in this suit. It is being raised long after the expiry of the defects liability period. I would not allow the fees for the Quantity Surveyor for the same reasons.
- [18] The defendant was obliged to appoint a consultant to supervise the building contract. She opted not to do so. It is absurd that she now hires one post contract and wishes to visit the cost on the plaintiff. Replacement of glass windows is similarly covered by the defects liability period. I will not allow the claim for it.
- [19] There is no evidence to support the claim for loss of revenue other than a regurgitation of the claim in the testimony of the defendant as set out in the plaint. This provides no proof of loss of SR100,000.00 per month as was claimed. There is no indication as to how the claim for SR100,000.00 per month arises as loss of earnings.
- [20] The defendant claimed SR300,000.00 as moral damages for inconvenience, anxiety, emotional distress and mental trauma. In her testimony the defendant testified that she was suffering from Cancer around this period and had to go to India for treatment. I am not too sure that it is not the fact of her suffering from cancer or rather the fact that she was sick and unwell that caused her anxiety and emotional distress rather than her disagreements with the plaintiff. No mental trauma has been established.
- [21] Secondly from the testimony of the defendant the matters that caused inconvenience and distress were the works undertaken by the plaintiff on a neighbouring plot of land which

would wake up her clients. This was not pleaded in the counter claim and is not arising from the contract between the parties. Any damage it may have occasioned cannot be claimed in this proceeding. The claim for moral damages fails.

[22] In the result both the suit and counter claim are dismissed with costs.

Signed, dated and delivered at Ile du Port on 21st day of March 2014

FMS Egonda-Ntende
Chief Justice