IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CC 18/2013

[2014] SCSC 124

ERNST PINDUR

Plaintiffversus

BENOITON CONSTRUCTION COMPANY [PTY] LTD
First Defendant

ALDERICK BENOITON
Second Defendant

Heard: 13 February and 4 March 2013

Counsel: Charles Lucas for plaintiff

Basil Hoareau for defendants

Delivered: 28 March 2014

JUDGMENT

Egonda-Ntende CJ

[1] The plaintiff entered into a building contract with the first defendant on the 6 September 2008 under which the first defendant was to build for the plaintiff a residential house or Villa on a plot of land at Belle Vue, Port Glaud, Mahe for the sum of US$ 420,000.00 only. The building contract was in writing. The first defendant was represented by the second defendant in finalising this contract.

[2] The contract, *inter alia*, provided under clause 5 thereof that the agreed period for construction of the house was 62 weeks after the signing of the agreement. For every week of unjustified delay thereafter as a result of the inability of the contractor there was

to be a penalty of no more than 5% of the contract price [US$21,000.00] paid by the contractor to the client every week of delay. It is contended that the first defendant under the control of the second defendant delayed to commence works for 6 months. And during the execution of the contract the architect / project manager had to intervene and stop the works for the defendant to undo sub standard works. At the same time the works were further delayed on account of shortage of labour.

[3] It is further contended that the second defendant so grossly negligently managed the said works that the project was not completed until the 6 December 2012 taking 208 weeks to complete the same and with a delay of 146 weeks. The plaintiff on 4 December 2012 invoked clause 5 of the agreement and claimed 94 weeks delay in the sum of US1,974,000.00 and now claims the equivalent of US$300,000.00 for unjustified delay. The plaintiff therefore claims SR3,600,000.00 for unjustified delay from the defendants.

[4] The second defendant contended that throughout the contract he acted as a director and representative of the first defendant. In answer to paragraph 4 of the plaint the second defendant contends that the penalty of 5% of the contract sum for every week of unjustified delay under clause 5 of the contract was manifestly excessive. The first defendant further contends that it was an implied term of the contract that at the signing of the contract the plaintiff had obtained all the necessary planning permissions in terms of the Town and Country Planning Act for the building of the house.

[5] In breach of the said implied term no such permissions and consents had been obtained and were only obtained in February 2009, making it possible for the first defendant to start construction. After the commencement of the works the Planning Authority issued a a stop notice as a result of which the first defendant could not proceed with the work until April 2010 when permission was granted to proceed with the works.

[6] It is contended for the first defendant that during the course of the works the plaintiff changed the scope of works and or ordered variations which rendered the delay in completion of the works in this case justifiable. Instead of placement of tiles on the floor and painting of the house the plaintiff decided that semcrite be applied both to floor and walls which necessitated the bringing in of an expert from South Africa delaying the completion of the works. The plaintiff requested the first defendant to build a swimming

pool and due to its location this delayed the completion of the main house. The plaintiff further requested the first defendant to carry out extra works underneath the house outside the original scope of work which included the construction of a private gym, a water tank and an open concrete area which contributed further to the delays of completion of the house. The septic tank was re positioned leading to rock blasting and wedge. A retaining wall had to be built as well as an access driveway with block wall, and placement of gates.

[7] The first defendant denied that it sub contracted any of the works and states that it had the necessary labour force at all times to proceed with the works. All the delay in construction and completion of the house was justified.

[8] In the alternative it was contended that the agreement of the parties of 20 January 2012 amended, altered and or novated the agreement of 7 October 2008 with a new mutually agreed completion date. The first defendant counter claimed from the plaintiff the sum of SR 800,000.00 being the value of the extra works which the plaintiff was liable to pay to the first defendant but did not. The first defendant prayed that the plaint be dismissed; in the alternative to find that the penalty of 5% of the contract sum per week of unjustified delay is manifestly excessive and replace it with a reasonable or fair sum; judgment be entered in favour of the first defendant for the sum of SR 800,000.00 and costs of these proceedings.

[9] The plaintiff denied the first defendant's counter claim. He stated in his defence that he had settled all fees for extra works. In relation to the delay the plaintiff states that he had deducted 52 weeks claim after due consideration of the mitigated delay alleged by the defendants.

The case against the second defendant

[10] I will deal initially with the case against the second defendant. The case against the first defendant is based on contract, an agreement between the parties. The second defendant was not party to that contract either in his individual capacity or any other capacity. He signed the contract as a director of the first defendant. No case is made out against him on the contract between the first defendant and the plaintiff. No cause of action is established against the second defendant by the plaintiff. The plaint is not able to demonstrate that the plaintiff enjoyed a right which was violated by the second defendant for which the plaintiff is entitled to relief from the second defendant.

[11] Article 1165 (1) of the Civil Code of Seychelles provides,

> 'Contracts shall only have effect as between the contracting parties: they shall not bind third parties and they shall not benefit them except as provided by article 1121.'

[12] As the second defendant is not a contracting party to the contract in issue in this case that contract cannot bind the second defendant in his personal capacity. No action based on that contract should therefore be brought against the second defendant.

[13] Section 109 of the Seychelles Code of Civil Procedure provides for the people that may be joined as defendants in a single action. It states,

> 'All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally or in the alternative. And Judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities, without any amendment.'

[14] The action against the second defendant is wholly misconceived. Asked to defend the same, Mr Charles Lucas, learned counsel for the plaintiff, refused to offer any justification for this action, through out the proceedings. The plaint demonstrates no right to relief against the second defendant on this action. I dismiss the case against the second defendant with costs.

The Case against the First Defendant

[15] The issues that arise in the case against the first defendant are the following: Firstly what was the unjustified delay occasioned by the first defendant in the execution of the building contract? Secondly whether or not the penalty set out in the contract for unjustified delay is manifestly excessive? If it is manifestly excessive what should the penalty be or what damages should the plaintiff be entitled to? I will proceed with the analysis of the evidence and the law issue by issue.

Was there unjustified delay by the first defendant in the execution of this contract?

[16] The agreement of the parties, dated 7 October 2008, exhibit P1, states in clause 5,

> 'It is hereby agreed by both parties that the construction period shall not exceed sixty two weeks after the signing of this agreement. For every week of unjustified delay as a result of inability of the contractor, there shall be a penalty of no more than 5% of the contract price paid by the contractor to the client.'

[17] This would put the completion date of the contract to around December 2009. From the evidence of the parties the completion date in this case was in December 2012. Roughly there was a gross delay of about 3 years or 156 weeks. Of this delay what delay can be described as unjustified delay on account of the inability of the contractor? The plaint claims that there was unjustified delay of 94 weeks but that the plaintiff is claiming a penalty for only delay worth US$300,000.00 which would put such delay at about 14.2 weeks if you divided that sum by the sum of US$21,000.00 being 5% of the contract sum.

[18] On this issue the plaintiff testified on his behalf and called on additional witness, Mr Roselie, the Architect, who was responsible for drawing the architectural plans and later on supervising the works. The second defendant testified in his capacity of director and representative of the first defendant and one other witness a quantity surveyor in the employment of the Government of Seychelles, DW2, Mr Ayodeji Ojo.

[19] Mr Pindur in his testimony did not engage in delay analysis as to determine either the overall gross delay of the project or individual activities of the project and apportion responsibility to each party responsible. In his testimony he stated that because he did not want to kill any one he has reduced his claim from US$1,900,000.00 to

US$300,000.00 only. He stated that the contractor did not have enough workers and materials on site and this was the cause of the delay.

[20] Mr Roselie the Architect conceded that there were delays occasioned by absence of approvals of the architectural drawings by the Planning Authority which took between 36 to 52 weeks for the final approval to be obtained. Approval was conveyed by a letter dated 31 March 2010. This would suggest that delay on account of absence of building approval is in fact about 76 weeks measured from the date of signing of the agreement to the 31 March 2010.

[21] Mr Roselie testified that the owner asked the contractor to build a swimming pool which was an extra item. This was after the main house had been roofed and nature of the location of the swimming pool introduced delay in the project. The house could not be completed before the swimming pool was completed. And work on the swimming pool was labour intensive as they could not use any machinery because the main house obstructed machinery access to the location of the swimming pool. He did not calculate amount of delay so occasioned.

[22] The contractor had started on opening the ground, actually rocky ground for the septic tank and location was changed to be under the main house. The contractor could not use blasting to break the rock under the house as it would weaken the main house. He had to do so manually using wedges and this consumed time, causing some delay.

[23] There was further variation of the work with the owner ordering the contractor to place the water tank under the main house and the building of a concrete platform. All this contributed to the delay. The owner changed finishes for the floor and walls from tiles and plaster to semcrete which had never been used before in Seychelles and it was the first time for the Architect and the Contractor to hear about it. The Contractor did not have skilled people to apply semcrete. The owner and the second defendant had to travel to South Africa where it was used and it was available. Secondly an expert in the same was retained from South Africa to come and train the contractor’s workers. Importing semcrete alone took about 6 months.

[24] There was variation in respect of windows and doors. The owner decided against the design specification of aluminium windows and doors and opted for wooden windows and doors. A sub contractor was hired to manufacture and install them. This took about 5 to 6 months. The added presence of a sub contractor on site contributed to the delay as the main contractor could not proceed with certain works while the sub contractor was working.

[25] Mr Roseli made no attempt to apportioning delay apart from responding to the questions put to him in both examination in chief and cross examination. He did not engage in any analysis to determine what was unjustifiable delay on account of the inability of the contractor. Neither did the plaintiff himself who in any case was not qualified to do so.

[26] Delay analysis in building contracts is a complicated and technical piece of work that seeks to determine the difference between what was planned [as planned] and provided for in the agreement and what eventually occurred [as built]. The burden of proof is upon the person seeking to prove 'unjustifiable delay' and or 'inability of the contractor' to do so and to prove particularly the exact period of the resultant delay. In the instant case the burden of proof lies upon the plaintiff.

[27] This burden of proof is explained by Planiol Civil Law Treatise [An English Translation by the Lousiana State Law Institute] at Page 51 as follows:

> 'He who alleges a fact contrary to the acquired situation of his adversary must establish its verity. As a consequence when a person exercises an action to obtain a thing which he has not, either a payment if he claims to be a creditor, or the delivery of an object, or the enjoyment of property which he has not in his possession, such person is bound to establish his credit or his right to the thing. This the meaning of the old adage: "*Onus probandi incumbit actori*" When the plaintiff has furnished proof, he has won his case, at least unless the defendant had made good against him an "exception" or a means of defense on the merits, which he in his turn must establish. The burden of proof in that case passes to the defendant, as is indicated by another adage: "*Reus in exceptione fit actor*." In his turn the plaintiff may have an answer to make, which may destroy the defence; the defendant perhaps will reply to that, and the burden of proof passes thus from one to the other, for all their reciprocal answers. In order to express this effect with the aid of a formula

> which in turn can apply to both parties, they often generalize the above mentioned formula by saying: "the burden of proving incumbs on him who alleges." (Comp. Art. 1315). That is a rule of law which should be respected by the judge.'

[28] 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:
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> > "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."

[29] The words of Lord Goddard, CJ, in Bonham-Carter v Hyde Park Hotel Ltd (1948) 64 TLR 177, at page 178 are pertinent. I set the same out.

> '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 these damages." They have to prove it.'

[30] On a review of the evidence adduced in this case I can only conclude that the plaintiff has failed to establish with particularity the extent of delay that is 'unjustifiable' and 'due to the inability of the defendant'. This period is capable of exact calculation by building consultants qualified to do so. The plaintiff is not one of them. Neither did he engage in the required analysis. Mr Roselie the Project Architect was in a position to do so but did not do so. He has provided some estimates for the delay as a result of certain variations

by the owner during cross examination but made no attempt at a comprehensive analysis of delay from commencement to finish.

[31] On the basis of evidence adduced by both sides it is clear that the owner was responsible for considerable delays that resulted in stoppage or delay in execution of the works on account of the late approval of architectural and design drawings; variation of existing works and imposition of extra works that affected the speed of the on going work. It is also possible but there is no credible estimate at all on the length of delays occasioned by the contractor not having sufficient labour on site. This was vigorously denied by the first defendant.

[32] I asked Mr Roselie whether there was ever a schedule of activities with a time scale [often a bar chart] submitted by the contractor at the beginning of the contract that detailed the time each activity would take, as is normally done, in building contracts. He said none was submitted. Of course the agreement between the parties did not provide for one to be submitted which was unfortunate as this is ordinarily the starting point for delay analysis. One would start by looking at what was planned and then examine the intervening factors and or events that affected the progress of the works in question.

[33] English case law suggests that there are several delay analysis techniques that may be used by parties' experts in a forensic determination of the delay in a contract and who was responsible for the same. In Balfour Beatty Construction Ltd v Burgess London Borough of Lambeth [200] Adj.L.R. 04/12 such possible techniques were discussed and included the following: 1. Time Impact Analysis; 2. Window Analysis; 3. Collapsed Window Analysis and 4. Impacted Plan Analysis. The most appropriate technique would depend on the information available from the parties.

[34] In the instant case none of the parties' witnesses has engaged in any detailed delayed analysis using any of the aforesaid delay analysis techniques.

[35] I find no basis for coming to the conclusion that the first defendant was in default for 94 weeks or 14.2 weeks in terms of unjustified delay on account of inability of the contractor. If the plaintiff wanted to recover penalty he had to prove liability for a given

period. It is not enough to 'pluck' a period out of the 'blue' and say 'I am claiming this because it is fair'.

Was the penalty manifestly excessive?

[36] In my view the plaintiff has failed to establish that the period for which the first defendant should be held liable for being in breach of the unjustifiable delay clause which triggers the payment of a penalty. Nevertheless I will proceed to consider whether or not the penalty in this case was manifestly excessive or not. The penalty established was US$21,000.00 per week of unjustified delay on account of the inability of the contractor. The penalty had no cap.

[37] Article 1152 of the Civil Code of Seychelles provides,

> 'When the agreement provides that failure to perform the contract shall make the debtor liable to a certain sum by way of damages, no larger or lesser sum may be awarded to the other party. This provision shall not apply if the failure to perform is due to fraud or gross negligence. In any case the Court may reduce the sum agreed upon if it is manifestly excessive in the particular circumstances of the contract.'

[38] The plaintiff seeks to enforce clause 5 and in particular the penalty element thereof which determines the penalty to be US$21,000 per week for the period of unjustified delay on account of the inability of the first defendant. He has claimed US$300,000.00. as penalty. The first defendant has contended that this is manifestly excessive and has produced the evidence of a Quantity Surveyor to explain why it is manifestly excessive. Before I review that evidence it is worth pointing out that from the plaintiff's own perspective he gave up a claim for 94 weeks delay for fear of 'killing' his friend and therefore claimed the lesser sum of US$300,000.00. In effect he found a claim for '94' weeks excessive and reduced the claim unilaterally. In my view this alone is sufficient to demonstrate that US$ 21,000.00 per week is manifestly excessive. The plaintiff himself was so embarrassed that he could not claim the full amount and arbitrarily capped it at US$300,000.00 only.

[39] The Plaintiff's Architect, Mr Roselie referred to this penalty as unreasonable in his testimony. Mr Ojo, a quantity surveyor testifying for the defendant stated that the sum of US$21,000.00 as penalty per week in respect of a contract value of US$420,000.00 is

highly excessive. Given that this contract was for 62 weeks on average the contractor would gross only about US$ 6,000 per week, and yet a penalty should not exceed the earning of the contractor for the period in question. The contractor could not possibly pay US$21,000.00 per week when its gross earnings per week were only about US$6,000.00.

[40] Mr Ojo further testified that contracts of this nature for a residential house normally the delay would be capped at 5% of the contract sum and expressed as per week or per day of the delay but the total sum would not exceed 5% of the contract sum. In this case the total penalty claim would be capped at US$21,000.00.

[41] US$300,000.00 is about seventy one percent of the contract sum of US$420,000.00. That claim would not only wipe out any earnings the contractor may have made on this contract but would substantially eat into its capital. It is manifestly excessive in my view. Had the plaintiff succeeded I would only have awarded him a total penalty of US$21,000.00.

Counter Claim by the First Defendant

[42] The first defendant counter claimed from the plaintiff the sum of SR800,000.00 only for extra works. In its answer to this claim the plaintiff stated in its defence to the counter claim that 'All fees for extra works have been fully settled.'

[43] Given that the response of the plaintiff to the defendant's counter claim is that the plaintiff had fully paid or settled the sums due or claimed under the counter claim this kicks into play article 1315 of the Civil Code of Seychelles. It states,

> 'A person who demands performance of an obligation shall be bound to prove it. Conversely, a person who claims to have been released shall be bound to prove the payment or performance which has extinguished his obligation.'

[44] I have examined the testimony of the plaintiff and all other evidence produced on his behalf. There is no proof adduced that he paid the sums claimed or otherwise settled for extra works. On the contrary the plaintiff in his testimony denied that there was an agreement for extra works. The plaintiff was not willing to pay the first defendant any

money for extra works. This position is contrary to the position taken on the pleadings. It is a position that is inconsistent with the pleadings. It is unacceptable.

[45] Secondly the Architect, Mr Roselie, testified to the extra works in question that were not originally in the initial scope of works. There was the swimming pool, boundary wall, road works, etc. The plaintiff has flatfooted himself on this claim. By claiming that he had paid all fees for extra works in his written pleadings he had thereby assumed the responsibility to demonstrate so in the proceedings. To the contrary he now repudiates his own pleadings and adopts a position contrary to them. This is not acceptable. The plaintiff shall be held to his pleadings.

[46] As the plaintiff has failed to offer proof of payment that extinguishes his obligations to the first defendant I find that the sum of SR800,000.00 for extra works is due and owing to the first defendant.

Decision

[47] The plaintiff's action against both defendants is dismissed with costs. I enter judgment for the first defendant in the said sum of SR800,000.00 with interest at the legal rate from the date of filing of this claim till payment in full and costs.

Signed, dated and delivered at Ile du Port on 28th day of March 2014

F M S Egonda-Ntende
Chief Justice