

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CC 6 /2013

[2014] SCSC

MARIE-FRANCE MARGUERITE

Plaintiff versus

WILFRED ALCINDOR

Defendant

Heard: 2/10/213 & 20/01/2014
Counsel: Nichol Gabriel for plaintiff
Defendant unrepresented

Delivered: 20/02/2014

JUDGMENT

Egonda-Ntende CJ

[1] The plaintiff has brought this action grounded in breach of contract. The plaintiff claimed as under:

- ‘2. At all material times, the defendant is a building contractor and had been contracted by the Plaintiff to build her house at Anse Boileau.
3. On the 3rd July 2011, whilst the house was under construction, concrete materials from the said building started to fall off.
4. The falling debris hit the niece of the Plaintiff Agnela Lagaie, who was visiting at the time and she was badly injured.
5. The said Agnela Lagaie was hospitalised and she passed away a few days later as a result of the injuries.
6. The house under construction had been badly damaged and the defendant was notified verbally of the incident.

7. The defendant however had failed to restore the house in its original state and further failed to pay the Plaintiff any damages due to the defective works that he had carried out on the house.

9. The plaintiff states that the defendant is in breach of the building contract entered with her and as a result she had suffered loss and damages.

Particulars of loss and damages:

Defective works on the house	350,000SR;
Loss of use of dwelling house	150,000SR;
Moral damages for distress, depression due to loss of relative, Anxiety, mental trauma, stress	200,000SR
TOTAL	700,000SR'

[2] The defendant's written statement of defence is fairly concise. And I will reproduce the essential elements of it.

'1. Paragraph 1 of the plaint is admitted.

2. Paragraph 2 is denied. Defendant avers that the plaintiff and he only agreed to construct a veranda to the plaintiff's existing house and an extension to her kitchen. Defendant was to provide materials for said construction some of which plaintiff failed to provide on time.

3. Paragraph 3 and 4 are denied. Plaintiff is put to strict proof thereof.

4. Paragraph 5 is also denied and the plaintiff is put strict proof thereof.

5. Paragraph 6 is denied. Defendant avers that he was told by the plaintiff to seize [cease] all works as Plaintiff could not provide materials as agreed, for the above referred constructions. At no time during the period of time that works were seized [ceased] had plaintiff inform Defendant of any defects in the work.

6. Paragraph 7 is denied. Defendant repeats paragraph 6 above.

7. Paragraph 8 is denied and Plaintiff is put to proof thereof.

8. Paragraph 9 is also denied. Plaintiff is put to strict proof thereof.'

[3] The defendant prayed that the plaintiff's claim be dismissed with costs.

[4] The plaintiff testified in person and called two other witnesses. And her case was closed after failing to obtain another witness. The defendant testified in person and called 2 additional witnesses.

[5] The plaint leaves much to be desired. No terms of the oral contract are set out. Though mention is made of defective works no particulars thereof are provided. The plaint is set out in very general and imprecise terms rather than **'a plain and concise statement of the circumstances constituting the cause of action and where and when it arose and of the material facts which are necessary to sustain the action.'** as envisaged by section 71 of the Seychelles Code of Civil Procedure. May be counsel ought to use the drafting aids found in such books as Bullen and Leake's Precedents on Pleadings; and or Odgers on High Court Pleadings & Practice in order to present properly drafted pleadings that help guide both the parties and the court with regard to the dispute before the court.

- [6]** The plaintiff lacks significant detail to support a breach of contract claim. No terms of the oral contract are set out. Neither is the nature of breach of such terms articulated. The defendant is accused that he ‘failed to restore the house in its original state and had further failed to pay the plaintiff damages due to defective works that he had carried out on the house.’ The defective works are not disclosed. The contract was not to restore the house in its original state. The facts which are necessary to sustain the action have not been stated in my view. I am constrained to find that this plaintiff does not disclose a cause of action based on breach of contract.
- [7]** Notwithstanding the foregoing from the evidence adduced by both sides in this case the facts not in dispute are as follows. The plaintiff is the owner of a house at Anse Boileau on Mahe. She decided to make an extension by adding a dining room to the kitchen; or extending the kitchen to create an eating area and a veranda. The defendant is a mason. The plaintiff retained the defendant to construct the extension on an oral contract. The construction started on a date that both parties cannot recall. The extension was not completed. On the 3rd July 2011 in the evening at about 8.30PM while the plaintiff was entertaining guests an accident or incident occurred. A niece of the plaintiff was struck by a block or blocks and was injured. She was taken to hospital but subsequently died a few days later.
- [8]** There is no evidence to prove that the plaintiff suffered loss and damage for defective works or even loss of use of the house at all. Defective works are not detailed both in the pleadings and the evidence. There is no evidence to support the claim that there was loss of use of the house for any period. There is no evidence to determine the cause of death of the niece. The claim for moral damages resting on the death of the niece is also not established in the absence of a cause of death and ascribing responsibility to the defendant’s breach of contract or ‘fault’.
- [9]** The evidence adduced in relation to her injury does not establish that such injury was caused either by the bad workmanship of the defendant or by the sub standard nature of materials used in building the extension and veranda or any other cause attributable to the defendant. No evidence has been adduced to show that the defendant brought on site and used sub standard materials. No direct evidence has been adduced to show that the

defendant employed bad workmanship or failed to use the necessary skill and care expected of a person in his trade in building the said works. It is not even alleged anyhow on the plaint that there was bad workmanship or sub standard materials not fit for purpose were used in the construction and that this is what led to the collapse of the blocks from the wall.

[10] The testimony of the plaintiff on record reads in part as follows:

‘Q Mrs. Marguerite do you know one Mr. Wilfred Alcindor?

A:Yes.

Q: How did you come to know Mr. Alcindor?

A: I have known him by his wife that we use to work together.

Q: And what does Mr. Alcindor do as a profession?

A: I know that he does the work as a mason.

Q: Did you ever contact Mr. Alcindor to do any work for you?

A: Yes we did have contact between each other.

Q: Now what kind of work did Mr. Alcindor carried out for you?

A: He was building a piece of dining room and a veranda.

Q: Now who was paying Mr. Alcindor?

A: I was the one paying Mr. Alcindor.

Q: And now tell the Court when did he start to do the job for you?

A: I do not really recall the date.

Q: And would you know when he stopped the work?

A: He stopped working when the incident occurred.

Q: Now tell the Court what incident that occurred?

A: It was a Sunday the 3rd.

Q: The 3rd of which month?

A: July.

Q: Do you know which year it was?

A: I guess in 2011.

Q: Yes continue.

A: When the daughter of my sister was holding the border of the veranda all of the bricks fell on her.

Q: What happened to her?

A: We brought her directly to the hospital and on the Tuesday she passed away.

Q: And how old was she?

A: 27years of age.

Q: Did you advice the defendant about the incident?

A: Yes I called him early in the morning I told him about the incident and he did not want to come so I asked him to come to have a little chat.

Q: You said he never came to the scene?

A: He came to me at the house and told me that everything that he has done was good.

Q: Did you asked him to rectify the defects?

A: Yes but he did not pay any attention to me.

Q: He did not pay any attention to you.

A: No.

Q: So what happened when he failed to rectify the defects what did he do?

A: We stop talking to each other because he never approach me for us to talk about anything.'

[11] The other accounts of what happened just before the bricks or blocks hit Agniella are somewhat at variance with the account of the plaintiff. PW2 states that Agniella was posing for photographs when the blocks fell on her. While PW3 stated that Agniella was behind the wall when her sister shouted to her to be careful as the wall was coming down. And then the bricks fell on top of her.

[12] This is a point the defendant took up on cross examination of PW2.

'Q I do not understand because the first witness said that Agniella grab the bricks but the 2nd witness said that she was taking pictures.

A: Maybe the distance that the two persons were standing I would not know. I am telling you what I have seen. I am telling you the truth.

Q: I still do not understand why the 2nd witness said that Agniella was taking pictures but the 1st witness would say that Agniella was holding the bricks.

A: I would not know because it depends on the distance where the 1st witness was and where I was. I have said to the Court what I have seen and it is the truth.

[13] The cause of the collapse of the brick wall has not really been established. At least not by direct evidence. I do not find sufficient circumstantial evidence to explain the cause of the collapse of the wall either. In the circumstances it is not possible at this stage to conclude that the collapse of the wall leading to the injuries suffered by Agniella was due to either a breach of the terms of the contract between the plaintiff and the defendant or even a 'faute' or fault of the defendant. It is important to note though that 'faute' or 'fault' has not been advanced by the plaintiff on its pleadings or its evidence.

[14] This duty of a claimant to adduce necessary evidence to support her/his/its claim 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.”

[15] The words of Lord Goddard, C.J. in Bonham-Carter v Hyde Park Hotel Ltd. (1948) 64 TLR 177 at page 178, are apt in this case. He opined:

"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."

[16] Similarly parties and more particularly their legal advisors and attorneys at law should 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."

[17] The plaintiff has failed to discharge the evidentiary burden of proof cast upon her by the law. In the result I am left with no alternative but to dismiss this case with costs.

Signed, dated and delivered at Ile du Port on 20th day of February 2014.

F M S Egonda-Ntende
Chief Justice