

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CA31/2014

Appeal from Magistrates Court Decision 209/2013

[2015] SCSC483

1. Eddy Laporte

2. Geraldine Laporte

Appellants

versus

Chandler Prakash

Respondent

Heard: 15th October 2015

Counsel: Melchior Vidot for appellant

Karen Domingue for respondent

Delivered: 26th October 2015

JUDGMENT

Twomey, CJ

[1] The Appellants entered into an agreement with the Respondent on 12 July 2010 in which they agreed that the Respondent would construct and complete a building on their land within a period of fifty-two weeks. It was further agreed that the Appellants would provide labour and the Respondents the materials for the construction of the building.

[2] It was a condition of the contract that the Respondent would be paid SR1, 150,000,000 in eight instalments for his labour and that the Appellants would retain a sum amounting to

10% from each of the instalments which was to be released, one half upon the practical completion of all the building works and half upon the end of the defects liability period. In other words SR 115,000 would be retained until the building was completed and no defects were apparent.

- [3] The Respondent in a Plaint entered against the Respondents on 11th September 2013 claimed that a total of SR78, 750 was retained as a breach of the agreement between the parties, of which SR28,750 was retention monies for latent defects and SR 50,000 for the cost of premixed concrete.
- [4] The Appellants in their defence claimed that the Respondent had not completed the works within the time frame agreed and that the SR 28, 750 had been retained as defects had manifested themselves after construction whilst SR50, 000 was for the purchase and transport of premixed concrete as the Respondent had been unable to carry out the mixing on site as agreed. The issue of defects was not explored in any great detail and the nature and cost of the defects alleged not explicated.
- [5] In a judgment given on 1st July 2014 the learned Magistrate Ng’hwani found that the practical completion of the building was done on 2nd December 2011, some six months outside the time frame agreed in the contract. She also found that the total cost of the concrete provided was SR 106,482, that there was no room on site to mix the concrete and that in any case even if the concrete had been mixed on site the Appellants were under an obligation to provide the composites for the concrete. Further as no evidence was provided by the Defendant as to how the figure of SR50, 000 was arrived at for deduction, that amount remained owing.
- [6] As the Appellants had already paid the Respondents some of the retention monies the learned Magistrate awarded the balance from the sum kept back, that is the sum of SR 63, 750.
- [6] The Appellants have appealed the decision on one ground only, namely that the learned Magistrate erred in finding that pre-mixed concrete should be considered as construction material.

[7] In their written submissions the Appellants have supported this ground by stating that although the contract clearly provided that the Respondent would be responsible for labour and the Appellants for materials, it was clear from evidence adduced that the intention of the parties was that the Respondent was to do the mixing of the concrete on site.

[8] I have no doubt that this may have well been the intention of the parties but as submitted by the Respondent, it became obvious that space was limited and the mixing could not be done on site. Premixed concrete was ordered and delivered. Concrete is made up of a mixture of composite materials. It is logical to infer that the aggregates for the mix, that is sand, cement and rock aggregate would have had to be purchased by the Appellants. The labour for mixing the aggregates would have been borne by the Respondent.

[9] No evidence has been adduced to indicate the proportion of the retained SR50, 000 to be attributed to the labour for mixing the concrete and the transportation cost of the premixed concrete. In the absence of such evidence the court is unable to conjure up a figure for the Appellants. Indeed there is no counterclaim or set off claimed by the Appellants.

[10] This court has reiterated on a number of occasions the maxim that he who avers must prove see *Suleman v Joubert* SCA 27/2010 , *Gopal & Anor v Barclays Bank* (2013) Vol II SLR553, *SBC v Beaufond* (unreported) SCA 29/2013. Article 1315 of the Civil Code also states that:

“He who demands the performance of an obligation shall be bound to prove it...”

[11] I agree with the learned Magistrate that the Respondent was able to prove on a balance of probability that he was owed the money under the agreement and while I agree with the Appellants that a percentage of the premixed concrete must include a figure for the mixing and transport costs, these figures have not been provided nor proven to this Court. I am in the circumstances unable to make a deduction from the sum of SR 63, 750 still owing and therefore dismiss this appeal with costs.

Signed, dated and delivered at Ile du Port on 26th October 2015

M Twomey
Chief Justice