

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CA002/2014

Appeal from Magistrates Court Decision /20

[2016] SCSC 122

ANDREW BENOITON

Appellant

versus

VANESSA LARUE

Respondent

Heard:

Counsel: Mr. M. Vidot for appellant

Mr. E. Chetty for respondent

Delivered: 29 February 2016

JUDGMENT

Renaud J

[1] In the Court below, the present Respondent as the Plaintiff then, sued the instant Appellant who was the then Defendant. The latter carried on business as a Construction Contractor. The cause of action arose out of a written agreement by which the Appellant was to build a house for the Respondent. The Respondent paid the Appellant the total sum of SR186,000.00 out of the agreed price of SR198,000.00.

- [2] The Respondent alleged that the Appellant breached the agreement by failing to construct the house in a workmanlike manner and utilized substandard materials resulting in certain defective works, some of which defects are not practical to rectify. The Appellant also did not fully complete the agreed works.
- [3] The Appellant did not dispute that there were certain minor defects but refuted the allegation of poor workmanship and the utilisation of substandard materials.
- [4] The Court below concluded that the Respondent had proved her case against the Appellant and she was accordingly awarded the global sum SR109,000.00 as damages together with interest and costs.
- [5] This appeal is principally against the quantum awarded. The original claim of the Respondent was SR321,000.00. The award of SR109,00.00 are for the following heads:
- (a) SR49,500.00 for rectification of defective works
 - (b) SR 9,000.00 for reports of QS and Engineer
 - (c) SR50,000.00 for moral damages
- [6] The Appellant being aggrieved by the decision of the Learned Magistrate given on 28th January, 2014 appealed against the whole decision on 3 grounds.

Ground 1

- [7] The Learned Magistrate was wrong to have dismissed the evidence of Jovanie Molle who was the Plaintiff's project officer on the grounds that he was an interested party.

Ground 2

- [8] In assessing the quantum of damages, the Learned Magistrate erred in not considering that the Respondent failed to mitigate her loss by refusing to accept an award of SR18,000.00 from the Ministry of Land Use and Housing in order to rectify alleged defects in construction and refusing the Appellant access to the premises to rectify such alleged defects.

Ground 3

- [9] The Learned Magistrate erred in awarding the Respondent the sum of SR50,000.00 for moral damage. The suit was for breach of contract where normally award for moral damage is not entertained. The sum awarded is grossly exaggerated.

Ground 1

- [10] The Appellant argued that it was wrong for the Learned Magistrate to dismiss the entire evidence of the Project Officer Mr Jovanie Molle, on the ground that he was an interested party, thereby failing to give full consideration of the case of the Appellant which resulted in making awards which were not based on a full appreciation of facts in issue.
- [11] I note that in 2008 Mr. Molle was in the employment of the Ministry of National Development as Project Officer responsible for the region of Victoria and Anse Aux Pins. He had five members of staff to assist him in discharging his duties.
- [12] It was the Housing Finance Company which financed the construction of the house of the Respondent by giving her a housing loan. The written Agreement for the construction of the house was dated 7th October, 2012 between Respondent and Appellant. Mr. Molle was appointed Project Officer in that Agreement.
- [13] The Project Officer was appointed by the Respondent as her Representative for all matters concerning the contract. Inter alia, the Project Officer was authorized to appoint Clerk of Works or an Inspector to assist him in his duties. The Agreement, apart from other matters, sets out the onerous obligations, authority and the considerable responsibilities of the Project Officer. For example, that the works were to be executed under the direction and to the entire satisfaction of the Project Officer, who should have access to the works at all times. All materials used for the works should be of the best quality and description and should be to the Project Officer's approval. All workmanship should be to the best standards and to the approval of the Project Officer. The Project Officer should certify the date when in his opinion any defects, excessive shrinkages or other defects which appear within 6 months of the date of practical completion and were due to materials or workmanship not in accordance with the contract or to the action of

the elements occurring before practical completion should be made good by the Contractor entirely at his own cost unless the Project Officer should otherwise instruct. The Project Officer should certify the date when in his opinion the Contractor's obligations have been discharged, and many other matters.

- [14] The question that arose is whether the Project Officer by himself or through his staff actually properly discharged all the responsibilities under the Agreement. If the Project Officer had failed to do so, his evidence would carry less weight or no relevance at all.
- [15] According to the evidence of the Respondent, when she informed Mr. Molle of the defects in the house Mr. Molle initially agreed to come and inspect but he did not do so. The Respondent claimed that Mr. Molle refused to come and address the Appellant regarding the defects. She had to resort to complaining to the President and to then CEO of HFC Mr. Bastienne. Mr. Bastienne came to inspect the house personally and he admitted that there were indeed defects.
- [16] Mr. Molle testified that he personally inspected the site at the beginning of the project and also when the roof was being constructed. He claimed to have done routine visits thereafter and on certain occasions sorted out matters raised by the Respondent with the Appellant. He took up the complaints of the Respondent with the Appellant regarding the post of the house, the foundation work which was not properly compacted. According to him the Appellant rectified these. He testified that his Technicians visited the site routinely and there were no complaints until the arch of the veranda was found to have not been properly done. He got the Appellant to rectify that. When building the roof structure there was a supporting post missing and he got the Appellant to redo that also. After the roofing was completed the roof was found to be sagging and he called on the Appellant to adjust and redo a perfect slope but the redone works needed more adjustment to be done. Mr. Molle testified that there were also issues regarding electrical wiring works and the qualities of electrical materials used. Mr. Molle testified that the Appellant stated that he would not be able to do the painting works, gutter and fascia board and the Respondent had to attend to these works herself at her own cost. Mr. Molle testified that he went on site to verify further complaints of the Respondent with

regards to the floor, toilets and hatch arch. Mr. Molle estimated that it would cost another SR18,000.00 to rectify those defects which the Ministry agreed to finance from the retention money. The Respondent refused and opted to sue the Appellant instead. When the Respondent took occupation of the house there were still issues and questions and the Engineer had to come on site.

[17] Mr. Molle confirmed that when the Respondent moved in the house there were still things that happened to the house such as cracks and leakages and issues with toilet. Mr. Molle also agreed that there is still a small bent in the roof of the house.

[18] When presented with photographs exhibited, Mr. Molle observed that the use of excessive white cement to patch up cracks and distortions were corrected. He did not comment on the issues of the defects where the wall plastering meets the internal and external ceiling.

[19] Mr. Molle conceded in examination-in-chief that –*“I was 95% satisfied regarding the workmanship and things could be improved if contractor was allowed on site to rectify problems brought to my attention.”*

[20] The brief extract of the testimonies of Mr. Molle in examination-in-chief conveyed enough to indicate that the Appellant did not perform to the required standard. It is understandable and rightly so why the Learned Magistrate did not rely on the evidence of Mr. Molle as a defence witness of the Appellant. The evidence of Mr. Molle, if anything, supported the case of the Respondent.

[21] As the Project Officer of the Respondent, Mr. Molle was indeed an interested party in this matter and has good reason not to expose any possible failure on his part in the proper discharge of the functions of the Project Officer in terms of the the Agreement. In any event I do not find how the evidence of Mr. Molle would have been of further assistance to the Appellant’s case that would assist the Learned Magistrate to reach the conclusion she did. The Learned Magistrate had the added benefit of observing the demeanour of Mr. Molle when testifying before her in order to assess the reliability and veracity of his testimonies.

[22] In the final analysis I find the Learned Magistrate was not wrong in any way if she did not rely on the evidence of Mr. Molle. In any event the Learned Magistrate did not cause any miscarriage of justice in not relying on the evidence of Mr. Jovanie Molle when he testified on behalf of the Appellant

[23] The first ground of appeal has no merit and therefore fails.

Ground 2

[24] Did the Learned Magistrate, when assessing the quantum of damages, err in not considering that the Respondent failed to mitigate her loss when she refused to accept SR18,000.00 from the MLUH to rectify alleged defects?

[25] After many complaints the Respondent obviously was not satisfied with the way the situation had developed during the period that the Appellant was undertaking her project. Whether the offer by a third party to the Agreement would have any bearing on the assessment of the quantum is neither here nor there. The SR18,000.00 was included in the retained sum of SR12,000.00 under the Agreement. That sum would in any event have to be repaid by the Respondent would as part of her housing loan. In other words she would be receiving her own money which was retained as penalty for non-performance by the Appellant. The issue of mitigation could have possibly arose if the Appellant had from his own funds offered to refund the Respondent SR18,000.00 to assist her in mending the defects.

[26] I find that in assessing the quantum of damages, the Learned Magistrate did not err in not taking into consideration the SR18,000.00 since that did not amount to mitigation of the liability of the Appellant towards her.

[27] I find no merits in this ground of appeal and it is dismissed.

Ground 3

[28] The Learned Magistrate err in awarding the Respondent the sum of SR50,000.00 as moral damage?

- [29] No doubt the suit before the Court was for breach of contract. In such cases normally award for moral damage is not often entertained unless there is good reason to do so.
- [30] Article 15(ii) of the agreement provides that –
- “If the works are not completed by the Contract completion dated or by any extended completion date fixed under sub-clause (i) hereof then the Contractor shall pay to the Employer liquidated damages in accordance with the appendix during the period which the Works remain uncompleted.”*
- [31] Unfortunately there is no such appendix to the Agreement made available to this Court. The Agreement, however, was entered into on 7th October, 2008 and the Respondent received the keys of the house on 12th October, 2010 – a period of 2 years to complete a one-bedroom house.
- [32] The original total price for the project was SR198,600.00. A sum of SR12,000.00 was retained for defects. The Appellant had received a total of SR186,600.00 out of that contracted sum.
- [33] On the other hand the Appellant gross income arising from this project, after deducting the Court’s award of SR109,000.00 from the sum of SR 186,600, is SR77,000.00.
- [34] The end result is that the Respondent would have disbursed only SR77,000.00 for the construction of her house, albeit with certain defects.
- [35] It is true that the house was not properly constructed and there were issues with its floor, ceiling, roof, roof overhang, window frames, finishing, workmanship and quality of materials used, yet at the end of the day the Respondent took over her house and is using it albeit with those elements of imperfection.
- [36] I note the Report of the Quantity Surveyor and also that of the Engineer that to bring the work to standard at the price in August 2011 would be SR61,500.00. That sum is equivalent to 31% of the original contract price. That means the works that the Appellant did was equivalent to 69% completion. A 69% completed house would not be such that I see in the photos exhibited before the Court. The house was completed and habitable but

contained certain elements of defects. The Respondent ought not to make a profit out of the situation. Likewise the Appellant ought not to get away with his part non-performance of the Agreement.

[37] Agreeably the Respondent must have suffered an element of moral damage due the non-performance of the Appellant and that she ought to be compensated for that. As is normal in such cases arising under a contract, interest is awarded instead of moral damage, unless there are good reasons for doing otherwise. I find that there is no such reason in the instant case.

[38] I hereby set aside the award of SR50,000.00 as moral damages and in lieu award the Respondent 10% interest at the commercial rate on the sum awarded.

[39] To the extent stated above this ground of appeal succeeds.

[40] I upheld the following awards made by the Learned Magistrate made in the Court below:

(a) SR49,500.00 for rectification of defective works

(b) SR 9,000.00 for reports of QS and Engineer

[41] In the circumstances judgment is entered in favour of the Respondent as against the Appellant in the sum of SR58,500.00 with interest at the commercial rate of 10% per annum with effect from the date of this judgment.

[42] I also award cost in both the Court below and in this Court.

Signed, dated and delivered at Ile du Port on 29 February 2016

B Renaud
Judge of the Supreme Court