

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: 35/2013

[2017] SCSC 614

PUBLIC UTILITIES CORPORATION

Plaintiff

versus

REHOBOTH BUILDERS PTY LTD

Defendant

Heard:

Counsel: Mr. Rajasundaram for Plaintiff
Mr. Gabriel for Defendant

Delivered: 13 July 2017

JUDGMENT

F. ROBINSON, J

[1] **BACKGROUND FACTS**

[2] This suit is before the court on Plaintiff's plaint filed on 11 December, 2013, against Defendant, for breach of contract. On 26 March, 2014, Defendant filed a statement of defence denying the claim of Plaintiff and a counterclaim for breach of contract.

[3] On the day of hearing learned counsel, Mr. Gabriel, and Defendant/Counterclaimant were absent. Upon application of learned counsel for Plaintiff/Defendant to the counterclaim, the court made order for the hearing of the suit to proceed *ex parte*.

[4] **THE CASE FOR PLAINTIFF**

[5] The case for Plaintiff is as follows. Plaintiff is a company involved in the supply of electricity and water. Defendant is a locally registered construction company that was awarded a civil engineering contract, to lay pipes, entitled "*Upper Mont Plaisir Water Supply Project*", dated 9 November, 2010, for the sum of Seychelles rupees 3,500,480.00/-. The said contract is hereinafter referred to as the "*Contract*". Plaintiff maintains that despite various extensions, Defendant failed to complete the work within the agreed twelve months (i.e., by 8 November, 2011) and "*failed to adhere the quality of works*"; thereby breaching the Contract. It is also the case for Plaintiff that Defendant delayed the commencement of the work. Moreover, Plaintiff contends that it made various payments to Defendant "*as part payments due*" under the Contract. On 7 May, 2013, Plaintiff terminated the Contract with Defendant and demanded that Defendant cease its work and settle its accounts, as Defendant was allegedly over paid for its work under the Contract. In a letter sent on 14 March, 2013, Plaintiff informed Defendant of the details of the alleged overpayment, namely Seychelles Rupees 357,780.96/-.

[6] Plaintiff contends that Defendant's breach resulted in serious prejudice, financial loss, and embarrassment and requests that the court orders Defendant to refund the sum of Seychelles rupees 357, 780.96/-, with interest at the rate of 9% per annum on the principal as from 7 May, 2013 – an amount of Seychelles Rupees 16,100.60/-, as well as the cost of the proceedings.

[7] ***The evidence of Steve Mussard*** (hereinafter "*Mr. Mussard*") — Mr. Mussard is Plaintiff's Managing Director in charge of the supply of water and sewerage. He has been working for Plaintiff for the past 19 years. He is aware of the Contract with Defendant and that the project consisted of laying water pipes, building a reservation and pumping station to serve the Mont Plaisir community. The Contract is before the court as exhibit P1. He testifies that Defendant was not professional in its performance and execution of the project, and therefore that Plaintiff had to terminate the Contract due to Defendant's

"lapses . . . in terms of commencement of the contract." (Proceedings of 30 March, 2017, at 9:45 a.m., at pp 5-6 of p 15).

- [8] Regarding Defendant's contention that Plaintiff had delayed the supply of materials, Mr. Mussard testifies that that was not totally correct. He acknowledged that there were some delays in certain aspects, but that there were other things Defendant was instructed to do; therefore, given that there was a lot to be done for the project, Defendant could not complain that Plaintiff had delayed them.
- [9] Prior to issuing the notice of termination, dated 7 May, 2013, which is before the court as exhibit P3, Mr. Mussard testifies that there were several meeting with Defendant, where Plaintiff expressed its concerns regarding the delays and their impact. He testifies that in February, 2013, Defendant sent Plaintiff a letter, dated 11 February, 2013, suggesting that Defendant did not want to proceed with the Contract *"until the extras that [were] sent to [Plaintiff] [were] approved and [notified to them] in writing."* The letter is before the court as exhibit P2. Defendant sent a letter to Plaintiff on 13 August, 2013, which is before the court as exhibit P4. In the said letter, Defendant denied all allegations of breach of the Contract and made a renewed claim of Seychelles rupees 1,605,552.00/- for damages resulting from Plaintiff's alleged breach of the Contract. Mr. Mussard also confirms that on 14 March, 2013, Plaintiff had replied to a letter sent by Defendant on 26 February, 2013. In its letter, Plaintiff denied and refuted all the claims made by Defendant, exhibit P5 (letter from Plaintiff to Defendant, dated 14 March, 2013). Moreover, Mr. Mussard testifies that it was normal procedure to pay advances to contractors and that there was a provision in Defendant's contract for such advances. He explains, however, that despite such advances, Defendant had commenced work with a lot of delays. Mr. Mussard testifies that the project was of national interest because if it was not completed on time, many people could not be supplied water to their households.
- [10] According to Plaintiff's breakdown of payments, (exhibit P6, computation of Plaintiff's payment and value of work done by Defendant, dated 2 September, 2013), Plaintiff had paid a total amount of Seychelles Rupees 1,806,347.86/- to Defendant, whereas the value

of measured work was Seychelles Rupees 1,448,557.00/-. He testifies, therefore, that Defendant had been overpaid the sum of Seychelles rupees 357,790.86/-.

[11] Mr. Mussard then indicates that Plaintiff had to re-tender the project to another contractor, (exhibit P7, letter from Plaintiff to Procurement Oversight Unit, dated 17 February, 2014), and that Plaintiff's application to the National Tender Board was approved for "Limited Bidding" by way of a letter dated 27 November, 2013. Finally, Mr. Mussard testifies that regarding Defendant's claim for damages, those were all amounts Defendant should have done cost provisions for at the time of the Contract.

[12] **DISCUSSION**

[13] The following issue is framed for the determination of the court:

In the main, whether Plaintiff has proven its claim for a refund in the sum of Seychelles rupees 357, 780.96/-?

[14] Based on the evidence and the documentary evidence the court makes the following findings. The admissible evidence that is relevant to the issue is limited. Upon review, it is not exactly clear what forms the basis of Plaintiff's refund request. Exhibit P6 purports to indicate the "Advance Paid" in the sum of Seychelles rupees 1,400,048.00/- and the "Amount Paid" in the sum of Seychelles rupees 406,299.86/-. Based on this evidence, Plaintiff maintains that it overpaid Defendant because the difference between the money paid to Defendant (Seychelles rupees 1,806,347.86/-) and the alleged value of the measured work performed by Defendant (Seychelles Rupees 1,448,557.00/-) results in a Seychelles Rupees 357,790.96/- difference. The court has to determine the probative worth of exhibit P6 in relation to the facts in issue? The court reads *Adrian Keane, The Modern Law of Evidence Second Edition D Weight* at p. 20 —

"Questions concerning the weight to be attached to evidence are related to but distinct from those concerning its admissibility. The weight of evidence is a question of fact."

It is quite unfortunate that Plaintiff has not provided any evidence that explains how it valued the work and in support of the amounts mentioned in exhibit P6, which would assist the court in evaluating the weight of its evidence. Plaintiff simply presents conclusions via letters and Mr. Mussard's testimony on the facts in issue.

[15] For the reasons stated above, the court finds that Plaintiff has not proven to the required standard its claim for a refund in the sum of Seychelles rupees 357,780.96/- and that Defendant has breached its obligations and caused it prejudice. The court dismisses the plaint.

[16] The court dismisses the counterclaim with costs to Plaintiff.

[17] Notice of this judgment under the seal of the Registrar of the Supreme Court to be sent to Defendant, through counsel, forthwith.

Signed, dated and delivered at Ile du Port on 13 July 2017

Fiona Robinson

Judge of the Supreme Court