IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CC07/2017

[2018] SCSC 275

ASCENT PROJECT SEYCHELLES PTY LTD

Plaintiff

Versus

MAESTRO LTD & OR

Defendant

Heard: 16 November 2017, Submissions 17 January 2018

Counsel: Mr. Daniel Belle for plaintiff

First Defendant absent and unrepresented

Mr. Elvis Chetty for the Second Defendant

Delivered: 20 March 2018

JUDGMENT

M. Twomey CJ

[1] The Plaintiff, a construction company, entered into a building contract with the First Defendant to construct telecommunication towers at Perseverance and Takamaka on its behalf for the Second Defendant for USD 50,000. In the event only one of the towers was completed as the second one had planning issues which did not permit its construction to proceed.

[2] It is the Plaintiff's case that the work was completed to the satisfaction of both Defendants on 15 July 2014, and the Second Defendant thereafter took possession of the first tower but the final payment for the said work remains unpaid.

[3] There is no defence filed by the First Defendant while the Statement of Defence of the Second Defendant is to the effect that there is no cause of action disclosed against the Second Defendant, and that it has made full payment to the First Defendant for the said works.

[4] At trial, Rajesh Pandya for the Plaintiff produced the agreement signed by the Plaintiff and the First Defendant for the construction of the towers.

[5] Exchange of correspondence between the Plaintiff and the Second Defendant's employees and/or contractors demonstrate that the latter were aware of the subcontract between the Plaintiff and the First Defendant. It is also in evidence that the Second Defendant's employees or representatives (Marc d'Offay and Andrew Sammy) were on site during the construction period.

[6] Mr. Pandya also testified that at all times the instructions concerning the construction of the tower were given by Marc d'Offay, the Second Defendant's engineer.

[7] The correspondence produced as exhibits also show that the Second Defendant invoiced the First Defendant and was paid for the contracted works by the Second Defendant.

[8] Mr. Maxime Morel, the Second Defendant's Manager for Support and Litigation accepted that the Second Defendant had entered into a contract with the First Defendant on 22 January 2014 for the construction of the communication towers. He accepted that the Second Defendant's engineer liaised with the Plaintiff but that the engineer was Andrew Sammy and not Marc d'Offay.

[9] The First Defendant invoiced the Second Defendant for the works and it made payment to it on 15 July 2014 by bank transfer after inspecting the works.

[10] Mr. Andrew Sammy stated that he was the Network Manager of the Second Defendant and that Marc d'Offay was indeed the civil engineer contracted for the works. As far as

he was concerned his company had contracted with the First Plaintiff and not the Second Defendant.

[11] The parties were asked to make submissions on the difference between an agency and a subcontract. The Plaintiff has submitted that the First Defendant was an agent for the First Defendant pursuant to Article 1984 of the Civil Code. In its submission agency need not be expressly made but can be inferred by the acts of the party when there is an arrangement or agreement between the agent and the principal.

[12] Further, it is the Plaintiff's submission that clause 14 of the agreement between the First and Second Defendant contains a stipulation for another which binds the Second Defendant in relation to the Plaintiff. The Second Defendant has made no submissions.

[13] First, since the First Defendant has neither filed a Statement of Defence nor made an appearance and since there is sufficient evidence adduced to show that the works carried by the Plaintiff were made contractually and only partly paid for, I find that the First Defendant is liable to the Plaintiff for the sum claimed, that is, SR 477,718.97 with commercial interests and costs.

[14] Second, insofar as the relationship between the parties is concerned I find the following provisions of the Civil Code relevant:

> *Article 1165 1: 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.*
>
> *Article 1121 1: A person may stipulate for the benefit of a third party. Such stipulation shall not be revoked if the third party has declared that he wants to take advantage of it. Provided that that party has a lawful interest.*

[15] While Article 1165 1 expresses the principle of privity of contract, Article 1121 permits standing for third parties to sue on a contract under certain circumstances, but these circumstances are limited. Article 1121 cannot be used to circumvent the will of the parties to a contract, but rather to put into effect their intentions. Hence, when it is specifically stipulated that the contract is intended to benefit a third party, that intention

will be put into effect by the court. There is no such provision in the contract in the present case. As was stated by the Court of Appeal in *Kolsch v Lefevre* (1993-1994) SCAR 54, contractual obligations and rights are extended to a third party by reason of the terms of the agreement. The beneficiary must be identified. That is not so in the present case.

[16] There is also no evidence of the Second Defendant being an agent of the First Defendant. The reliance by the Plaintiff on the averment of the Second Defendant that the First Defendant performed the works on its behalf is unfounded. The terms used are perhaps infelicitous but not proof of agency. Article 1984 of the Civil Code specifically states that an agent is required to act in the name of the principal. I see no evidence of the Second Defendant acting on behalf of the First Defendant. True it is that the Second Defendant inspected the works carried out by the Plaintiff for the First Defendant and expressed its dissatisfaction that the First Defendant had not paid the Plaintiff but that is all.

[17] Insofar as the Plaintiff and the Second Defendant are concerned, I find from the evidence adduced that the Second Defendant was a third party as regards the contract between the Plaintiff and First Defendant and cannot be held liable for a breach for the terms of that contract by the First Defendant.

[18] The Plaintiff has also relied on clause 14 of the Agreement it signed with the First Defendant. Clause 14 of the subcontractor agreement stipulates:

> *"This agreement shall be binding upon and ensure to the benefit of, the parties hereto, their heirs and assigns."*

[19] The Plaintiff has submitted that the definition of "assigns" (those to whom rights have been transferred by title) would include the Second Defendant. I am of the firm view that this submission is erroneous. There is no transfer of title of any sort between First Defendant to the Second Defendant or for that matter to the Second Defendant. There only exists a contractual relationship between the First and Second Defendant and a sub-contractual relationship between the Plaintiff and Second Defendant.

[20] The reliance of learned Counsel for the Plaintiff on the principle of "stipulation for another" pursuant to Article 1121 is therefore misconceived. A stipulation for another

must form part of the contract itself. I cannot see such a stipulation in the subcontractor agreement dated 24 March 2012.

[21] In the circumstances I find that there is no liability on the part of the Second Defendant. As I have stated above, I do find the First Defendant has breached the agreement with the Plaintiff by failing to pay the last instalment for the works completed.

[22] There shall therefore the judgment for the Plaintiff against the First Defendant in the sum of SR 477,718.97 with commercial interests and costs.

Signed, dated and delivered at Ile du Port on 20 March 2018

M. Twomey, CJ
Chief Justice