

SUPREME COURT OF SEYCHELLES

Reportable

[2019] SCSC 852
CS43/2019

In the matter between

EVELINA MARCHESSEAU
(rep. by Olivier Chang-Leng)

Plaintiff

and

EUODOO (PTY) LTD
(rep. by Kelly Louise)

Defendant

Neutral Citation: *Marchesseau v Euodoo (Pty) Limited* CS 43/2019 [2019] SCSC 852 (3 October 2019)

Before: Twomey CJ

Summary: breach of contract of contrat d'entreprise rescission-damages

Heard: 4 July 2019 - 24 July 2019

Delivered: 3 October 2019

ORDER

The Defendant is ordered to pay the Plaintiff the total sum of SR791, 700,000 with interest and costs.

Copies of this decision to be served on the Seychelles Licencing Authority and the Ministry of Employment, Immigration and Civil Status.

JUDGMENT

TWOMEY CJ

The Pleadings

[1] In a Plaintiff entered in March 2019, the Plaintiff averred that he had entered into a contract with the Defendant in November 2017 in which the Defendant had agreed to construct a

vertical extension to her home in consideration of the sum of SR1, 300,000 with the works to be completed in approximately five and a half months.

- [2] The Plaintiff avers that in breach of the contract the Defendant failed to commence the works as envisaged but in February 2018 the parties signed a written contract which was further amended in May 2018. It was a term of the contract that the works were to be completed by 31 October 2019 and that during the period of the works the Plaintiff would vacate her home with the rent of alternative accommodation for the Plaintiff to be paid by the Defendant.
- [3] The Plaintiff further avers that despite repeated requests the Defendant has failed, neglected and or refused to complete the works or refund the money advanced to him by the Plaintiff together with the money she has spent for rented accommodation. She has also claimed for moral damages for her ordeal.
- [4] In his statement of defence the Defendant has demurred stating that it was prevented by the Plaintiff's sister from accessing the property to carry out the contracted works and that he has spent a significant amount of the contract price on materials and labour costs.

The Evidence

- [5] The Plaintiff testified that she does not own property in Seychelles but that she had been residing with her mother, husband and her sister at her mother's house in Souvenir, La Misère at the material time. Her husband had met the managing director of the Defendant, a building contractor at the hospital. He had subsequently approached them and offered his services for their project which consisted of a vertical extension to her mother's house.
- [6] On 14 October 2017 the Managing Director of the Defendant company (hereinafter the Defendant) wrote to her husband and her quoting for the works proposed. He estimated the price of the works at SCR 1,582,737.20 and stated that the work would be completed within 4 months. He also requested 50% advance payment of the total contract sum for which he would provide a payment bond form his insurance company. The details of the

works for which he quoted included the demolition of the existing roof, the construction of built in wardrobes, kitchen cabinets, ceramic floor and wall tiles.

- [7] The Plaintiff and her husband did not accept the quotation which they found too high and he reduced his quotation in November 2017 to SR 1,300,000 for the works which offer she accepted. She therefore paid the Defendant a deposit of SR 500,000 by two bank transfers of SR 250,000 at the Mauritian Commercial Bank on 28th and 29th November 2018.
- [8] It was envisioned that the works would commence in February 2018 and would last six months. It was also agreed that as part of the work the architectural and engineering plans would be done by the Defendant. A written contract was drawn up and signed in February 2018 and the date of the possession of the site by the Defendant entered as 15 February 2018.
- [9] The Defendant then claimed he did not have enough workers or materials to commence the works. The Plaintiff approached the Defendant on several occasions to enquire about the delay in the works but was reassured each time that the materials would be brought on site. The commencement date of February in the contract was subsequently crossed out and replaced with May 2018 with the works now to finish in October 2018.
- [10] The work did not start in May or at all apart from the fact that the Defendant had some foundation holes dug in which to insert columns. No other works were ever carried out. On 18 May 2018, the Defendant wrote to her to demand a further sum of SR8, 700 for the extra cost for diversion of drainage pipes, drilling and extra concrete for pad footings. She paid the money as demanded. Similarly, a further sum of SR 3,000 was demanded by the Defendant for architectural works which she paid
- [11] On 5 June 2018 she was informed by email from the Defendant that new workers were arriving from Sri Lanka and Gainful Occupation Permits for the workers were attached to the email. These workers were brought by the Defendant to live on the construction site at her home at La Misère. The Defendant had explained to her that he had nowhere to move them to. The Plaintiff and her family members had since February 2018 moved out

of the house to rented accommodation at Fairview, La Misère. They were expected to be there for six months. The Defendant was to pay the rent for the duration.

[12] On 7 June 2018, the Defendant wrote to her claiming a total sum of SR70, 000 for house rent for two months, salaries for two workers, food allowances and contingencies. She refused to pay the money. He continued to claim the money and came to her work place to ask for money. There was an exchange of emails between the in which to her claiming he SR 70,000. He made further claims of SR 101, 000 on 26 June 2018 which she refused to pay. On 6 July she got Mr. Guy Ferley, Attorney-at-law to write to the Defendant demanding the return of her deposit of SR 500,000 to ask him to leave materials, if he had bought any at the site and to remove he workers from her home immediately and to return all keys to her, failing which she would commence legal action.

[13] On 10 July the Defendant wrote to her reminding her of his claim for money for the workers that he had previously sent to her. She told the Defendant she would not pay and it would appear that the workers were not being paid either but remained in her home. On 23 July 2018, the Defendant again wrote to her in which he indicated inter alia that it was not responsible for the delays in the architectural plans, that the SR 5000,000 she had paid was an “investment” in the project and that perhaps it had not made himself clear in indicating that the workers’ salaries would have to be paid separately. He also stated that in digging the foundations he had discovered stones which were not in the scope of the works. He again claimed the sum of SR101, 00 which he stated was outstanding for labour costs.

[14] On 24 August 2018, the Defendant again wrote to her asking for patience. Both letters are peppered with biblical and religious quotes including the following: “It is scriptural to be challenged and unscriptural to be defeated, we shall not be defeated. Jesus is Lord.”

[15] On 8 October 2018, a letter from the Ministry of Health was sent to her mother in which she was notified of the unsanitary situation of her home and given seven days to rectify the nuisances found at the site which included desludging the septic tank, sealing manholes and providing soak-aways. The workers were excreting in the holes dug in the house. There were also holes outside the house presumably for columns to be inserted.

She contacted the Defendant who did not respond. Her mother got her nephew to fill the holes with soil. When she herself saw the state of the house she was disappointed, angry and depressed.

[16] Her mother then moved back into the house. She stayed at Fairview Estate and continued paying for the rent which was reduced from SR15, 000 to SR 10,000 for the last month although the Defendant had contracted to pay it. She produced all her rent receipts from March 2018 to September 2018.

[17] She produced a number of photographs showing the state of her home in March and April 2018 and then in June 2018. The photographs show the state of the house before the contractor came on site and after. In the June photographs there are holes in the house and outside with mud and water, odd bits of breeze blocks, steel bars and welded wire mesh, debris, some tools and rubbish. There is also a store and the Plaintiff's personal effects. No other construction work was ever effected by the Defendant. That remains the state of the house to this day.

[18] When she moved out of her home to rented accommodation at Fairview, her mother and her sister, Jane Bonne moved with her. During these events the Plaintiff stated that she did not want to visit the house at Souvenir as she felt depressed. The Defendant had full access to the site and was not obstructed by anyone to carry out the works.

[19] In relation to the planning approval for the works she wanted carried out, she received a letter from the Planning Authority on 20 December 2017 acknowledging the projects; submission for planning. In January 2015, she was then advised that the services of an engineer was necessary to submit structural details for the works proposed. On 2 March 2018, she received notification that the works had been approved and on 22 March the structural design was also approved.

[20] On 9 October 2018, her lawyer wrote to the Defendant formally advising him that the contract was terminated and to demand the sum of SR500, 000 which had been paid to him. She was also claiming SR80, 000 being the cost of alternative accommodations. Additionally, she claimed moral damages for loss, anxiety and inconvenience.

- [21] In cross examination, she admitted that she had not asked the Defendant to vacate her premises but had asked him to leave after the 31 October 2018. She denied that the payment of rent for alternative accommodation by the Defendant was only for a period of two months although this was not in the written agreement. She denied that her sister had obstructed the work on site. She admitted that she had sent an email to the Defendant instructing him to disregard whatever her sister said with regard to the works.
- [22] The Plaintiff's sister, Jane Bonne aka Elsie testified that she lived with her sister and mother. She was aware that her sister had contracted with the Defendant for the extension of the family home. In February 2018 they all had to move out so that work could commence on the house. She stayed in Fairview for three months and moved back into the house in May 2018. It was a mess. Their personal belongings which were to have been moved into the store were still there. The corridor of the house had been dug up. There were five workers on site - two Bangladeshis and three Sri Lankans. They were not doing any work. Holes were dug outside the house. She asked the contractor about them and he said he would dig the trenches on the mother's part of the house but not where Ms. Bonne was living. When she got home from work she saw that he had dug everywhere. This caused difficulties in terms of her access to her room.
- [23] She took photographs in June 2018 which showed the mess around the house and in the house and the exposed steel in some of the house. The foundations of the house were exposed and their personal belongings were strewn around the house and not securely kept in a store as had been promised.
- [24] In May 2018 she was going to work when she noticed the workers were about to break the steps into the house. She went to the Planning Authority to ask for clarification about the works being carried out. No additional work was ever performed by the contractor. She denied that she had obstructed the contractor in performing the construction work. She did see some workers' tools on site, some cement and steel mesh. The crusher dust and chipping on site were hers and not the contractor's. The Defendant left the site around the end of June 2018.

- [25] Mark Agrippine testified that he had been in the construction business for over twenty years and currently traded as Euodoo Pty Limited. He admitted that he had traded as First Builders and later Rehoboth builders and that his licence had been suspended. He had trouble with clients previously. He opened a new company to be able to trade.
- [26] He knew the Plaintiff as they had been at the National Youth Service together. He had entered in a contract with the Plaintiff to construct the house. The date entered on the contract was 15 February 2018 which had been crossed out and 7 May 2018 entered. This was because he had to do a concept note first. This was done sometime in December 2017 or January 2018 which the Plaintiff accepted. He then proceeded to planning and the matter was held up until approval was granted on 23 March 2018.
- [27] He also did not have man power to proceed and in order to obtain permission to bring in the work force he had to have a contract together for the Ministry of Employment. He secured all the workers and were able to bring them into Seychelles with the deposit of SR500, 000 he had obtained from the Plaintiff. He was meant to pay the workers' salaries through the client's money. He paid different amounts to the Ministries of Health and Immigration in respect of Gainful Occupation Permits for the workers.
- [28] He had agreed with the Plaintiff that she needed to move out of the house in order for the works to be carried out and as a gesture of goodwill he offered to pay the first two months of alternative accommodation for her and her family. He did so at the cost of SR 15,000 per month. He has never covered rent for any other of his clients before.
- [29] When the workers arrived he was given permission by the Plaintiff to lodge them in the house at Souvenir although he had obtained Gainful Occupation permits for them by stating that they would be living elsewhere. The Plaintiff's sister remained in the house and said she would leave when work started on the house.
- [30] The work started immediately- an excavator was brought in to dig the foundations for 9 columns. When the Plaintiff's sister came home that evening he argued with him over the fact that the column was going to be where the steps to her bed sit was. After that she continued to disturb him and prevent the works. He phoned the Plaintiff to complain and

she responded by email to ask him disregard whatever her sister said with regard to the works. He did not see the Plaintiff ever on site.

[31] From the deposit of SR 503,000 paid by the Plaintiff he had spent SR20, 000 for the architectural works, SR 12,000 for Gainful Occupation Permits for the workers, SR 11,000 for the air tickets for the workers, SR 1,750 for medical tests for the workers, SR 15, 000 for their initial accommodation at Quincy Village for the workers, SR 13,000 for tools and SR 5,000 for food.

[32] He did the steel works for the project, the starter base for the columns, the concreting of pad footings for eight columns as he was prevented from doing the ninth by the Plaintiff's sister. He also dug holes inside the house for supporting columns. He explained that the columns were never erected as he would have had to demolish the roof and had he had done the items inside the house would have been wet for the rain. He was supposed to build a store but there were too many items inside the house to store.

[33] The Plaintiff also called him to tell him that he had to ensure that all the receipts for works done were in her name because her sibling would fight with her when her mother died for the property and she wanted proof of what she had invested in the property.

[34] In the end he left the site as the Plaintiff would not pay a claim for salaries of the workers. The work had progressed but he couldn't go any further because if he removed the roof of the house the Plaintiff would have nowhere to sleep.

[35] From the deposit of SR 500, 000 the Plaintiff had given him he tried to source material in Japan and Sri Lanka. In the end it was too expensive. There were also delays with Planning. Although that was his responsibility under the contract it was only in March 2018 that he got the got ahead to commence the works. He agreed that he was the employer for the workers but that he had brought them in specifically for this contract and therefore their salaries and upkeep ought to have been paid by the Plaintiff. He could not therefore use the money from the SR500, 000 to buy materials. He agreed that he had sought and found alternative accommodation for the Plaintiff and her family.

[36] He stated that the picture produced in court did not show the reality on site as he had constructed pad footings, starter bases, framework for the columns and the digging of the septic tank. He stated that the house was in a bad state before he started digging holes inside and outside it. He stated that the rubbish in the hoes must have been placed by the Plaintiff's sister and not his workers. He admitted that when he obtained the gainful occupation permit for the workers it was on the basis that they would be housed at Quincy Village.

Submissions

[37] The Plaintiff has submitted that the contract entered into by the parties was prepared by the Defendant and had appended to it Annexe C which had a breakdown of all the works envisaged in the contract. It is not stated therein that the Plaintiff had to pay for the workers' salaries and living expenses. The Defendant's evidence as a whole displays his unprofessional and indiligent conduct. The photos showed very little work done on the house despite the Defendant getting an extension to the commencement date. The e-mails sowed the frustration of the Plaintiff and the Defendant's attempt to shift the blame to her in order to buy more time. This underpins the breach of the contract by the Defendant's non-performance. Other than a few building materials and few holes dug in the ground no work was performed. With regard to the Plaintiff's sister obstructing the works, this was only an excuse by the Defendant for his non-performance.

[38] The Plaintiff relies on Article 1134 of the Civil Code and submits that the oral agreement and the written agreement between the parties be construed together as the essential terms of the contract were agreed in November 2017. Counsel for the Plaintiff has directed the Court's attention to Clause B 8 of the contract which specifies that amounts would only be paid by the Plaintiff for the various elements of work on their satisfactory completion.

[39] With regard to termination, clause 2 of the Schedule permits the Plaintiff to terminate the agreement. This was done formally by letter dated 9 October 2018 due to the failure of the Defendant to commence and complete the works. In terms of Article 1147 of the Civil Code, the Defendant failed to perform his obligations without any excuse and in bad faith

and the Plaintiff has a right to damages. These damages are not limited to pecuniary loss but for mental and /or emotional injury to the Plaintiff.

[40] The Defendant has submitted that the sums advance to him were spent on fulfilling the contract he had negotiated with the Plaintiff. He had not agreed to pay alternative accommodation for the Plaintiff for the duration of the contract. Further, the Plaintiff had acquiesced to the delays which were due to a lack of manpower. In view of the fact that the Plaintiff's sister had prevented the Defendant from carrying out the project the Plaintiff's claim is not made out.

The Law applied to the Evidence

[41] It is not contested that there are two agreements concluded by the parties in this case - one agreed orally in November 2017 and one in March 2018. With regard to the interpretation of these agreements Article 1156 of the Civil Code provides in relevant part that :

“In the interpretation of contracts, the common intention of the contracting parties shall be sought rather than the literal meaning of the words.

However, in the absence of clear evidence, the Court shall be entitled to assume that the parties have used the words in the sense in which they are reasonably understood.”

[42] Having heard the evidence and assessed the credibility of the Plaintiff and Defendant in their testimony, I find that the parties had agreed that the Defendant would perform the construction of a vertical extension to the Plaintiff's house at Souvenir, La Misère for the total price of SR 1, 300,000 and that the Plaintiff would advance the sum of SR 500,000 prior to the works commencing. The works agreed are set out both in the letter of 14 October 2017 from the Defendant and in the Schedule to the contract. Clause B8 specifies that the Plaintiff would pay the Defendant an advance payment but that the advance payment would be deducted from each progress payment at a negotiated rate until full recovery of the advance had been made.

[43] The letter of 14 October specifies the price estimated for the works was negotiable and included “materials, labour, overhead and profits” (sic). The price was indeed negotiated and revised downward from SR 1,582,737.20 to SR 1,300 0000. The agreement in writing concluded on a date unknown but with the contractor to take possession of the site on 15 February 2018 states that the scope and nature of the works to be performed are contained in Annex C. Annex C lists preliminaries and site works, details of work on the sub-structure, the roof and ceiling works, the floor and ceiling finishes, the doors and windows, services including electrical and plumbing, fittings and features and external works.

[44] I have no doubt that the proposed works were meant to be performed at the price agreed to include labour and materials. These are the norm in building contracts unless of course they are specifically excluded. I am fortified in my interpretation by clause B6 which states that any works not included in Annex C would be considered as extra works and paid for separately.

[45] The term of the contract was about 5 months but the commencement date was moved from 15 February to 7 May 2018 by the agreement of both parties. I find that this was as a result of a delay in the Defendant obtaining planning permission for the works. On 2 March 2018, the Plaintiff notification that planning approval for the works had been granted and on 22 March the structural design was also approved. There was therefore no reason for the works not to commence on the amended date, namely the 7 May 2018.

[46] Articles 1134 - of the Civil Code provides that:

“1134 - Agreements lawfully concluded shall have the force of law for those who have entered into them.

They shall not be revoked except by mutual consent or for causes which the law authorises.

They shall be performed in good faith.

1135- Agreements shall be binding not only in respect of what is expressed therein but also in respect of all the consequences which fairness, practice or the law imply into the obligation in accordance with its nature.”

[47] The parties agreed the terms of the contract and in the circumstances, I am obliged to find that the agreement is binding as to the terms and conditions therein. I also find, without a shadow of a doubt, from the evidence adduced that the Defendant has breached the agreement by the non-performance of his obligations under the contract. It is clear that the works the Defendant performed were minimal and not within the time allotted for their performance. His excuses were preposterous given the evidence of the Plaintiff and her witness as set out above which I believe. In any case they are not excuses that cannot be imputed to him as provided for in Article 1147 of the Civil Code.

[48] The Defendant's attempt in trying to extort further money from the Plaintiff and trying to make the court believe that the payment of workers' salaries and expenses were a matter for the Plaintiff and not his obligation to meet is farcical.

[49] Article 1142 provides that:

“Every obligation to do or to refrain from doing something shall give rise to damages if the debtor fails to perform it.”

[50] The Plaintiff will be entitled to damages for the Defendant's breach. As I have already pointed out, the Defendant would have been excused from paying damages if his failure to perform was for a cause that cannot be imputed to him or that it was not done in bad faith. That is certainly not the case. It is clear to the court that the acts of the Defendant amount to nothing less than daylight robbery.

[51] The Plaintiff has proved her case. In *United Concrete Products v Pool* (1978) SLR 213, where a contractor had unilaterally suspended construction work, Sauzier J relying on Article 1184 of the Civil Code held that a contractor had to apply to court for a rescission of its contractual obligations. In the circumstances, the Defendant was not entitled to suspend work.

[52] Further, in a *contrat d'entreprise*, Article 1794 of the Civil Code provides that

“The employer may annul at will the agreement for a lump sum, even if the work has already started, provided he indemnifies the contractor for all his expenses, all his labour and whatever profit he would have made from the agreement.”

[53] Moreover, Article 1149 provides in relevant part:

“1. The damages which are due to the creditor cover in general the loss that he has sustained and the profit of which he has been deprived, except as provided hereafter.

2. Damages shall also be recoverable for any injury to or loss of rights of personality. These include rights which cannot be measured in money such as pain and suffering, and aesthetic loss and the loss of any of the amenities of life.”

[54] The Defendant has not counterclaimed. In any case in *Dubois v Nalletamby* (1979) SLR 33 Wood J held that a contractor who suspends the execution of the work cannot claim any part payment of the price or any indemnity from the employer.

[55] In the circumstances I find the evidence of the Plaintiff as to the damages she has suffered uncontroverted. I do not see any expenses as adduced by the Defendant relevant to the work contracted for. The work done was minimal and no estimate of its value was presented to the Court or claimed.

[56] The Plaintiff is entitled to be refunded all the sums she has advanced the Defendant that is, SR511, 700, 000, and the rental costs she has incurred, that is SR180, 000. She has undoubtedly suffered moral damages. That is clear from the emails and correspondence between the parties, her evidence and from the strain and distress she showed in her testimony. I believe her evidence. In the circumstances I award her SR100, 000 which I believe is sufficient reparation for the moral she has suffered.

[57] I am concerned about the behaviour of the Defendant especially given his brazen comments and total disregard for the laws of this country which became apparent during the trial. I have been asked to make any order that I deem fit in the circumstances. I believe other unsuspecting parties must be warned about the Defendant’s cowboy antics when it comes to building and employing foreign workers. I am confounded by the fact that Mr. Agrippine has had clients bring him to court for similar matters whilst he operated under two previous companies, First Builders and Rehoboth which licences were suspended and yet once again a new company, the present Defendant was again

granted a licence and permission to being in foreign workers with no suitable accommodation. The relevant authorities must be informed and take action.

My Orders

[58] I therefore order the Defendant to pay the Plaintiff the total sum of SR791, 700,000 with interest and costs.

[59] I also order that copies of my decision be served on the Seychelles Licencing Authority and the Ministry of Employment, Immigration and Civil Status.

Signed, dated and delivered at Ile du Port on 3 October 2019.

Twomey CJ