

IN THE SUPREME COURT OF SEYCHELLES

Reportable
[2020] SCSC *36*
CC 66/2015

In the matter between

SUNSHINE PROPERTIES PTY LIMITED
(rep. by Frank Elizabeth)

Plaintiff

and

FADA CONSTRUCTION COMPANY PTY LTD
(rep. by Elvis Chetty)

Defendant

Neutral Citation: *Sunshine Properties (Pty) Ltd v Fada Construction Company Pty Ltd* CC 66/2015 [2020] SCSC (January 2020)

Before: Robinson sitting as a Judge of the Supreme Court

Summary:

Heard:

Delivered: 9 January 2020

ORDER

The Plaintiff is dismissed with costs.

JUDGMENT

ROBINSON sitting as a Judge of the Supreme Court

1. In a plaint, the Plaintiff averred that the Plaintiff and the Defendant entered into an agreement, dated the 19 February 2011, to build a perimeter fence¹ at Villa Masry 2, at Ma Josephine Saint, Mahe, Seychelles, as per an agreed quotation and work specifications.
2. The express terms of the agreement, mentioned in para 1 hereof, were the following —

¹ The word "fence" or "wall" was used interchangeably in this case

- 1) *The "Perimeter fence at Villa Masry 2 at Ma Josephine Saint" be built in accordance to the work and drawings provided by the Plaintiff*
- 2) *The Plaintiff to pay the Defendant the sum of SCR 2500.00 per linear metre for the construction*
- 3) *The work shall commence on the 22nd February 2011*
- 4) *Liquidated and ascertained damages if the work is delayed due to the contractors fault, damages will be charged with a "maximum of delay damage shall be 10% of the contract price*
- 5) *The Contractor shall pay all fees and charges legally demandable from him in respect of the works and service."*

3. Para 6 of the plaint averred that, in terms of the agreement, mentioned in para 1 hereof, the Plaintiff made a total payment of 606,925 rupees for the construction of the perimeter fence.
4. In its plea, the Plaintiff claimed that the Defendant acted in breach of the agreement, mentioned in para 1 hereof, as the perimeter fence built by the Defendant was defective and not as per the drawings and specifications provided (para 7 of the plaint).
5. The Plaintiff further averred that, by reason of the matters aforementioned, the Plaintiff has suffered loss and damage as particularised below, for which the Defendant is liable to make good to the Plaintiff. The particulars of loss and damage are as follows —

"Particulars of loss and damages

i. Moral damages as a result of breach of contract *SCR 200,000.00*

ii. Liquidated damages and ascertained damages for delays in building works; with regards to the Perimeter Fence *SCR 60,692. 50*

iii. Remedial costs with regards to the Perimeter Fence *SCR 313,887. 01*
(USD 23,250.89 at the rate of 13.50)

TOTAL ***SCR 574,579.51"***

6. Para 8 of the plaint averred that the Plaintiff, on several occasions, informed the Defendant, in writing, that it had acted in breach of the agreement, mentioned in para 1 hereof, but the Defendant has to date refused, failed and or neglected to respond to the Plaintiff.
7. The Plaintiff, therefore, prays for a judgment condemning the Defendant to pay to it damages in the sum of 574,579.51 rupees, together with interest and costs.
8. The Defendant has, in its plea, denied any breach of the agreement, mentioned in para 1 hereof. The defence averred that it was an express term of the agreement that the perimeter fence at Villa Masry 2, at Ma Josephine, was to be built in accordance with the drawings provided by the Plaintiff. In its plea, the Defendant admitted that it was an express term of the agreement that the perimeter fence was to be built as per an agreed quotation and work specifications.

9. The defence denied para 6 of the plaint and put the Plaintiff to the strict proof thereof. The defence also denied each and every singular averment contained in para 7 of the plaint. By way of further answer to para 7 of the plaint, the Defendant averred that the perimeter fence was built in accordance with the terms of the agreement, and that the works carried out by the Defendant were not defective. Para 8 of the plaint was also denied by the Defendant. As regards para 9 of the plaint, the defence denied the said para whether as alleged or at all. Further, para 9 of the defence alleged that the Defendant was never issued with any notice, from the Plaintiff, in terms of Article 1230 of the Civil Code of Seychelles. The Defendant has moved that the plaint be dismissed with costs.

The case for the Plaintiff

10. Mr. Nabil Elmasry, 62 years of age, lives at La Misere and is a director of Sunshine Properties.
11. **Sunshine Properties Limited** was incorporated on the 20 December 2001, exhibit P1². A copy of the certified Articles of Association of **Sunshine Properties Limited** mentions *inter alia* that the name of the company is **SUNSHINE PROPERTIES LIMITED**, and that the original directors of the company shall be Peter J Ward and Marie France Pouponneau. An agreement, which was entered into between "**Sunshine Properties (Pty) Ltd** – Villa Masry 2" and the Defendant on the 19 February 2011, is before this court as exhibit P3 (hereinafter referred to as the "*Agreement*").
12. The purpose of the Agreement was to build a perimeter wall at La Misere and the sum to be paid was 2500 per linear metre. However, Mr. Elmasry could not recall how long the fence to be built was. Mr. Elmasry also testified about the payment terms, in accordance with the Agreement, which have no relevance to this case.

² A copy of a certified certificate of incorporation

13. Clause 2 of the Agreement dealt with "*Schedules of conditions of contract*", which provided that —

"1) The work shall be carried out in accordance with drawings and to the satisfaction of the employer; the contractor will practice his responsibility according to the attached Scope of Work. 2) No extra work shall be carried out or additional cost is incurred unless instructed in writing by the employer."

14. The construction of the wall was meant to commence on the 22 February 2011. The evidence of Mr. Elmasry was not clear with respect to whether or not a completion date was set for the works.
15. The Agreement provisioned for damages if the works were delayed due to the fault of the contractor/Defendant. This was termed as liquidated damages.
16. The Plaintiff paid 660,925 rupees to the Defendant for the works done by the latter.
17. Mr. Elmasry testified to the effect that the works done by the Defendant were defective as the wall had cracks and needed to be repaired by Mahe Design and Build. The report of Mr. Angelin Confait of Mahe Design and Build, reported on the defective and corrective works. He could not recall how much the Plaintiff paid Mahe Design and Build to do the works, however, when showed exhibit P4³, he testified that the amount paid to Mahe Design and Build to build the wall was 461,040.13 rupees.
18. The Plaintiff is claiming the sum of 574,579. 52 rupees broken down as follows —
- 200,000 rupees for moral damage for breach of contract;
 - 60,692.52 rupees for liquidated damages; and

³Exhibit P4 shows re-computation of payments and other miscellaneous matters

- \$23,250 (313,807.01) paid to Mahe Design and Build for remedial works. Together with interest and costs.
19. When cross-examined, Mr. Elmasry stated that Mahe Design and Build took two months to reconstruct the beams.
 20. When queried as to the fact that the Agreement had no date cited with respect to when the Defendant was supposed to complete the works, Mr. Elmasry stated that there being no completion date did not mean it was an "*open date*".
 21. Mr. Elmasry agreed to the suggestion of Counsel that the Plaintiff had failed to notify the Defendant in writing of any delays committed in accordance with clause 4 of the Agreement. He testified that the Plaintiff had done so verbally.
 22. With respect to the amount being claimed for moral damage, he agreed with Counsel's suggestion that, "[t]his [...] is [his] way of estimating how [he] would get back the entirety of the sum that [he] had paid".
 23. When re-examined, Mr. Elmasry exhibited a written notice of *mise en demeure*, exhibit P5, dated the 25 September 2015, to show that the Plaintiff had issued the Defendant with a written notice.
 24. The second witness for the Plaintiff was Mr. Angelin Confait, 50 years of age, an architectural technician living at Anse La Mouche. He was the Managing Director and project director of Mahe Design and Build. He produced a report, dated the 4 August 2015, which he was commissioned by the Plaintiff to produce.
 25. Mr. Confait testified to the effect that Mahe Design and Build did not do any work with respect to the perimeter fence or wall.

26. Mr. Confait testified that Mahe Design and Build worked on "RC⁴ walls" inside of the house. With respect to the works undertaken on the "RC walls", the brief of the report reads
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<i>"Item</i>	<i>Defect</i>	<i>Remedial Action</i>	<i>Cost (\$)</i>
<i>Re-casting beams and abortive works on RC walls</i>	<i>Some beams were casted at wrong levels</i>	<i>Demolition and recasting of beams including all reinforcement and fence works</i>	<i>22,925.00</i>

27. Mr. Confait testified that this item, *"Re-casting beams and abortive works on RC walls"*, referred to *"a beam inside the house, the beam was already cast at a certain level inside the house. So that it was when we come to do the finishing works the beam was not done at the level of what was supposed to be. Then you did not have enough headroom so that the beam was cast to the wrong level, that is what we meant by this."*

The case for the Defendant

28. The Defendant called two witnesses. The first Defendant witness was Mrs. Margaret Sun, the owner and Director of the Defendant.
29. The Plaintiff had contracted the Defendant to build a perimeter fence at Villa Masry number 2, at Ma Josephine, and that the Defendant built the wall. Once the works were completed, the project supervisor Alex or Rudolph, who worked for the Plaintiff, double check the works. The Plaintiff paid the Defendant for the works done.
30. The Defendant never received any notice from the Plaintiff that the works done were defective. Mrs. Sun denied all claims and asked this court to dismiss the case.

⁴ Reinforced concrete

31. Under cross-examination, Mrs Sun did agree that she received a letter on the 30 November 2015⁵. She was adamant that the said letter, exhibit P5, referred to a retaining wall, which was not the same as the wall the Defendant was contracted to build. Moreover, Mrs. Sun refused to accept the complaint contained in the letter of 30 November 2015. According to her testimony, the Plaintiff was satisfied with her work, checked, approved and paid.
32. As regards the completion date, she does state that there was no completion date and that, therefore, no delay could have occurred.
33. She also testified that the Defendant was paid the entire retention fee for 6 months in the total sum of 2,500 per linear metre. She however, could not recall how much she received in total. Counsel put to her that the Plaintiff had paid the sum of \$23,250 to Mahe Design and Build to remedy the defects, which she denied.
34. Upon re-examination, Mrs. Sun stated that the boundary wall was about 260 metres and maintained that she received no complaint about the works undertaken by the Defendant, and that as far as she was concerned, the Defendant had completed the works that it was contracted to do.
35. The second witness for the Defendant was Mr. Flavien Butler Payet. Mr. Payet used to work for the Plaintiff's company, now retired. He worked for the Plaintiff at the material time.
36. The Plaintiff gave to the Defendant a set of drawing to execute the boundary wall at an agreed price. Exhibit P3 was the contract entered into between the Plaintiff and the Defendant for the said works. The boundary wall was built and payments were made after the quantity surveyor and the project consultant had inspected the works. He [Mr. Payet] and Mr. Elmasry carried out weekly work site visits to monitor progress of work.

⁵ Exhibit P5

37. Under cross-examination, Mr. Payet testified that he was present when Mahe Design and Build came on site. He was asked the following —

"Q: were you there when works was being done on the wall to correct the defect that became apparent in the wall after the defendant finished the work, if you remember?"

A: The defect in the boundary wall would be quite impossible, maybe completion or extension or extra boundary wall being built.

Q: So Mahe Design and Build came to complete the work that was left uncompleted by the defendant in relation to the boundary wall

A: I cannot confirm that or I cannot affirm."

Analysis and findings

38. The Plaintiff averred that the Agreement was breached as the perimeter fence or wall built by the Defendant was defective and not as per the drawings and specifications provided.
39. Firstly, the plaint did not particularise the works which the Plaintiff considered to be defective.
40. Secondly, clause 2 of the Agreement provisioned for "*Schedules of conditions of contract*", which contained the work specifications. No such "*Schedules of conditions of contract*" have been exhibited.
41. Thirdly, it is clear that the Agreement did not contain a date relating to the completion of the Agreement.
42. In the light of the above matters, this court considers each head of claim.

"iii. Remedial costs with regards to the Perimeter Fence: USD 23,250 at the rate of 13.50 – SCR 313887.01"

43. In chief Mr. Elmasry testified that the wall had cracks. The plaintiff claimed the sum of 313887.01 rupees (\$23,250) representing the sum paid to Mahe Design and Build to undertake remedial works. Mr. Elmasry could not recall how much the Plaintiff paid Mahe Design and Build to repair the wall. He referred this court to a figure itemised in exhibit P4, 461,040.13, and claimed that the said figure represented the amount of money paid to Mahe Design and Build. This court attaches no weight to exhibit P4. In this court's view, Exhibit P4, which refers to miscellaneous matters, is clearly unrelated to the Plaintiff's claim.
44. Mahe Design and Build did not attend to any perimeter fence. The figure \$23,250 listed in the report of Mr. Confait, related to the item *"Re-casting beams and abortive works on RC walls"*. Mr. Confait's evidence clearly did not support the Plaintiff's claim.
45. In the light of the above, this court concludes that the Plaintiff has not established that the Defendant had acted in breach of the Agreement on a balance of probabilities. This court does not award the sum of \$23,250 to the Plaintiff.

"ii. Liquidated damages [...] in regards to the Perimeter Fence SCR 60,692.50"

46. Neither the Agreement nor the oral evidence speaks about a completion date. Therefore, it is not clear on which basis the Plaintiff is entitled to claim liquidated damages. In that regard, it is even futile for this court to address the issue of notice under Article 1230 of the Civil Code of Seychelles.
47. This court concludes that the Plaintiff has failed to establish its claim under this head of claim *"ii. Liquidated damages and ascertained damages for delays in building works; with regards to the Perimeter Fence – SCR 60,692.50"* on a balance of probabilities. This court refuses to award the Plaintiff the sum of 60,692.52 rupees for liquidated damages.

"i. Moral damages as a result of breach of contract – SCR 200,000"

48. This court has found that the Plaintiff has not established on a balance of probabilities that the Defendant had acted in breach of the Agreement. Therefore, this head of claim does not arise for the consideration of this court.

The Decision

49. In light of the above, this court is satisfied that the Plaintiff has not proven its claims against the Defendant on a balance of probabilities and consequently, dismisses the plaint with costs in favour of the Defendant.

Signed, dated and delivered at Ile du Port on 9 January 2020

A handwritten signature in black ink, appearing to read 'Robinson', written over a horizontal line.

Robinson sitting as a Judge of the Supreme Court