

IN THE SUPREME COURT OF SEYCHELLES

Reportable
[2020] SCSC 35
CC 65/2015

In the matter between

ASHRAF ELMASRY
(rep. by Frank Elizabeth)

Plaintiff

and

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

Defendant

Neutral Citation: *Ashraf Elmasry v Fada Construction Company Pty Ltd* CC 65/2015 [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 in favour of the Defendant

JUDGMENT

ROBINSON sitting as a Judge of the Supreme Court

1. It is undisputed by the Plaintiff and the Defendant that the Plaintiff is and was at all material times the proprietor of Sunshine Properties Limited, and that the Plaintiff and the Defendant entered into a contract, dated the 30 March 2010, to build a house at La Misere. The contract entered into between the Plaintiff and the Defendant to build a house at La Misere is hereinafter referred to as the "Contract".

2. The plaint averred that the express terms of the Contract were *inter alia* as follows —

"i. *the "HOUSE AT LA MISERE" be built in accordance with the work and drawings provided by the Plaintiff.*

ii. *the employer will pay the contractor the sum of SCR 3,488,000.00 (Rupees three million four hundred eighty eight thousand only)*

iii. *the work shall commence on the 18th April, 2010 and completed on the 18th August, 2010*

iv. *liquidated and ascertained damages if work is delayed due to contractors fault, damages will be payable, where the, "maximum of delay damage shall be 10% of contract price".*

v. *the contractor shall pay all fees and charges legally demandable from him in respect of the works and services."*
verbatim

3. Para 6 of the plaint averred that the Plaintiff paid the Defendant a total sum of 5,692,103.97 rupees, in accordance with the Contract.

4. In breach of the Contract, the Defendant failed, neglected and/or refused to complete the said building works within the specified date. Additionally, the Plaintiff averred that the building works carried out by the Defendant were defective and of poor quality as outlined below —

"i. *the Defendant failed to carry out termite treatment before commencing building; a term of which was implied within the contract.*

- ii. *the foundation of the house was defective and in breach of both the express and implied terms outlined above.*
- iii. *the completion date of building the house was not adhered to.*
- iv. *fixtures and fittings with regards to the house, were negligently, recklessly and/or wrongly completed."* verbatim

5. Para 10 of the plaint averred that the Plaintiff suffered loss and damage as a result of termite infestation caused by the failure and/or negligence of the Defendant to carry out termite treatment before commencing the works.
6. Para 11 of the plaint averred that the Plaintiff, on several occasions, through his company director, has informed the Defendant in writing about the delays and the defective works, but the Defendant has to date refused, failed and or neglected to respond to the Plaintiff.
7. As a result of the aforementioned, para 8 of the plaint averred that the Plaintiff had suffered loss and damage. The particulars of the damage are as follows —

"i. Additional costs for remedial works (USD 150, 303. 33) *SCR 2, 029, 094. 90*

ii. Cost of structural replacement, resulted by termite activity *SCR 64, 500.00*

iii. Moral damages resulting from the termite infestation and/or breach of contract (estimate) *SCR 300, 000. 00*

iv. Cost of replacement of fixtures and fitting	SCR 525, 000.00
v. Liquidated damages and ascertained damages for delays in building works, with regards to both the house	SCR 348, 800.00
vi. Damages with regards to the foundation of the house	SCR 872, 000.00
vii. PUC outstanding bill	SCR 11, 439.10
viii. Loss of use and enjoyment of the swimming pool	SCR 1, 000, 000.00
TOTAL	SCR 5,150,834. 00"

8. The Plaintiff, therefore, prays for a judgment condemning the Defendant to pay to it damages in the sum of 5,159,834 rupees, together with interest and costs.
9. In a "*REPLY TO REQUEST FOR FURTHER AND BETTER PARTICULARS*", the Plaintiff stated that the foundation constructed by the Defendant was defective as "*it was cracked, unstable*" and caused water leaks.
10. The Defendant has, in its plea, denied any breach of the Contract. The defence denied para 6 of the plaint and put the Plaintiff to the strict proof thereof. Further, the Defendant averred that, at the request of the Plaintiff, the Defendant effected extra works, in addition to those mentioned in the Contract and, for which the Plaintiff effected payment to the Defendant. The defence averred that the works were not completed on time because the Defendant effected extra works at the request of the Plaintiff.

11. Para 6 of the defence denied each and every singular averment contained in para 8 of the plaint. By way of further answer to para 8 of the plaint, the defence averred that —

"(i) the Defendant carried out termite treatment prior to commencing the building;

(ii) the foundation of the building was not defective and was constructed in a workman-like manner;

(iii) paragraph 5 of the defence is repeated: and

(iv) the fixtures and fittings in respect of the building were completed in a workman-like manner."

12. As regards the allegations contained in the report by Mr. Angelin Confait, the defence denied each and every allegation.

13. The Defendant has moved this court to dismiss the plaint with costs.

The case for the Plaintiff

14. The Plaintiff's brother, Mr Nabil Elmasry, testified on behalf of the Plaintiff by virtue of a power of attorney, exhibit P1. The Contract is before this court as exhibit P2. In accordance with the Contract, a quotation of 3,488,000 rupees was agreed upon for the works.

15. The first payment of thirty percent of the Contract sum was to be made upon signing of the Contract. Number 2 interim payment was to be made upon written application by the contractor/the Defendant according to the following; thirty percent of the Contract sum paid as an advance payment amount of 1,046,400 rupees. Twenty-five percent of the Contract sum paid when the foundation is completed which came to 872,000 rupees. Retention of five percent of the Contract shall be made on the period of six months as defects liability. According to Mr. Elmasry, these payments were made to the Defendant.

16. The vast of Mr. Elmasry's testimony was based on giving evidence on the amounts asked for by the Defendant (request for payment) at various times and stages of the construction of the house at La Misere. The relevant exhibits were produced for this purpose. He testified that the total amount of money paid to the Defendant was 5,692,103 rupees, which amount included the amount paid to the Defendant for extra works undertaken by the Defendant.
17. This court interjects to state that most of the relevant documents with respect to payments emanated from Sunshine Properties (Pty) Ltd. The plaint contained no averment to the effect that payments were made by Sunshine Properties (Pty) Ltd on behalf of the Plaintiff. Moreover, exhibit P17, an "*ACCOUNT RECONCILIATION [...] CONSTRUCTION WORK AT DR'S RESIDENCE - LA MISERE - VM2 AS OF SEPTEMBER 18, 2015*" referred to Sunshine Properties Limited.
18. This court returns to the evidence of Mr. Elmasry. He testified that the commencement date of the Contract was the 18 April 2010, and that the completion date was meant to be the 18 August 2010, plus fifteen days extra. The works were not completed by the date stipulated, and that the works that had been done were defective and of poor quality.
19. There was no termite treatment done to the house. He referred this court to the report made by a pest control company.
20. The house foundation was not built in accordance with the specifications. The report of Mr. Angelin Confait dated the 4 August 2015, dealt with the defects.
21. He also testified about a written notice of "*mise en demeure*" sent to Mrs. Margaret Sun of the Defendant pertaining to this case. This court interjects to state that the written notice of "*mise en demeure*" referred to "Sunshine Properties (Pty) Ltd herein legally represented by Mr. Nabil Elmasry" as being the client of Counsel, Mr. Frank Elizabeth. The plaint contained no averment with respect to Sunshine Properties (Pty) Ltd and no information was laid before this court with respect to this company. This court recalls that the plaint

averred that the Plaintiff is the proprietor of Sunshine Properties Limited, and that the Plaintiff on several occasions, through his company director, had informed the Defendant in writing that it had acted in breach of the Contract, but the Defendant has to date refused, failed and or neglected to respond to the Plaintiff.

22. This court returns to the evidence of Mr. Elmasry. The Plaintiff is also claiming the sum of 2,029,094.90 rupees for "*additional costs for remedial works*"; the sum of 64,500 rupees representing the costs of "*structural replacement resulted by termite activity*"; the sum of 300,000 rupees for moral damage resulting from breach of the Contract and/or termite infestation; the sum of 525,000 rupees representing the "*cost of replacement of fixtures and fittings*"; the sum of 348,800 rupees for liquidated damages due to the delays in the completion of the works by the Defendant; the sum of 872,000 rupees with respect to the "*damages with regards to the foundation of the house*"; the sum of 11,439.10 rupees representing money owed to the Public Utilities Corporation with respect to outstanding bills (exhibit P19 collectively), and the sum of 1,000,000 rupees for the loss of use and enjoyment of the swimming pool. With respect to the swimming pool, he stated that it had a few cracks, that it leaked, and that it could not be made use of for quite some time.
23. With reference to a quotation for the construction of the house and the swimming pool, dated the 15 March 2010, emanating from the defendant, exhibit P20, he stated that the quoted amount was 3,488,000 rupees, and that the period for the works to be undertaken was four months. This court mentions that exhibit P20 was addressed to Sunshine Properties Ltd.
24. Mr. El Masry also testified about a quotation for the "*PROPOSED HOUSE FOR MR. NABIL EL MASRY AT MONT JOSEPHINE*", dated the 1 April 2011, emanating from Mrs. Margaret Sun of the Defendant, exhibit P21. This court mentions that the Plaintiff is not mentioned on this quotation.
25. He testified about an invoice with respect to extra construction works undertaken at La Misere in the sum of 47,800 rupees, exhibit P22. This invoice is made out in the name of

the Plaintiff. Exhibit P22 is about *"demolish work for cutting new windows at the front of the building according to the new drawing."*

26. The Plaintiff received a quotation from the Defendant, dated the 12 August 2011, relating to extra works undertaken at *"VM2 at ground floor"*, in the sum of 206,000 rupees. He testified that this quotation was paid.
27. The Plaintiff also received an invoice relating to extra work *"for VM2"* dated the 28 November 2011, emanating from the Defendant, in the sum of 355,000 rupees, exhibit P24. This invoice was approved for payment.
28. The Plaintiff was asking this court to enter judgment in his favour in the sum of 5,150,834 rupees, together with interest and costs.
29. Under cross-examination, Mr. Elmasry maintained that he made a payment amounting to 5,692,103.97 to the Defendant for the sub-structure of the building along with the sub-structure of the swimming pool. He maintained that the start of the Contract was the 18 April 2010, and that the completion date was the 18 August 2010 plus 15 days extra. He did accept that slight delay can happen due to certain changes that could be made to the building during the building process. The initial works were completed after one year. He stated that the Plaintiff did not notify the Defendant in writing that it was late in the completion of the project. He added that: *"at that time [they] had a few projects going with Fada Construction apart from this project. So this is why [they] didn't press on the delay"*.
30. With respect to the sum claimed for the loss of use and enjoyment of the swimming pool in the sum of 1,000,000 rupees, Mr. Elmasry explained why the Plaintiff was claiming this amount, as follows, *"[t]he house is rented at 10,000 dollars a month. As the swimming pool is not functional we could not rent the house for two years. So you can imagine the amount of loss we lost."* Moreover, Counsel made the point that the report referred to *"finishes to swimming pool"* and did not refer to any defects. Mr. Elmasry reiterated that the swimming pool leaked.

31. Under re-examination, Mr. Elmasry maintained his testimony. He also testified that he had to pay Mahe Design and Build 1.2 million United States Dollars to remedy the defects of the Defendant and altogether spent 3.2 million United States Dollars.
32. Mr. Angelin Confait is an architectural technician. He was the Managing Director of Mahe Design and Build until he left the company in 2015. When asked whether or not Mahe Design and Build had a client by the name of Mr. Nabil El Masry at the time when he was the Managing Director of Mahe Design and Build, his response was that Mr. Nabil El Masry was the representative of Sunshine Properties Limited.
33. He testified that Mahe Design and Build had done some finishing jobs for Sunshine Properties Ltd in La Misere Ma Josephine. It continued the works previously started by other contractors and undertook some jobs. An attempt was made to rely on a report done in the name of "Sunshine Properties", but this was objected to and sustained by this court. As noted by this court, in the course of proceedings, the brief of the report stated, "[i]n July 2012, Mahe Design and Build was contracted by Sunshine Properties to undertake all the finishing works at Villa Masry 2, a Two Storey Residential House situated at Ma Josephine La Misere". Emphasis supplied. It is fundamental to note that the plaint did not contain any averment to the effect that "Sunshine Properties" had contracted Mahe Design and Build to undertake all the finishing works at Villa Masry 2, on behalf of the Plaintiff.
34. This court returns to the evidence of Mr. Confait. He testified that Mahe Design and Build did some structural replacement, but the termite treatment was done by others. Mahe Design and Build had to do excavation around the project, the building itself. He was unaware of how much this work costs. Mahe Design and Build also repaired conduits.
35. With respect to the foundation of the house, when asked by Counsel whether or not any works were done to it, his response was, "*The foundation not really on our part because it is only 1 part that we did, at the back of the house because there was some water penetration. [...]. There was water slipping through the foundation coming inside the*

house and then that is where we have to do a new wall and waterproof behind it so that you do not have the water slipping through." Verbatim

36. With respect to the swimming pool, he described the works done by Mahe Design and Build as follows: *"Swimming pool the structure was there but when the structure was cast they did not cast the nozzle or the fittings that goes for the swimming pool. Therefore we have to put this and then re-plaster."*

37. When asked if he could confirm that the works done that he saw on site were defective, his response was and this court records the interaction —

"well I cannot say it was defective, we went there, and we did not just go on site. We were contracted for this project and they had consultant. Therefore we did work, I am talking about Mahe Builder now, we did works and the works was done on the request of what the consultant and client wanted.

Q: But when you got on site you did not work from scratch. There was work done already on site?

A: No but like in the report say, the whole structure was already up, the roof covering was in place and mostly the floor was done and those things.

Q: But you did work to complete what was not completed?

A: we did work which was not completed, at the same time we did some works just to make sure that the type of finishing is what the client wanted. And we proposed some finishes to the wall so that it comes acceptable to the client and Consultant.¹"

38. He did confirm that Mahe Design and Build were paid for the works done; however, he could not remember how much it was paid.

¹ See pages 14 and 15 of the court proceeding dated 7th January 2018 at 9am

39. Under cross examination, when asked whether or not he had occasion to go over what was the responsibility of the Defendant *vis-a-vis* the swimming pool, Mr. Confait could not tell whether or not the Defendant was supposed to plaster or not to. He explained that he could not testify about what the parties had discussed and agreed to.
40. Mr. Harold Michaud, a pest controller for almost 30 years, dealing in termite control, insects control, these being structural pests and household pests, testified that he received a call from Mr. Butler Payet to fix a problem at Ma Josephine, La Misere.
41. He testified that he first went there on the 18 April 2013; he checked the premises and then stated that he went back a year later on the 21 March 2014. On that day he conducted an inspection of the whole place and wrote a report after which he was hired to do the treatment for the interior and exterior. He told this court that he *inter alia* sprayed sufficient chemical to deal with the termites as there was a termite infestation. The quotation of Michaud Pest Services (Pty) Ltd was tendered in evidence. The sum quoted by it was 64,500 rupees.
42. This court had questions and wanted to ascertain if Mr. Michaud knew where the infestation came from and whether or not he could tell if the foundation was treated before. The response of Mr. Michaud was that he could not tell with certainty if it was treated or not, and that the infestation came from under the floor as he kept on stating.

The case for the Defendant

43. The Defendant did not call any evidence or witnesses.

Analysis and findings

44. This court has considered the evidence on record. No written submissions were offered on behalf of the Plaintiff and the Defendant.

45. This court considers the following heads of claim together —

"i. Additional Cost for remedial works (USD 150,303.33) SCR 2,029,094.90;

iv. Cost of structural replacement of fixtures and fittings SCR 64,500.00;

vi. Damages with regards to the foundation of the house SCR 872,000.00"

46. Having considered the evidence in this case, this court concludes that the Plaintiff has not established heads of claim "i", "iv" and "vi" of para 12 of the plaint, on a balance of probabilities. As mentioned above the plaint did not aver that Mahe Design and Build had been contracted by Sunshine Properties to do a "REPORT ON ABORTIVE & REMEDIAL WORKS UNDERTAKEN AT VM2" on behalf of the Plaintiff. Therefore, there is no evidence in support of any of these claims.

47. In the case of *Marie-Ange Pirame v Armano Peri SCA 16 of 2005* (unreported), the Court of Appeal at para [8] of the judgment, held, "this court did state in (CA 8/97) *inter alia* that evidence outside the pleadings although not objected to and the relief not pleaded for ..., cannot and does not have the effect of translating the said issues into the pleadings or evidence. Indeed we should reiterate here that the above quoted views of this court still remain good law".

"ii. Cost of structural replacement resulted by termite activity SCR 64,500"

48. This court finds that the Plaintiff has not established this head of claim, "ii. Cost of structural replacement resulted by termite activity SCR 64,500" on a balance of probabilities. It appears that the quotation of Michaud Pest Services (Pty) Ltd, tendered in evidence did "not include the cost of any replacement structural or otherwise necessitated as a result of the termite activity or any damage occurring whilst the treatment is being carried out".

"v. Liquidated damages SCR 348,800"

49. This court concludes that the Plaintiff has not established this head of claim "*v. Liquidated damages and ascertained damages for delays in building works, with regards to both the house SCR 348,800.00*" on a balance of probabilities. This court attaches no weight to exhibit P18, the letter captioned, *RE: SUNSHINE PROPERTIES (PTY) LTD – VILLA MASRY 2/RETAINING WALL*": see Marie-Ange Pirame *supra*. In any event there was no evidence to establish any delay on the part of the Defendant.

"iii. Moral damages resulting from the termite infestation and/or breach of Contract (estimate) SCR 300, 000.00"

50. This court has concluded that the Plaintiff has not proven that the Defendant has acted in breach of the Contract on a balance of probabilities. Thus, the Plaintiff's claim for moral damage for breach of the Contract does not arise for the consideration of this court. This court observes that, in any event, no evidence was led to establish this head of claim "*iii. Moral damages resulting from the termite infestation and/or breach of Contract (estimate) SCR 300, 000.00*".

"viii. Loss of use and enjoyment of the swimming pool SCR 1,000,000.00"

51. This court concludes that the Plaintiff has not proven this head of claim "*viii. Loss of use and enjoyment of the swimming pool SCR 1,000,000.00*" on a balance of probabilities. There is no tangible evidence to support the allegations made by Mr. Elmasry to the effect that "[t]he house is rented at 10,000 dollars a month. As the swimming pool is not functional we could not rent the house for two years". This court holds the view that serious concerns can be raised as to the certainty and nature of the sum claimed, in the absence of documentary evidence, which unfortunately has not been forthcoming as well.

"vii. PUC Outstanding bill SCR 11439.10"

52. This court concludes that the Plaintiff has not proven this head of claim "*vii. PUC Outstanding bill SCR 11439.10*" on a balance of probabilities. It is not clear to this court

why the invoices relating to this head of claim are made out in the name of Sunshine Properties (Pty) Ltd, and emanated from Sunshine Properties (Pty) Ltd. As mentioned above, there are no averments in the plaint concerning Sunshine Properties (Pty) Ltd.

The Decision

53. 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