

SUPREME COURT OF SEYCHELLES

Reportable
CC6/2018
[2020] SCSC 207

In the matter between

CHANDER PARKASH
(rep. by Guy Ferley)

Plaintiff

and

MARTHE PETOVAR-DIDON
(rep. by Clifford André)

Defendant

Neutral Citation: *Parkash v Petovar-Didon* CC 6/2018) [2020] SCSC 207 (27 March 2020)

Before: Twomey CJ

Summary: breach of contract- stage payment- valuation of works done- counterclaim- penalty clause- pleadings and evidence at variance quantification of works completed

Heard: 31 October 2019 - submissions 27 November 2019

Delivered: 27 March 2020

ORDER

The Defendant is ordered to pay the Plaintiff the sum of SR 225,538.80 with interest and costs.

JUDGMENT

TWOMEY CJ

The claim and counterclaim by the parties

[1] The parties entered into an agreement for the Plaintiff, a building contractor, to construct a house, retaining wall, boundary wall and other related external site works for the Defendant, the owner of Parcel C9205 at Au Cap, Mahe.

[2] It was inter alia terms of the said agreement that the Plaintiff would complete the works within one year with the commencement date of 2 May 2017 for the works and that the contract price for the said works totalling SR 3,850,004.89 would be payable in six stage instalments as follows:

1. An advance payment of 20% of the contract sum (SR 770,00.98) on signing the agreement
2. 25% of the contract sum upon completion of the ground floor slab and retaining wall and boundary wall.
3. 20% of the contract price upon completion of the first floor slab, roof slab and all block work
4. 20% of the contract price upon completion of roof, ceiling, and plastering works
5. 13% of the contract price upon completion of remaining works
6. 2% retention of the contract price for six months after the date of practical completion considered as the defect liability period

[3] The Plaintiff completed works up to Stage 5 as set out in paragraph 2 above and requested the payment of SR785, 000, but the Defendant refused to remit the same.

[4] By letter dated 20 August 2018, the Plaintiff was requested by the Defendant to complete the works within 14 days or vacate the site. By letter in response, the Plaintiff indicated his willingness to complete the works as agreed if the 13% payment due was made and further explained the delay in completion of the work as being due to changes in design and the extra-works contracted by the Defendant.

[5] It is the Plaintiff's claim that no response was received from the Defendant, that he was evicted from the building site and that he is owed the sum of SR401, 681.56 for the balance for works done under the contract and for additional works contracted by the Defendant.

[6] In her Statement of Defence, the Defendant has claimed that she has paid a total of SR 3, 124,002.21 to the Plaintiff but has refused to pay the rest of the contract price as work was not duly completed as agreed and was not up to standard. She further averred that these matters were notified to the Plaintiff on two occasions, namely by letters dated 20 August 2018 and 6 September 2018 respectively.

[7] The Defendant counterclaimed for breach of contract by the Plaintiff. She averred that she paid SR181.624 for a quantity surveyor's report, that after activating the penalty clause under the contract the two-month delay for uncompleted works amounted to SR 160,000 and that for the completion of works a separate contractor had to be engaged for the total sum of SR75, 338.

The Plaintiff's evidence

Evidence of Chander Parkash

[8] The Plaintiff gave evidence that he operated under the business name of Parkash Construction and employed ten persons and that on 22 April 2017 he had entered into an agreement with the Defendant, which he tendered to court (Exhibit P1). He was meant to begin the construction of the Defendant's house on 2 May 2017 and finish on 30 April 2018. The contract price was SR3, 850,004.89 to be paid in instalments at different completion phases. He received four payments of 20% of the contract price, followed by 25% of the contract price, then 20 % on completion of the first floor slab and a further 15% on completion of the roof, ceiling and plasterwork but not 20% as was due under the contract. He also did not receive the next 13% of the contract price when he claimed for it. He had completed all the works except for finishing the tiling work and the balustrade and the painting of the exterior of the house.

[9] He was then barred from the site. Subsequently, he received a letter on 20 August 2018 from the Defendant's lawyer determining the contract unless the works were completed within fourteen days.

[10] On 17 September 2018, he responded in writing notifying the Defendant that he was due SR 401, 681.56 for completed works under the contract and for additional works carried out with an appendix of all the works completed annexed to the letter. Two or three

months later, he returned to the site to collect his tools of which 75% were missing. He would have finished all outstanding works under the contract within two or three weeks. He had also carried out additional works to the contract, namely a veranda which had required slab work and sandwich walls for the retaining wall which had not been in the original plan. This had added another two to three months to the work.

[11] There was then a further addition of an extra bedroom, the steps outside the house and tiling. He was paid for some of this work but it delayed the completion of the rest of the house within the contracted time. There were further matters, which added to delays such as the fact that he had to reposition electric sockets on many occasions. Steel work was a further add-on.

[12] He did not agree that the penalty clause was triggered as the delay was not caused by him. In any case, the notification for the penalty clause was only communicated to him after he had left the site. The stage payments were certified by the Defendant's quantity surveyor, Gustave Larue. He was not aware that Mr. Larue had subsequently carried out a valuation of the completed works. At no stage was it indicated to him that his work was defective or sub-standard.

[13] He disagreed that a Mr. Roch Didon had indicated to him that the works were defective. He also disagreed that with the Quantity Surveyor's analysis and valuation that he owed SR 181,624.40 to the Defendant or that he owed a penalty fee of SR160, 000 for delay in completing the works and another SR 45,000 for an unfinished veranda and SR 30,338 for a balustrade.

Evidence of Philip Zoé

[14] The Plaintiff also called Mr. Philip Zoé, a town planner and construction manager. The witness worked as a private consultant and technical adviser and had been employed as the Plaintiff's project manager. He prepared quotations for works and procurement of materials for the Plaintiff. He also looked after the works on site and gave technical advice to make sure the site ran smoothly and rules and regulations were followed.

- [15] He had worked on the project in dispute. He had prepared a quotation for the contracted works and some materials were to be supplied by the Defendant. The contract was prepared by the Defendant and was a standard one. It was lump sum contract with payments released that is, by percentage of the contract sum once a stage of the works had been reached. He was on site twice a week.
- [16] In the event, the advance payment of 25% was made, the ground floor slab, retaining and boundary walls were completed and also paid for. A further 20% was paid on the completion of the first floor slab, roof slab and all the block work. A further 20% was paid on completion of the roof, the ceiling and plastering works. However, the last two payments had not been made.
- [17] The only dispute between the parties related to speeding up the works. The Defendant was not in the country and was trying to come back within a certain timeframe and the Plaintiff was asked to catch up on delays. Some of these delays were due to additional works requested by the Defendant. This was discussed with the Defendant's Quantity Surveyor, Mr. Gustave Larue.
- [18] The extra work related to the retaining wall at the front of the building which was supposed to be a single wall but was then changed to a sandwich wall with concrete and welded mesh in the middle. This resulted in double materials and double the amount of time and effort. An additional external staircase, the demolition of an internal wall and its repositioning, a concrete veranda roof as opposed to the original aluminium covering all added a minimum of between seven to eight weeks to the completion date of the contract.
- [19] The Plaintiff was asked to leave the site in August 2018. He decided to take a measurement of the works completed under the contract. He costed out the works completed and made a report of his findings (Exhibit P3). He found that SR401, 681.56 was due for the unpaid works. These were calculated in terms of the percentage of the works done for each phase as set out in the contract.
- [20] With regard to the Defendant's allegations that the works completed amounted to SR2, 942,337.81 and not SR3, 486,183.77, this was misleading. The agreement in the

present case was for a lump sum contract divided into stage payments and not quantified in terms of works completed. The lump sum contract payment was calculated in terms of the works done in percentage terms of the consideration of the contract. The two different methods of calculation can involve a discrepancy of between 0% to 10%.

[21] In terms of the additional works contracted, the completion of those works took six to eight weeks. This meant that the works suspended to permit these works to happen could only start after the expiration of this delay. The contracted works would have taken another six to eight weeks. The delay therefore caused by the additional works would have been about twelve weeks altogether.

The Defendant's evidence

Evidence of Roch Didon

[22] The Defendant called Roch Didon, the Defendant's sister and a building contractor by profession. He got to know the Plaintiff when he was in the tree felling business and had met him at Beau Vallon where they were both working. He had told the Plaintiff about his sister's house building project and invited him to quote. His quotation was the lowest he received for the job and his sister decided to take on the Plaintiff for the job. He signed the contract on behalf of the Defendant who was not in the country at the time.

[23] He paid the Plaintiff the deposit and was told that ten workers would be assigned to the site. The works started two weeks late with only three workers initially and the Plaintiff himself.

[24] After two months one of the workers left and only two remained on site. Then more workers, numbering five or six were brought to the site. The work progressed well until the first floor and roof slab level. He paid the Plaintiff according to the contractual terms. Sometimes payments were made even though some items were not completed. In particular, the retaining wall with the railing on it and the boundary wall and parking were not completed.

[25] There were also variations in the works to be done, namely putting a concrete roof as opposed to an aluminium roof on the building. There was no period agreed for this extra

work. However, he estimated that it would take four weeks to complete this work. The staircase was also changed as well as the elevation of the veranda.

- [26] The Plaintiff was paid even if he had not completed certain of the works as the owner was anxious to gain entry to the house. Pressure was put on the Plaintiff to finish these jobs but he asked for more money and then payment was stopped. Certain items such as the construction of doors from timber provided by the Plaintiff was never done. The timber given to the carpenter for this purpose disappeared and only three doors were made.
- [27] He stated that in total 80% of the contract price was paid to the Plaintiff. He had notified the Plaintiff on 5 March that there was outstanding work to be performed although payment for them had been made. These included the roof structure, the ceiling, some of the plastering, the retaining wall and its steel railing and the concreted parking area.
- [28] The Plaintiff responded by letter dated 28 May 2018 asking for additional time and the 10% payment due. The 10% was paid on the 29 May 2018 followed by another 5% shortly thereafter on 3 August.
- [29] The works continued to be delayed, materials were not delivered on site, workers were missing for the site. The Plaintiff claimed he had trouble with his vehicles, sometimes the workers came on site by bus.
- [30] Two weeks after the last payment the Plaintiff claimed more money but it was refused. He then left the site and said he would return when he was paid. The Defendant arrived three months later and another contractor was taken to complete the works.
- [31] Mr. Gustave Larue, a Quantity Surveyor was asked to value the works and he duly produced his report on 4 September 2018.
- [32] The counterclaim by the Defendant included a sum of SR 160,000 for four weeks at SR 40,000 a week for delay for completion of the contract under the penalty clause. It also included a claim for SR45, 000 paid to Ed Enterprise for the steel railing on the retaining

wall and the balustrade which should have been done by the Plaintiff. The Defendant also claimed a further sum of SR 30,338 for the balustrade on the veranda.

[33] Although there had been variations to the contract resulting in additional works, the Plaintiff had also benefited from variations which had reduced the works such as the construction of only three bedrooms as opposed to four bedrooms on the original plans. The ceilings were not plastered as planned and a false ceiling inserted with materials from the Defendant. The boundary walls' height was reduced from 1.8 metres to 1.2 metres.

[34] The witness stated that the Plaintiff only came on site on average four days a month. He invoked the penalty clause after the Plaintiff left the site. He agreed that there was no agreement to remove the cost of the balustrade that had been imported by the Defendant and not provided by the Plaintiff. When asked to explain the cost claimed for the Quantity Surveyor's report, the witness stated that this was a mistake in the pleadings. The money claimed was in relation to the excess money paid out for works to be completed by another contractor.

[35] He agreed that he had made payments for the different stages of works until the last two and stated that he did so even though the works in those previous stages had not been completed as he had been too flexible.

[36] The delays had not been occasioned by additional works but rather because the Plaintiff was doing work on his own house. He did not kick the Plaintiff off the site; he left of his own accord. In the end, it took another contractor another eight months to complete the works.

Evidence of Gustave Larue

[37] Mr. Gustave Larue, a Quantity Surveyor also gave evidence for the Defendant. He stated that an advance of 20% of the contract price amounting to SR770,000.97 was paid to the Plaintiff in April 2017, a second instalment of 25% amounting to SR 962,501.23; a third instalment of 10 % amounting to SR 385,000; a fourth and fifth instalment of another

10% amounting to SR385,000 each; and a sixth instalment of SR 192,500 under the agreement. These amounted to a total of SR 3,080,002.21.

[38] Further payments were made by the Defendant to third parties, namely SR7, 000 for doors, SR 12,000 for a plumber, SR 44, 000 to Ed Enterprise for a balustrade. There were also additional works by the Plaintiff, which were paid for amounting to SR261, 952.

[39] After the physical examination at the site, he valued the works completed at SR 2,943,377.81. In this respect, this meant that the Plaintiff had been overpaid by SR 181, 000 and not as indicated on the counterclaim that that was the cost for his report.

[40] In cross-examination, he agreed that he had okayed the payments at various stages of the contract on physical examination at the site and once he had satisfied himself that the various stages for work had been completed.

Evidence of Roy Labrosse

[41] Mr. Labrosse, an electrical engineer and contractor testified that the Defendant was his sister-in- law and that he had been engaged as the electrical contractor for her house. He had completed the works according to the plans save for some minor adjustments when the kitchen was installed, some changes in height of some of the sockets and work on an extension after the Plaintiff had left.

The issues to be resolved

[42] The following issues are to be resolved by the court:

On the Plaint and the Counterclaim:

1. Whether there was a breach of the building contract by either the Plaintiff or the Defendant
2. If so what is the quantum owed to either the Plaintiff or the Defendant under their respective claims.

[43] Both parties claim that the contract was breached. The Plaintiff claims that he completed works up to the fourth stage and then claimed payment for the fifth stage which sum he

needed in order to complete the remaining works but that he was evicted from the site. The Defendant admits the Plaintiff was not paid for the remaining works because he had not completed the whole work during the time stipulated in the contract.

[44] The Plaintiff claims that the works completed at the time of his eviction amounted to SR 3, 846, 183,77 and that he was therefore underpaid by SR 401,681.56. Conversely, the Defendant in his Counter claim avers that he had the works quantified and that the Plaintiff had been overpaid by SR 235,338 (penalty SR160, 000 + railing SR45, 000 + veranda and staircase SR30, 338). In addition there was the cost of a valuation report at SR181, 624.40 totalling SR 416,962.40. However, Mr. Gustave Larue, the Defendant's witness in evidence stated that the SR 181,624 was in respect of overpayment for the works completed by the Plaintiff and not the cost of the report.

[45] The Defendant's pleadings are therefore at variance with his evidence at trial.

The law on pleadings and evidence

[46] It is trite that a party is bound by his pleadings. In the present case, despite the evidence he adduced being at variance with his pleadings, the Defendant sought no amendment even when the discrepancy was pointed out to him at the trial.

[47] In the case of *PTD Limited v Zialor* (SCA 32/2017 (Appeal from Supreme Court Decision CS 46/2013)) [2019] SCCA 47 (17 December 2019); the Court on Appeal reviewed the law relating to this issue. Robinson JA stated:

"[111] In Gallante v Hoareau [1988] SLR 122, the Supreme Court, presided by G.G.D. de Silva Ag. J, at p 123, at para (g), stated —

"the function of pleadings is to give fair notice of the case which has to be met and to define the issues on which the Court will have to adjudicate in order to determine the matters in dispute between the parties. It is for this reason that section 71 of the Seychelles Code of Civil Procedure requires a plaint to contain a plain and concise statement of the circumstances constituting the cause of action and where and when it arose and of the material facts which are necessary to sustain the action".

[112] In *Tirant & Anor v Banane* [1977] 219, Wood J, made the following observation —

"[i]n civil litigation each party must state his whole case and must plead all facts on which he intends to rely, otherwise strictly speaking he cannot give any evidence of them at the trial. The whole purpose of pleading is so that both parties and the court are made fully aware of all the issues between the parties. In this case at no time did Mr Walsh ask leave to amend his pleadings and his defence only raised the question of plaintiff's negligence.

In Re Wrightson [1908] 1 Ch. at p. 799 Warrington J. said:

The plaintiff is not entitled to relief except in regards to that which is alleged in the plaint and proved at trial

In Boule v Mohun [1933] M. R. 242 on an issue of contributory negligence, which had not been pleaded in the statement of defence, the Court found against the defendant, but held that such issue could not in any event have been considered as it has not been raised in the pleadings".

[114] In *Lesperance v Larue* SCA 15/2015 (7 December 2017), the Appellate Court reiterated the fact that a court cannot formulate the case for a party. At paragraphs 11, 12 and 13 of the judgment, the Appellate Court quoted with approval the decisions of the English Court and the principle enunciated by Sir Jack Jacob in respect of pleadings —

"11. In his book "The Present Importance of Pleadings" by Sir Jack Jacob, (1960) Current Legal Problems, 176; the outstanding British exponent of civil court procedure and the general editor of the White Book; Sir Jacob had stated: "As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial.

The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by their pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice ...”

[48] More to the point where the pleadings and the evidence are at odds, the Court of Appeal again in *PTD Limited* (supra) stated

“[114]... In the case of Nandkishore Lalbhai Mehta VS New Era fabrics Pvt. Ltd. & Ors. [Civil appeal No 1148 of 2010] the Supreme Court of India said that the question before the court was not whether there is some material on the basis of which some relief could be granted. The question was whether any relief could be granted, when the Appellant had no opportunity to show that the relief proposed by the court could not be granted. When there was no prayer for a particular relief and no pleadings to support such a relief, and when the Appellant had no opportunity to resist or oppose such a relief, it certainly led to a miscarriage of justice. Thus it is said that no amount of evidence, on a plea that is not put forward in the pleadings, can be looked into to grant any relief”. Emphasis supplied”

[49] The Court of Appeal’s’ view as expressed above reiterates clear and consistent case law that a party is bound by the pleadings filed in court and the court cannot adjudicate on issues which have not been raised in the pleadings (see further *Charlie v Françoise* (1995) SCAR 49, *Vel v Knowles* (1998-1999) SCAR157, *Allen Ernestine v Mario Ricci* [1984] SLR 122, *Grandcourt v Esparon* (12 of 2008) [2009] SCSC 1 (18 October 2009);

[50] In the circumstances, I cannot adjudicate on the sum of SR181, 624.40 raised in the Counter claim by the Defendant and dismiss it.

Issue 1- breach of contract

[51] With respect to the Plaintiff and the Defence and whether either of them have breached the contract, Article 1315 of the Civil Code provides that:

“A person who demands the performance of an obligation shall be bound to prove it.

Conversely, a person who claims to have been released shall be bound to prove the payment or the performance which has extinguished his obligation.”

[52] It is not contested that the Plaintiff performed and was paid for works up to the beginning of the fifth stage of the contract.

[53] I must also take into consideration that 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.”

[54] It is in evidence that the Plaintiff was barred from the construction site by an equivocal letter dated 20 August 2018 in which he was given fourteen days to complete the works or leave and told that the letter served as termination of the contract. It is also not contested that the two final stage payments were not paid to the Plaintiff.

[55] In *Chow v Bossy* (7 of 2005) (7 of 2005) [2006] SCCA 19 (28 November 2006), the Court of Appeal stated that law and fairness required that before bringing a claim for failure to perform the obligations of a contract, the alleged defaulter should be put on notice of the default and given a chance to fulfil his obligations. I am not of the view that giving the Defendant fourteen days to complete the work was adequate notice and time to

complete the works. That fact is underlined by Mr. Roch Didon, the Defendant's own witness who stated that it took months for another contractor to finish the works.

[56] I also do not find on the evidence adduced by the Defendant that the penalty clause was triggered given the paucity of evidence on this issue and the fact that extra works were contracted which delayed the completion of the original works. In *Pindur vs Benoiton Construction Company [Pty] Ltd and another* (CC 18/2013) [2014] SCSC 124 (28 March 2014), Egonda-Ntende CJ in a similar case stated:

“Delay analysis in building contracts is a complicated and technical piece of work that seeks to determine the difference between what was planned [as planned] and provided for in the agreement and what eventually occurred [as built]. The burden of proof is upon the person seeking to prove ‘unjustifiable delay’ and or ‘inability of the contractor’ to do so and to prove particularly the exact period of the resultant delay”

[57] In the instant case, the burden of proof in this respect was on the Defendant He has not proved this element of his defence. Ultimately, I find on the evidence that the Defendant terminated the contract and pursuant to Article 1794 (supra) he has to indemnify the Plaintiff.

Issue 2 Quantum.

[58] Having heard the evidence of the Plaintiff's and the Defendant's respective Quantity Surveyors (QS) I find the truth relating to the works completed is somewhere in between the two amounts quoted in the reports.

[59] The Plaintiff's Q.S. in his report (Exhibit 9) states that the following items have been completed: 75% of the electricity installation completed, 80% of the finishing completed (including fixing of tiles, plastering, painting fitted wardrobes and kitchen cabinets) and 85% of the external works completed (reinforced concrete retaining wall, boundary wall steel railing paved parking area diversion of access road, septic tank/soakaway). In addition, 50% of the doors have been completed, all the plumbing has been completed.

[60] The Defendant's Q.S, in his report (Exhibit D5) states that the substructure is complete, the superstructure is 80% complete as floors need waterproofing, the roof is 90% complete as gutters and downpipes need to be completed, doors and windows are only 10% complete, plumbing is only 40% completed as the connection of the appliances are not done and that electricity installation is only 30% completed as the wiring work was carried by others. The finishing is 60% complete and the external works 75% complete.

[61] Overall, the Plaintiff's Q.S. states that the works completed amounted to SR3, 486,183.77 whilst the Defendant's Q.S. states it was SR 2,943,377.81. The contract price for 100% completion of the works was SR3, 850,004.89. Hence according to the Plaintiff, 90.55% of the works had been completed whilst according to the Defendant, 76.45%, - a difference of 14% between the two experts.

[62] It is impossible for the court to choose one expert's evidence over the other in the present case. I have not been shown any further evidence in relation to the quantified works. In the circumstances I take the average of the two quantities calculated. I find therefore that 85.97% of the works were completed. Hence, the sum of SR 3,310,041.70 was due to the Plaintiff for complete works.

[63] He has already been paid the sum of SR3, 084,502.21. He is therefore owed the sum of SR225, 538.80.

Order

[64] I therefore order that the Defendant pays the Plaintiff the sum of SR 225,538.80 with interest from the date of this judgment and costs.

Signed, dated and delivered at Ile du Port on 27 March 2020.

Twomey CJ