IN THE SUPREME COURT OF SEYCHELLES

Reportable
[2021] SCSC …
CA 27/2019

In the matter between

BERTIE HOAREAU **APPELLANT**
(rep. by Mr. Charles Lucas)

and

TRUST FOR CONSTRUCTION (PTY) LTD **RESPONDENT**
(rep. by Mr. Serge Rouillon)

Neutral Citation: *Bertie Hoareau v Trust for construction (CA27/2019) [2021] SCSC*
Before: G. Dodin
Heard: Written submissions
Delivered: 5 November 2021

ORDER

Grounds 1, 4 and 5 of appeal are unsustainable as they are wrongly founded on allegedly unfinished and substandard work by the Respondent.

The learned Magistrate applied the correct principles of the laws of contract and determined the matters at hand strictly within the pleadings before the Court.

This Court finds no reason to interfere with the decision of the learned Magistrate arising from the learned Magistrate's assessment of and findings on facts. Consequently, grounds 2 and 3 of appeal cannot be sustained and are dismissed.

JUDGMENT

Dodin J

[1] The Appellant feeling dissatisfied with the judgment of the Magistrate's Court giving judgment in favour of the Respondent in the sum of SCR 134,962.28 with interest at the legal rate of 4% per annum appeal against the said judgment raising the following grounds of appeal:

1. *The trial Magistrate erred in his assessment of the effective commencement date which resulted in his non-consideration of the Appellant's claim for late or non-completion of the works by the Respondent within the contractual period allowed for completion of the Appellant's project.*

2. *The trial judge was wrong in Paragraph 14 of his judgment to make the finding that "it is apparent, based on evidence that the Plaintiff had carried out certain works for the benefit of the Defendant and under his instructions" when no such certain works were ever done or instructed by the Appellant.*

3. *The trial Magistrate erred in paragraphs 28 and 29 of his judgment by concluding that the project could have been completed by February 2016 as exoneration of fault attributable to the Respondent, which conclusion was wrong and was purely bias conjecture.*

4. *The Magistrate failed to consider uncompleted, defective and unworkmanlike works and that were itemized certificate No5 of the Respondent for which could not be disbursed by the Development Bank of Seychelles due to the Quantity Surveyor's Report and other overwhelming evidence in favour of the Appellant for which the Magistrate ought to have made an award in his favour.*

5. *In all circumstances of the case, the award granted to the Respondent ought to have been less given that it stopped all works in January 2016, abandoned site altogether in March 2016, while the Appellant was denied any award for his heads of claim which the Court below ought to have awarded as prayed in the Counter Claim.*

[2] Learned counsel for the Appellant made the following submissions on the on the grounds on appeal.

[3] On ground 1:

i. Exhibit P2, the building contract provides at paragraph 4 thereof, for the commencement date for the works on site, and clause 5 provides for the time frame for completion, which was "eight (6) months" from the commencement of works. The works were to be completed either within 8 months or 6 months thereafter. This typographical error was never clarified during the proceedings, it would be best to presume the period at 8 months to give the Respondent the benefit of the doubt.

ii. Clause 7 required the Appellant to pay 20% in advance to the contractor. Thereafter the Appellant was to write to the Respondent to officially commence works. The evidence of the Respondent states at page 15 (proceedings of the 15/319) that this payment was made on the 6th May 2015 and he started works in June 2015. The duration of works was to be 8 months. At the bottom page 16 and at page 17 he testifies that although he did not receive the commencement of works letter from Appellant, he started working early in June 2015, one month after 1st instalment. His action shows that had condoned the missing letter required under the agreement. However, it must be presumed that the parties did communicate and interacted to enable the Respondent to mobilise on site and commence works. Therefore, the effective completion date was due eight months after June 2015, which effectively would come due early February 2016. As at that date works had yet to be completed. Works entailed in the 6th Invoice had yet to be performed as at May 2016.

Exhibit P3**:** Invoice 5. Although dated 2nd January 2016, the Appellant received it only on the 10th February, more than a month later when the eight months had expired. Works had stopped since December prior to the issuance of the invoice (January 2016).

Exhibit P6: Letter demand, dated 12th May, terminating the contract. Since Invoice no. 5, the Plaintiff had stopped works on site.

Exhibits P9 and P12: The evidence of Appellant and documents of the QS of works appointed by DBS, both corroborate defective works that required remedial attention as at February 2016 and the same state of affairs remained unchanged as at May 2016.

Exhibit P15: The report compiled by FTC on the joint site visit in April 2016. The Plaintiff admitted at page 5, paragraph 18 as per the judgment that he was willing to do any missing electrical wiring, fix any defect and that he would send workers on the site to fix all defects on the structure and clean all debris left over on the site. He had also failed to plaster the floors of the whole building, which work he claimed in invoice no.5.

However, Between January and March he failed to attend any joint inspections, or remedy any works pointed out by the QS. He demobilized and removed all building materials without clearing the site. It was only on April 13th that he turned up for the joint inspection together with Fair Trading Commission.

iii. From the above, any reasonable court ought to have found that the plaintiff was liable for delay in completion by at least 5 months. Invoice 6 had yet to be issued because works on Invoice 5 had to be attended to, which he avoided and it even demobilised when the QS did not approve the invoice raised for disbursement by the Bank until defective or uncompleted works were either fully completed and remedied.

iv. The Defendant/borrower had no control on the release of funds for disbursement to the Plaintiff. The QS of the project had to inspect works allegedly completed and claimed, whenever the Plaintiff issued an invoice. He was not satisfied and he did not recommend payment by DBS.

v. The chronology of events that ensued between January and May 2016 do not corroborate paragraph 18 of the Judgment. The Plaintiff did not act in good faith and was not truthful in his testimony on his willingness to rectify the defects. Considerations have to be taken of the complaint to FTC by the Appellant, contents of the QS report on quality of works and unfinished works plus the unilateral acts of carting away the loose materials from the site and demobilisation of workforce against non-payment of invoice 5. No payments by DBS until the QS was satisfied with the quality of works and the effective remedy of defective/unfinished works. Hence the findings in paragraph 18 were incorrect and did not represent the state of affairs.

[4] On ground 2 learned counsel submitted that the records do not show that there was evidence as to what other or additional works for the benefit of the Appellant that had been carried out by the Contractor. All scopes of works executed were as per contract. Therefore, this finding of sympathy in paragraph 14 of the judgment that had swayed the opinion of the Magistrate in the Plaintiff's favour. It ought not to have been taken into consideration. In the same paragraph the learned Magistrate suggested that over and above the free extra works, the Appellant failed to pay the Contractor but thereafter his analysis in paragraph 15, 16,17,18,19 and 20 cannot stand ground based on the ratio of *Labco (Pty) Ltd v/s Bertie Ah-Kong SCA 13 of 2014*. Payment for works claimed under Invoice No. 5 had to be paid only upon verification and confirmation of completed works by the QS and not partly completed works or billed works as per Invoice No. 5, although not performed on substandard.

[5] On ground 3 of appeal leaned counsel submitted that exhibit P2, the building contract was signed on the 2nd April 2015. Time for completion was quoted 6 months and eight months. Deadline for completion was therefore December 2015 or 8 months after payment of 1st instalment in June 2015. In January 2016, the plaintiff instead of completing the project, it was still at the stage of the 5th invoice out of 6 invoices. No further works were executed and he stopped works altogether. For reasons best known to the Plaintiff he only conveyed invoice no. 5 to the Appellant in February 2016 after 1

month of stoppage of works. Further there were defective and uncompleted works admitted by the Plaintiff in evidence and blatantly reflected in paragraph 18 of the judgment. In March the Plaintiff abandoned the site and in May 2016 the Appellant terminated the contract. Yet the Magistrate found reasons unrelated to the facts and the evidence to dismiss the Appellant's counterclaim for loss of income, delay in completion and moral damage. Learned counsel prayed for the Court to review the evidence in that respect and to make an award in favour of the Appellant as per his counterclaim.

[6] On ground 4 learned counsel submitted that certificate No.5 was allegedly issued early in January 2016, although the Appellant received it 1st February 2016. Works allegedly completed as per the invoice were either defective or yet to be performed. The documentary evidence of the QS and the FTC suffice to indicate the non-performance of works. The testimony of the Plaintiff adopted in paragraph 18 of the judgment amounted to an admission of such breach of contract. If there were no defects or uncompleted works to attend to, the Plaintiff would not have made such admissions in his evidence, which is reflected in paragraph 18 of the judgment as the crux of the case against the Appellant. However, the Plaintiff never offered to rectify works or complete invoiced works from January 2016 to May 2016. His testimony on his willingness to rectify faulty works at all times do not hold water and was only a hoax. Had he such intentions he would have cooperated fully with the QS and the Appellant, as far back as January 2016 but his behaviour was otherwise when he demobilized and carted off all loose materials from site in March 2016. His testimony ought not to have been accepted by the Court.

[7] On ground 5 of appeal learned counsel submitted that the learned Magistrate argued in his judgment that the Appellant completed the project only 10 months later. Thus, for that reason he could not award loss of income. (Paragraph 26,27,28,29,30 and 31 of the judgment). Learned counsel submitted that:

i) The Appellant ought not to be blamed for the delay from January to May 2016. These were acts and omissions wholly attributable

to the Plaintiff, its comportment and unwillingness to redress the breaches in the contract. Had the Plaintiff completed the project in the contract within the 8 months the Appellant would not have had the inconvenience to seek alternative contractors for their quotations, negotiate and outsource works for remedy and completion. The Appellant did take 10 months for that reasons. Meanwhile the Plaintiff had taken the stance of abandonment of works because it had not paid for the invoice instead of attending to the works required to satisfy the list of uncompleted and defective works.

ii) The Plaintiff admitted at page 24 of the records that *"Yes I know Mr. Hoareau was going to operate a business on site and the work had to be completed in 8 months. Yes we started works in June 2015. By May 2016 our scope of works was completed. We had completed the work yes, yes should have completed by February 2016"* This blanket admission sufficed to prove the Appellant's counter claim. However, the Magistrate had only to consider only the quantum of the counterclaim which was never challenged.

iii) If subsequently it took 10 months for the Appellant complete the project from his own funds which involved taking stock of his failed construction project, remedying the defects and completing unfinished works claimed in Invoice 5, the Magistrate erred in paragraphs 29 to 31 of the judgment by failing to consider the loss and prejudice suffered by the Appellant as a result of the breach of the timely completion of contract and abandonment of the site by the Plaintiff and the consequential loss suffered by the Appellant.

[8] Learned counsel hence moved the Court to review that heads of claim, the admissions made by the Plaintiff and the case for the Appellant altogether and to make such awards in terms of the counterclaim.

[9] Learned counsel for the Respondent submitted in reply that Article 1134 and Article 1135 of the Civil Code of Seychelles provides that:

> *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 authorizes. They shall be performed in good faith.*
>
> *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.*

[10] Learned counsel further submitted that Article 1315 states,

> *A person who demands 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 performance which has extinguished his obligation.*

This applies to both parties. There is the general rule that he who seeks to come to Court must prove their case. This has just been restated by Dingake J.A in the case of *Dora Marie nee Rosalie ors v Molly Rosalie SCA 41/18.* In *Marie-France Marguerite V Wilfred Alcindor CC 6/2013*; the court said;

"This duty of a claimant to adduce necessary evidence to support her/his/its claim was discussed in *Ebrahim Suleman and others v Marie-Therese Joubert and others SCA No. 27 of 2010* in which Twomey, JA, stated that in such circumstances applying evidentiary rules we need to find that the Respondents discharged both their evidentiary or burden of proof as is required by law. The maxim "he who avers must prove" obtains and prove he must on a balance of probabilities.

[11] In *Re B [2008] UKHL 35***,** Lord Hoffman using a mathematical analogy explaining the burden of proof stated:

> *"If a legal rule requires a fact to be proved (a fact in issue), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates on a binary system in which the only values are*

0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened."

[12] Learned counsel further submitted that the words of Lord Goddard, in *Bonham Carter v Hyde Park Hotel Ltd. (1948) 64TLR 177* at page 178, are apt in this case. He opined:

"Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying: 'This is what I have lost; I ask you to give me these damages.' They have to prove it.'

Again this applies to both parties who are coming to court to make a claim. The Appellant wishes to be paid on his counterclaim but instead of leading this appellate court down a merry path of contested figures one simply can trace the issues from the pleadings of the parties from Plaint, Defence and Counterclaim and Defence to Counterclaim. The Appellant has made no attempt to calculate the value of completed works and provided no bill of quantities or provide any solid evidence of uncompleted works when the contract was terminated.

[13] Learned counsel submitted that the Defence and Counterclaim which is very sketchy and not a full Defence and Counterclaim to the averments in the Plaint for the purposes of Section 75 of the Seychelles Code of Civil Procedure must fail since the Court cannot now assess the value of the amount of work completed when the Appellant has not provided this information. The final figures in the particulars of damages seems more of an afterthought and relies strongly on different ideas such as loss of profits and moral damages.

[14] Learned counsel further submitted that the Appellant has made no attempt to consider what his obligations were under the contract and put the sole blame for delays on the Respondent when it was clearly delays of completing certain stages and providing part of

the materials which he was responsible for. The Respondent has explained in detail through their witness Mr. Tamer, the contractor and brought evidence of the issues which have been raised by the Parties such as the responsibility for particular works, provision of materials and costings, reasons for delays and finally how things ended between the parties. The FTC witness had hardly any evidence to add except to concur that if there were any defective works "the Respondent was always ready and willing to comply and fix what was required to be corrected"

[15] Learned counsel submitted that Article 1184 of the Civil Code, applies to the agreement.

> *1.A condition subsequent shall always be implied in bilateral contracts in case either of the parties does no perform his undertaking. It may also be implied in some unilateral contracts, such as a loan or a pledge. In that case, the contract shall not be rescinded by operation of law. The party towards whom the undertaking is not fulfilled may elect either to demand execution of the contract, if that is possible, or to apply for rescission and damages. If a contract is only partially performed, the court may decide whether the contract shall be rescinded or whether it may be confirmed, subject to the payment of damages to the extent of the partial failure of performance. The Court shall be entitled to take into account any fraud or negligence of a contracting party.*
>
> *2. Rescission must be obtained through proceedings but the defendant may be granted time according to the circumstances. Rescission shall only be effected by operation of law, if the parties have inserted a term in the contract providing for rescission. It shall operate only in favour of the party willing to perform.*
>
> *3. If, before the performance is due, a party to a contract by an act or omission absolutely refuses to perform such contract or renders the fulfilment thereof impossible, the other party shall be entitled to treat the contract as discharged.*

Since the Appellant did not apply for the rescission of the contract through proceedings he was under an obligation to ask the Respondent to come and remedy the defects he saw

in the works and as he did not and the Respondent remained ready and willing to complete or remedy the works, he fell afoul of Article 1184 (3) of the Civil Code.

[16] Learned counsel submitted that in terms of delayed completion of the works the Respondent has explained why there was a delay and the commencement procedure to be adopted by a letter of commencement which should have been provided by the Appellant but was not provided at the agreed time. Furthermore the case of *Labco (Pty) Ltd v Ahkong* referred to by the Appellant can be clearly distinguished from this case from a simple reading of the judgment of the court of appeal when one sees clear terms relating to the withholding of monies for failure to perform; which clause does not exist in the contract in this case. Learned counsel reproduced the following extracts:

> *"We are of similar view to the learned trial judge that the crucial and deciding factor in this case was the operation of clauses 5 and 6 of the contract which provide in relevant part;*
>
> *[1] Clause 5: Practical Completion and Defects Liability….*
>
> *[2] vi. The works which shall cost SR 3,245,000.00 shall commence on the 15 Jan 2011 and shall be completed by the 15 Sept. 2011.*
>
> *[3] [1] Clause 6: Consequences on Non-Completion…*
>
> *[4] i. without prejudice to the right of the client to claim damages for breach of contract:*
>
> *[5] ii. The contractor agrees that the client will retain whatever amount of money outstanding and due to the contractor in the event of non-completion of the building works within the time specified in 5(vi).*
>
> *[6] The provisions are clear and unambiguous and bound the Appellant to complete the works as agreed or face the consequences which in this case was the forfeiture of the rest of the contract price. This is a salutary lesson for lay persons drafting or entering into contracts especially where substantial sums of money are involved. It would have been best to consult a lawyer on the*

consequences of provisions in the contract. Contracts are freely entered into but as stated in Article 1134 of the Civil Code they have the force of law.

It has to be emphasized against that the Defence of the 1st Defendant contains scant simple general denials without fully denying many of the averments and some of which have been particularized to a limit extent without specifying how this affected the works and there is no mention anywhere about the problems with the engineer. All this court has to work with on the pleadings are that the works were delayed for some reasons which are pleaded or specified. Any other rulings of this Honourable court it is argued would be ultra petita the pleadings.

The plight of the 1st Defendant is compounded by their failure to produce any photographs or documents to back up their oral evidence. The Plaintiff on the other hand has proved her case on the balance of probabilities there were delays in the agreed works and the 1st Defendant has not provided any reasonable justification or excuse in their pleadings or evidence for the delay except their oral testimonies.

This Honourable court should enter judgment for the Plaintiff as prayed with interest on the said sum as from the date of the plaint and with costs of this action."

[17] Learned counsel submitted that all the grounds of appeal of the Appellant can be put into a simple scenario where one party has performed a building contract and the other party has failed to pay for the service. The trial Magistrate has recognized the differences and delays caused by both the parties but the complaint of the Appellant seems to rest on not fulfilling his side of the contract. Even the complaints laid before the Quantity Surveyor and the FTC were minor and insignificant such as clearing away debris after carrying out works or redoing a piece of work which the Respondent always said they were willing to carry out. In fact many of the delays mentioned or failure to finish came from the fault of the Appellant who had expressly undertaken to complete certain works or provide the material for the contractor to complete certain works.

[18] Learned counsel moved the Court to dismiss the appeal with costs in this court and the court below and the judgment of the Magistrates Court maintained.

[19] This case highlights the importance of having proper pleadings laid before the Court. As stated by Low J. in *Lysko v. Braley, 2004 CarswellOnt 4776 (S.C.J.),* (reversed in part on appeal in 2006, see *2006 CanLII 11846 (ON CA), 2006 CarswellOnt 1758, 79 O.R. (3d) 721 (C.A.)*):

> *"The purpose of pleadings is to define the issues for the parties and for the Court. The pleadings govern the trial and the interlocutory proceedings. A case properly pleaded permits an efficient use of judicial resources and the parties' resources. Bad pleadings do the opposite and more. They are instruments of potential mischief in the litigation process. One of the functions of pleadings is to govern discovery. If a matter is pleaded, it may be discovered upon. Where a pleading is replete with evidence or irrelevant material ... it is calculated to open the door to prolonged and potentially abusive discoveries which do not address the real issues between the parties . . ."*

The Respondent, then Plaintiff before the Magistrate's Court pleaded breach of contract vide paragraph 6 of the Amended Plaint prayed for damages for the same. The Appellant, then Defendant and counterclaimant also counterclaimed for breach of contract in paragraphs 9 and 10. However, the particulars and prayers do not address the claim for breach of contract.

[20] In this case, the claim by the Respondent, then Plaintiff, was for outstanding contract sum of SCR 152,710.28 and special damages for breach of contract in the sum of SCR 30,000/-, totaling SCR 182,710.28. The Appellant, then Defendant, counterclaimed for loss of income from business in the sum of SCR 120,000/-, costs of remedial work at SCR 86,000/- and moral damage in the sum of SCR 44,000/-, totaling SCR 250,000/-. Just as parties should conduct their proceedings in accordance with the pleadings, the learned Magistrate's determination must be in accordance with the pleadings and claims made out therein.

[21] Where the pleadings is so nebulous that it is unclear whether the claim is for breach of contract, breach of warranty or just under par performance, the real issues to be

determined become blurry and the evidence adduced may not address the issues that need to be determined.

[22] What is clear is that this appeal is based mainly on facts and hardly challenged the interpretation of the law by the learned Magistrate. The basic principles applicable to all civil hearings is that he who asserts must prove. The standard of proof is on the balance of probabilities. The Court is tasked with making relevant assessments of the facts before it and assesses the credibility and demeanour of the witnesses. Consequently, Appellate Courts must approach any appeal based on facts or assessment of evidence with utmost caution. This Court stated thus in the case of *Ronny Georges Fred v Sound and Vision CA 25/2016 (delivered on 22 November 2017)* ;

> *"the Appellate Court although it can review the facts, unless it is satisfied that the conclusion of the Tribunal (*in this case the Magistrate's Court*) from the facts is perverse and patently unreasonable, should not substitute its own opinion on the facts only because the Appellate Court could have come to a different conclusion".*

Also in the case of *McGraddie v McGraddie [2013] UKSC 58; [2013] 1 WLR 2477* the Court of Appeal stated;

> *"It was a long settled principle, stated and restated in domestic and wider common law jurisprudence, that an appellate court should not interfere with the trial judge's conclusions on primary facts unless satisfied that he was plainly wrong."*

[23] I have carefully considered the record of proceedings in the Magistrate's Court and I am satisfied that the learned Magistrate gave due consideration to the counterclaim by the Appellant in respect of uncompleted performance of the contract or unfinished work as stated by the Appellant (Counterclaimant). The conclusion that there was insufficient evidence to support the counterclaim was not irrational or unreasonable. The learned Magistrate therefore did not err by not awarding damages to the Appellant for the same. Grounds 1, 4 and 5 of appeal are which are founded on the same issue of unfinished work do not have merit and are therefore dismissed accordingly.

[24] On the issue of remedial works, the learned Magistrate in paragraph 31 of the judgment made an assessment of the claim and concluded that the claim was inadequately supported by evidence. Similarly, the learned Magistrate at paragraph 32 analyzed the claim for moral damage and concluded that the claim had no merit and cannot succeed. I do not find these determinations by the learned Magistrate to be so unreasonable or that no reasonable Court or Tribunal could have come to, based on the facts and testimonies before it.

[25] The learned Magistrate awarded the Respondent only the sum of SCR 134, 962.28 being payment up to the 5th stage of work. This might suggest that the contract which was to be in 6 stages might not have been performed to the end hence there was breach of contract by the Respondent. However as stated above, this was not pleaded.

[26] The Appellant at the most argued that there could have been a breach of implied warranty that the works to be performed by the Respondent was to be to the standard expected for works of such nature. Every contractor impliedly warrants that his work will be performed in a good and workmanlike manner and that it will be sufficiently free of any major defects. The implied warranty of workmanship governs how the actual performance of the contract will be evaluated. This does not guarantee a perfect result. It just establishes a baseline of expected performance. The Appellant however did not advance this in his pleadings or in evidence. Had the Appellant done so, and adduced evidence to that effect, award of damages on the counterclaim might have been open to the learned Magistrate.

[27] From my perusal of the record of proceedings, with particular attention to the evidence adduced by the Appellant, I am satisfied that the learned Magistrate applied the correct principles of the laws of contract and determined the matters at hand strictly within the pleadings before the Court. This Court therefore finds no reason to interfere with the decision of the learned Magistrate arising from the learned Magistrate's assessment of and findings on facts. Consequently, grounds 2 and 3 of appeal cannot be sustained and are dismissed accordingly.

[28] The judgment of the learned Magistrate is upheld and this appeal is dismissed it its entirety.

[29] I award cost to the Respondent.

Signed, dated and delivered at Ile du Port on 5th November 2021.

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C G Dodin

Judge