IN THE SUPREME COURT OF SEYCHELLES

Reportable
[2021] SCSC 519
CC15/2017

SA FABRICATION WORKSHOP **PLAINTIFF**

(rep. by Frank Elizabeth)

and

HARI BUILDERS (PTY) LIMITED **DEFENDANT**

(rep. by s. Rajasundaram)

Neutral Citation: *SA Fabrication Workshop v Hari Builders (Pty) Limited* (CC 15/2017) [2021] SCSC 519. (09th August 2021).
Before: Vidot J
Summary: Breach of Contract
Heard:
Delivered: 09 August 2021

ORDER

Liability was admitted; quantum of damages disputed. Therefore, judgment entered in favour of the Plaintiff against the Defendant in the sum of SR881, 250.00with interest at commercial rate and cost

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JUDGMENT

VIDOT J

[1] The Plaintiff has filed a Plaint claiming damages in the sum of SR2, 967,000.00. On or around 17th July 2015, the parties signed a contract wherein it was agreed that the Defendant, which is a construction company, would build for the Plaintiff a workshop, store, offices and a boundary wall (hereafter "the building") on land parcel V11607 at

Providence, Mahe in accordance with approved drawings. The architectural drawing made by Richard Hoareau is exhibited at exhibit P6. As per the agreement, construction of the building was be completed within a period of ten months. The Plaintiff alleges that the Defendant did not follow the plans when constructing the building.

[2] The Defendant started the construction as per contract. The Plaintiff was to supply the Defendant with some building materials of mainly iron rodS which the Plaintiff did which amounted to SR310,000.00. The Plaintiff also paid the Defendant a deposit (which to my mind was by instalments) for the works. It was also a term of the building agreement that Defendant was to be liable for rebuilding and repairing any defects in the building upon request of the Plaintiff, either during the construction period or the maintenance period.

[3] The Defendant commenced construction as per contract. At the time the Plaintiff had enlisted the service of Ted Confait, an engineer to oversee the works. After the works had reached the columns and the first floor slap, the Plaintiff complained that hairline cracks could be observed on both the columns and the slab. Mr. Dereck Marie of the Seychelles Planning Authority visited the work site and by letter dated 22nd February 2016 made proposal as to how such defects could be cured. That was after tests (both hammer and core tests) had been carried out on the concrete that was used which was found to be of different thickness and strength in different parts of the slab. At one point it was discussed that a strengthening agent under the brand name of 'Sika' could be utilized to cure both the cracks and strengthen the slap. That was rejected by the Plaintiff.

[4] The decision was taken to terminate the contract and for the construction to be demolished at the Defendant's cost and for the Plaintiff to be refunded all its expenses incurred thus far in the building. The Defendant proceeded to reimburse the Plaintiff all sums incurred.

[5] The Plaintiff is now making the following claims against the Defendant;

(i)	Sum due and outstanding for loss of rentals for 6 months	SR1,116, 000.00
(ii)	Damages for inconvenience, delay and embarrassment	SR 500,000.00
(iii)	Damages for loss and use and enjoyment of the building	SR 500,000.00

(iv) Difference in cost of hiring another contractor SR 695,000.00

Between 4,295,000.20 and SR3,600.000.00

(v) Additional cost incurred in hiring two foreign workers SR 156,000.00

[6] The Plaintiff prays for Court to enter judgment in their favour in the sum of SR2,967,000.00 together with interest and cost.

[7] The Defendant filed a defence denying a breach of contract. They averred that the works commenced on the agreed date of 28th July 2015. They complained of undue interference by the Defendant in the works. They state that the Plaintiff's own engineer, Ted Confait made no complaints about the quality of work. In the statement of defence they aver that the works carried out were not defective and that cracks as the ones that appeared the columns and slab were normal in any construction and that the engineer did not make any representation that the works were not to acceptable standard and that they were not of good workmanship. They further add that after the demolition they paid the Plaintiff the sum of SR1,568,750.00 as full and final settlement of any claim that the Plaintiff had against them. They maintain that any further claims by the Plaintiff is devoid of merits. They add that the Plaintiff decided to choose another contractor of his own wish and therefore the Plaintiff cannot claim for the difference in price between them and the other contractor and in view of the fact that the Defendant paid a sum as full and final settlement, then the Plaintiff's claim has no merits.

[8] The Defendant also filed a Counterclaim claiming the sum of SRSR671,210.00 and €3,340.00. these include;

(i) Constant interference with works SR 45,000.00

(ii) Stress, mental agony and anxiety SR 45,000.00

(iii) Imported materials necessary for application of Sika SR 5, 210.99

(iv) Demolition work SR576,000.00

(v) Cost of Import of Chika (Sika) €3,340.00

[9] I have to command Mr. Harish Patel who throughout cross examinations came across as being a most honest person. He answered the questions truthfully and acknowledged that there were problems with the construction. They agreed to settle the matter save that they feel that the Plaintiff's claim was exaggerated. I am of the view that if the Defendant agreed to demolish the construction, it because they recognised that there were defects with the construction.

[10] Since the Defendant admitted liability, they nonetheless dispute the quantum of damages as claimed by the Plaintiff. However, based on the admission by the Defendant, the Court invited parties to try to negotiate a settlement between them. Despite several attempts the parties were not able to arrive at a settlement. Thereafter, upon demand by Counsels for the parties, time was granted to file submission in respect of quantum. On at least two occasions Counsels failed to file submissions. The Court is now in possession of submission of both Counsels.

[11] In view of the fact that the Defendant admitted liability, I shall not be considering the counter-claim. In any case, the same is not addressed in Counsel for the Defendant's submission.

[12] Therefore, I shall address the issue of quantum only in this judgment. As already mentioned, the Defendant has already settled by payment to the Plaintiff of all costs incurred for the building prior to its demolition. They have also refunded cost of materials, mainly iron rods supplied by the Plaintiff. They cleared the site by carting all debris from the demolition away.

[13] Counsel for the Defendant reminded Court that the onus is on the Plaintiff to establish on the damages and loss he claims are justified. He referred to **Planiol Civil Law Treatise [An English Traslation of Louisiana State Law Institute]** at P51 where it provides as follows;

"He who alleges a fact contrary to the acquired situation of his advisory must establish its verity. As a consequence when a person exercises an action to obtain a thing which he has

not, either a payment if he claims to be a creditor, or delivery of an object , or the enjoyment of property which he has not in his possession, such person is bound to establish his credit or his right to the thing. This the meaning of the old adage: "Onus probandi incumbit actori". When the Plaintiff has furnished proof, he has won his case, at least unless the defendant has made good against him an "exception"or a means of defence on the merits, which he in turn must establish. The burden of proof in that case passes to the defendant, as is indicated by another adage: "Reus in exceptione fit actor." In his turn the Plaintiff may have an answer to make, which may destroy the defence; the defendant perhaps will reply that, the burden of proof passes thus from one to the other, for all their reciprocal answers. In order to express this effect with the aid of a formula which in turn can apply to both parties, they often generalise the above mentioned formula by saying; "the burden incumbs on him who alleges" (Comp. Art. 1315). That is the rule of law which should be respected by the judge."

[14] Counsel noted that that principle was confirmed in **Ebrahim Suleman and Ors. V Marie Therese Joubert and Ors. SCA 27 of 2020.**

[15] It is not disputed by Counsel for the Plaintiff that the burden of proof rests on the Plaintiff. Counsel quoted **Bonham –Carter v Hyde Park Hotel Ltd. [1948] 64 TLR 177**, wherein Goddard CJ reminded parties of the importance of discharging the burden of proof when they file an action before courts. Goddard CJ stated;

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

[16] Mr. Frank Elizabeth Counsel for the Plaintiff also quoted **Ratcliffe v Evans [1982] 2QB 524, at page 532,** when Bowen LJ stated;

"As much certainty and peculiarity must be insisted on both in pleading and proof of damages as is reasonable, having regard to the circumstances and the nature of the acts

themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be vainest pedantry."

[17] The Plaintiff's Counsel also referred to Article 1147 of the Civil Code of Seychelles that provides;

"The debtor shall be ordered to pay damages, if any either by reason of his failure to perform the obligation or by reason of his delay in the performance, provided that he is unable to prove that his failure to perform is due to a cause which cannot be imputed to him and that in this he was not in bad faith"

[18] It is not in dispute that the Defendant did not complete the work as it was defective thus the reason he agreed to demolish the construction. As I have said, Mr. Harish Patel showed a level of honesty rarely seen in these type of transactions.

[19] At the end of the day the only contentious issue is the quantum of damages being claimed which the Defendant claims is exaggerated and that in any case the Plaintiff has failed to discharge the requisite burden to establish the damages claimed. The Plaintiff argues that that burden has been discharged.

[20] Firstly, I note that claim no. 5 that the Plaintiff needed to engage two foreign workers has not been established. No proof of such personS being employed nor payment being made to them was provided. So, that claim will not be entertained. As regards claim no.4, which is in respect of difference of in hiring an alternative contractor, which amounted to SR695,000.00 was equally not established. The Plaintiff provided to the Court a Bill of Quantity from Qingjian International Seychelles Group Dev. Co. Ltd. However, it did not present to Court the final contract between them and that contractor. Claims 1,2 and 3 are somewhat co-related.

[21] Claim 1 is respect of damages for loss of earnings on rental. As yet some of these floor outlets are yet to be rented out but some of the space is being occupied by the Plaintiff themselves. There is definitely a cost to that even it is occupied by the Plaintiff themselves. The Plaintiff did not enjoy the benefit of use of such space in time. The market value of rent is set at SR200.00 per meter square. It is unclear if the space was to be used for rental

to any third parties. In any case albeit that it that it was to be rented out or to be used by the Plaintiff themselves, there is a loss suffered. In the circumstances, I shall allow only 70% of that claim. Therefore, I award the Plaintiff the sum of SR781,200.00.

[22] As for claims no.2 since the Plaintiff has claimed damages for loss on rental, they cannot make such claim for delay. They have already been compensated for loss of rental As to inconvenience and embarrassment, the Plaintiff provided scanty evidence but sufficient enough to establish that claim, nonetheless an award of SR100,000.00 shall be made to them.

[23] As regards claim no.3, the loss of use has already been covered in the claim no. 1. For loss of enjoyment of the building, I make an award of SR50,000.

[24] Therefore, I enter Judgment for the Plaintiff against the Defendant in the sum of SR881,250.00 with interest at the commercial rate from the date of this judgment and cost.

Signed, dated and delivered at Ile du Port on 09 August 2021

Vidot J