

SUPREME COURT OF SEYCHELLES

Reportable

[2024]

CS41/2023

In the matter between:

COLVY UNDERWOOD

(rep. by Mr Guy Ferley)

Plaintiff

and

JOHANSE MICHEL

T/A JHM Construction

(Unrepresented)

Defendant

Neutral Citation: *Underwood v Michel* (CS41/2023) (delivered on 19 February 2024).

Before: A. Madeleine, J

Summary: *Rescission of Contract – Refund of Contract Sum – Performance of Contract in Good faith – Articles 1101, 1134(3) and 1184 (3) et al. Civil Code of Seychelles Act, 2020*

Heard: 17 November 2023

Delivered: 19 February 2024

ORDER

Judgment is entered in terms of the Plaint. Defendant is hereby ordered to refund the contract sum of SCR.1, 000,000/- to the Plaintiff with interests and costs.

JUDGMENT

A. MADELEINE, J

Introduction

[1] The Plaintiff, a client, and the Defendant, a contractor, are the parties to an agreement concluded on 23rd October 2021 for the construction of Plaintiff’s dwelling house by the Defendant.

- [2] On 9 May 2023, the Plaintiff filed a plaint in the Supreme Court seeking the refund of the contract sum paid to the Defendant on the ground of breach of the agreement. The breach consists in the Defendant's failure to commence and complete the construction of the dwelling house.
- [3] The plaint was served on the Defendant by way of substituted service, but the Defendant failed to appear before the court or to answer the plaint. The court then ordered ex-parte hearing of the matter with notice thereof on the Defendant who, again, failed to appear before the court.

The Plaint

- [4] The plaint avers that the Plaintiff is a client and the Defendant a building contractor who concluded an agreement on 23rd October 2021 for the construction of a house for the Plaintiff on land parcel V829 situated at Castor Road, English River, Mahe.
- [5] The plaint also avers that the terms and conditions of the agreement were, inter alia, that the works were to be carried out by the Defendant as per drawings prepared by Jean Paul Laira & Ted Confait, to commence on 25th October 2021 and to be completed on 27th June 2022. The Defendant undertook to provide all labour, materials, tools and equipment to do the works. The Plaintiff undertook to pay the contract price of SCR.1,000,000/- in one lump sum to the Defendant in advance.
- [6] It is further averred that the Plaintiff paid the Defendant the contract sum of SCR.1,000,000/- on 23rd October 2021 by way of a cheque, and that despite payment, the Defendant failed and refused to commence the works except for the partial demolition of an existing wall on the land. Defendant deserted the site and all attempts by Plaintiff to contact him have been futile.
- [7] Despite letter of demand, the Defendant has failed and refused to return the SCR.1,000,000/- to the Plaintiff.

[8.] Plaintiff therefore prays this court for an order that the Defendant refunds the sum of SCR.1,000,000/- with interests and costs to the Plaintiff and for the court to make any other orders it deems fit and reasonable in the circumstances.

Plaintiff's Evidence

[9] Plaintiff testified that he reached an agreement with the defendant, Johanse Michel, to construct a dwelling house on his land, parcel number V829 situated at Castor Road for the sum of Seychelles Rupees One Million (SCR.1,000,000/-). Plaintiff also testified that Defendant is a contractor trading under the business name 'J.H.M Construction' as confirmed by certified true copy of Certificate of registration of business name 'J.H.M Construction' issued by the Registrar of Companies dated 9th of July 2021 produced in evidence (Exhibit P1).

[10] Plaintiff also produced the original "Agreement between Owner and Contractor" dated 23rd October 2021 (hereinafter referred to as the "Agreement") (Exhibit P2) and testified that in terms of the said Agreement, the works were to commence on 25th October 2021 and to be completed on 27th June 2022. Labour, materials, tools and equipment were to be supplied by the Defendant and that the Plaintiff only had to pay an agreed sum of SCR.1,000,000/- to the Defendant. Plaintiff testified that he paid the agreed sum and produced 'Cheques Information Report' from the Mauritius Commercial Bank (Seychelles) Limited (hereinafter referred to as the "MCB"), duly stamped, showing a copy of the cheque drawn on JHM Construction in the sum of One Million Seychelles Rupees dated 25th of October 2023 (Exhibit P3).

[11] According to the Plaintiff, once the payment was effected the Defendant "*came only two times just to see the site and do some clearing and then he vanished afterwards from that day on until now.*" Despite all attempts to reach him, the Defendant failed to commence the works except for the partial demolition of an existing wall on the land. Defendant also did not refund the SCR.1,000,000/- paid to him by the Plaintiff as requested.

Law and Analysis

[12] Based on the plaint and evidence of the Plaintiff, the following issues arise for determination by the court:

1. Was there a binding contract between Plaintiff and Defendant?
2. Whether the Defendant breached that contract?
3. Is the Plaintiff entitled to claim a refund of the contract sum from the Defendant?

Issue 1 – Was there a binding contract between Plaintiff and Defendant?

[13] Article 1101 of the Civil Code of Seychelles Act, 2020 (hereinafter referred to as the “Civil Code”) defines a contract in the following terms –

*“**1101** A contract is an agreement whereby one or several persons bind themselves towards one or several others to give, do, or refrain from doing something.”*

(Emphasis added)

[13] The Plaintiff produced the Agreement (Exhibit P2) by which the Defendant bound himself towards the Plaintiff to build Plaintiff’s dwelling house and to supply all labour, materials, tools and equipment subject to the Plaintiff paying the contract sum of SCR1,000,000/- in advance. The Agreement also confirms that the Defendant bound himself towards the Plaintiff to commence construction works on 25th October 2021 and to complete the works eight months later, on 27th June 2022. The Agreement has been signed by the parties. Furthermore, the Defendant has initialled and affixed the stamp of his trading business name “*J.H.M Construction*” on all pages of the Agreement. The Plaintiff also produced documentary proof from the MCB confirming that he paid the

contract sum to the Defendant by way of MCB cheque number 822483 drawn on 25th October 2021 and cleared by the Defendant's bank – the Seychelles Credit Union – on 26th October 2021.

[14] In absence of evidence to the contrary, I find that the Plaintiff has established, on a balance of probabilities, that there was a binding contract between Plaintiff and Defendant.

Issue 2 - Whether the Defendant breached that contract?

[15] Article 1134 of the Civil Code, provides that contracts lawfully concluded have the force of law for the parties, are irrevocable unless mutually agreed or authorised by law, and must be performed in good faith:

“1134(1) Contracts lawfully concluded have the force of law for those who have entered into them.

(2) Contracts cannot be revoked except by mutual consent or for reasons authorised by legislation.

(3) Contracts must be performed in good faith.”

(Emphasis added)

[16] The above cited Article 1134 implicates that upon conclusion of the Agreement and receipt of the contract sum, the Defendant was bound to execute his contractual obligations towards the Plaintiff. Namely, to commence the works on 25th October 2021 and to supply for the duration of the Agreement, all labour, materials, tools and equipment needed in order to complete Plaintiff's dwelling house on 27th June 2022. Unless it had been expressed in the Agreement or otherwise mutually agreed between the parties or authorised by law, none of which applies here, the Defendant could not renege his contractual undertakings towards the Plaintiff. He had to perform the undertakings in good faith.

- [17] The Plaintiff's evidence shows that after the contract sum was paid on 26th October 2021, the Defendant merely went on the construction site on two occasions, to inspect and do some clearing works. The Defendant then took flight. No other works have been performed on the site. All attempts to contact him subsequently and to obtain a refund of the contract sum, have been in vain.
- [18] The above circumstances establish that the Defendant's action and behaviour upon receipt of the contract sum were inconsistent with his duties of 'loyalty' and 'cooperation' towards the Plaintiff as derive from the obligation to perform the Agreement in good faith under Article 1134(3) of the Civil Code [vide: *Monthy v. Government of Seychelles (SCA 37 of 2019) [2021] (delivered on 17 December 2021), University of Seychelles American Institute of Medicine Inc. Ltd v Government of Seychelles (delivered on 29 January 2018)*].
- [19] The court also takes note of the Defendant's lack of interest in defending the plaint.
- [20] Based on all the above, I find that the Plaintiff has equally established, on a balance of probabilities, that the Defendant has breached the Agreement by failing and refusing to perform the contractual obligations that form the basis of the Agreement after he was paid the contract sum.

Issue 3 - Is the Plaintiff entitled to claim a refund of the contract sum from the Defendant?

- [21] Article 1184(3) of the Civil Code provides for the following remedies in the event of non-performance of contractual obligations –

“(3) (a) The party towards whom the undertaking is not fulfilled can elect either to demand execution of the contract, if that is possible, or to apply for rescission and damages.

(b) Rescission must be obtained by court order but the defendant may be granted time according to the circumstances.”

(Emphasis added)

[22] In terms of Article 1184(5) of the Civil Code, where contractual obligations have only been partially performed, the court has to decide whether to order a rescission or to confirm the contract subject to payment of damages:

“(5) (a) If a contract is only partially performed, the court may decide whether the contract must be rescinded or whether it may be confirmed, subject to the payment of damages to the extent of the partial failure of performance.

(b) The court is entitled to take into account any fraud or negligence of a contracting party.”

(Emphasis added)

[23] The evidence establishes a breach of the Agreement by the Defendant’s non-performance of the obligations to fully commence and complete the construction of Plaintiff’s dwelling house within the agreed time frames upon receiving the contract sum.

[24] The Plaintiff simply prays for a refund of the contract sum with interest and costs. He does not pursue a claim for damages. He also prays the court for any other order it deems fit and necessary in the circumstances.

[25] It is clear that in seeking a refund of the contract sum, the Plaintiff seeks to be placed in the same position he was prior to the Agreement. Plaintiff’s own evidence confirm that the Defendant carried out some clearing works on site in that he partially demolished an existing wall. However, in absence of evidence as to the extent and value of the site clearing works or wall demolition works carried out by the Defendant pursuant to the

Agreement, the court cannot determine whether the Agreement may be confirmed or what expenses incurred by the Defendant, if any, may be deducted from the contract sum. I do not consider attending the site on two occasions over the entire contract period and some site clearance works to amount to a substantial performance of the Defendant's obligations under the Agreement. The time frames set by the parties for the commencement of the works and for the completion of the dwelling house have lapsed since 27th October 2022. I also consider Defendant's partial performance of site clearing works to be insignificant in relation to the Plaintiff's performance of the obligation to pay the contract sum in full. The non-performance by Defendant in the circumstances described herein is material, such that the Agreement should be rescinded and the prayer for refund of the contract sum should succeed.

[26] I note from Article 1184(3)(b) of the Civil Code that the court may always give a defaulting party time to perform his contractual obligations. According to the Seychelles jurisprudence, before bringing a claim for non-performance of contractual obligations, the Defendant should have been put under notice of default and given the chance to fulfil his obligations: [vide: *Noella Figaro v. Armand Samson* 1983 SLR 68 and *Paul Chow v Heirs Josselin Bossy* [2006] SCCA 19].

[27] Plaintiff testified that after the Defendant abandoned the site, he also avoided the Plaintiff. Although the plaint refers to a letter of demand, the same was not produced in evidence. Nonetheless, I consider the Defendant's lack of interest in fulfilling his contractual obligations. I also consider that the Defendant opted not to defend the plaint and not to take part in the proceedings despite service of summons and notices. In the circumstances, it would be unfair for the court to grant an unwilling defaulting party further time to perform his obligations, the more so almost 2 years after the expected completion date.

[28] Based on the above, I find that Plaintiff has established, on a balance of probabilities and in absence of evidence to the contrary, that he is entitled to be refunded the contract sum.

Order

[29] I hereby enter Judgment in terms of the Plaint. The Defendant is to refund the Plaintiff the contract sum of SCR1, 000,000/- with interests and costs.

Signed, dated and delivered at Ile du Port on 19th February 2024.

A. Madeleine J