

CAMILLE v VANDAGNE PLANT HIRE COMPANY (PTY) LTD

(2012) SLR 324

F Elizabeth for the plaintiff
P Pardiwalla SC for the defendant

Judgment delivered on 2 December 2012 by

KARUNAKARAN J:

The plaintiff has brought this action against the defendant claiming damages in the sum of R90,000 resulting from an alleged breach of contract by the defendant, a construction company incorporated in Seychelles. On the other side, the defendant, in its statement of defence, having completely denied the plaintiff's claim, not only averred that it was not in breach but also claims that it duly executed the road construction as per the instruction or direction given by one Mr Amade, the plaintiff's engineer when the work was in progress.

It is not in dispute that at all material times the plaintiff was the owner of Title No H6654 situated at Pointe Conan, Mahe, which lies on the mountainside, away from the public highway. The defendant is a licensed building contractor and is engaged inter alia in the business of concrete road building. In March 2007 the plaintiff and the defendant entered into a contract for the latter to build a concrete driveway for the sum of R55,000 and as per a plan and drawing drawn by Patrick Amade, a licensed engineer which was approved in January 2007. The works were admittedly executed between 29 March and 31 April 2007. During the execution of works the engineer visited the site. It is the case of the plaintiff that despite several attempts and entreaties by the engineer to the defendant while on site to execute the works as per the pegged demarcation on site and to stick to the gradient as per drawings, the latter persistently refused to do so.

As a result thereof, at the completion of works it became visually apparent that the driveway was defective; it had not been properly routed as it had been deviated from the plan and the gradient profile was too steep. Motorable access onto the road up to the car park space was too steep and the parking area was too high up. The plaintiff was unable to use her access by vehicle.

According to the plaintiff, on 7 May 2007 during a joint site visit by the officials from the Planning Authority and Mr Amade, the defendant agreed to remedy the works subject to a substitute plan that would be drawn by Patrick Amade. The substituted plan was submitted in July 2007 and approved in August 2007. Despite several requests by the plaintiff and by her counsel in writing to the defendant to remedy the works at his own costs as he undertook in May 2007, the latter failed to do so.

The plaintiff testified that the defendant having been paid R55,000 for the construction of the driveway as per the plan and in good workmanship, has breached the contract for which he is liable for the rectification of works and for consequential loss and damage suffered by the plaintiff arising out of the said breach. Hence, the plaintiff claims from the defendant for loss and damage as follows:

Loss of use, enjoyment of the access drive, inconvenience and moral damage	R25,000
Extra expenses for engineer and professional services	R15,000
Remedial works as per substituted plan	R50,000
Total	R90,000

The plaintiff's witness Mr Joel Philo, Development Control Officer from the Planning Authority also testified in support of the plaintiff's case. According to this official, upon his inspection of the completed construction work, he found and reported that the driveway in question had not been built in accordance with the original approval plan in Exhibit P1. It was defective as the defendant had failed to observe the gradient ratio 1:4. The road was therefore not usable as a motorable driveway. He testified that even when he went for the said inspection, his own vehicle was not able to drive up the steep driveway. Hence, the Planning Authority asked the plaintiff to submit another plan to rectify the defect. This officer also testified that it was normal practice of the Planning Authority, that when development work was not carried out in accordance with the original approved plan, they would instruct the owners to submit a substitute plan for approval to rectify the defect. A relevant excerpt from a letter (Exhibit P3) dated 24 March 2009 from the Planning Authority to the defendant reads:

Reference is made to the above mentioned development. It was observed that the construction of the access road has not been carried out according to approval granted. It is also a fact that you have also failed to submit the mandatory reinforcement notice prior to casting of concrete. Mr. Patrick Amade, the engineer responsible to monitor the project was written a letter dated 10th May 2007 which was copied to you. He thereafter submitted a substitute plan approved on 6th August 2009 to remedy the construction. (Refer to letter attached)

Note that in view of non-compliance to the original approved plan dated 26th February 2007 you are now liable to rectify the construction to adhere with the approval granted on the 6 th August 2007.(sic) Planning Authority should be informed of every stages of the development 48 hours to implementation.

Note that failure to comply with Planning Authority's directives will result in further action being instigated against your license.

In Exhibit P8, according to a memo from Development Control Officer Derek Marie to the CEO of the Planning Authority, it indicated that not only had the defendant failed to construct in accordance with the alignment and gradient of the original plan, but had also failed to submit a reinforcement notice, which would then have allowed an opportunity for the Quality Assurance Engineer to check the reinforcement and compliance to approved documents, prior to casting of the concrete.

In these circumstances, the plaintiff contends that the defendant was liable for the defective work and bad workmanship as he has failed to adhere to the original approved plan and is therefore in breach of the contract of service. Hence, the plaintiff claims the sum of R90,000 for loss and damages resulting from the said breach of contract.

On the other hand, the defendant testified in essence that he built the driveway in accordance with the original approved plan. Moreover, it is the case of the defendant that throughout the construction work the plaintiff's engineer, Mr Amade was present and supervising the work regularly, giving directions to the defendant. Hence, the defendant contends that he was not personally responsible for any defect therein. In any event, the defendant testified that the driveway he built is motorable and has no defects either in construction or workmanship. Further, the defendant testified that the second approval of the substitute plan relates to a different contract for which he is not liable. The defendant also testified that he never agreed to rectify the supposed defects either with the plaintiff, the engineer, or any other officials from the Planning Authority. Therefore the defendant seeks the dismissal of this case with costs.

I meticulously perused the evidence on record, including the documents adduced by both parties. Obviously, the following questions arise for determination:

1. Was the driveway constructed by the defendant defective in that it was not a viable motorable access?
2. If so, was the defect caused solely due to the breach of contract by the defendant in that he failed to adhere to the approved plan, or was there any other contributory cause or fault or negligence through any act or omission of the plaintiff's engineer, who supervised the work? What is the legal impact of such contributory cause or fault or negligence on the quantum of damages awardable to the plaintiff?
3. What is the extent or degree of such contributory cause or fault or negligence, if any? And, what is the quantum of damages the plaintiff is entitled to, if any?

As regards the first question, it is evident from the testimony of the independent witness Mr Joel Philoe (PW2) - Development Control Officer from the Planning Authority - that the driveway was defective in that it was not usable as motorable access. It is also evident from the fact that even his own vehicle was not able to climb up the steep driveway, while he went to inspect the site. The report submitted by the Development Control Officer to the CEO of the Planning Authority in Exhibit P8 also corroborates the fact that the road in question was not built to the approved specifications and was indeed defective due to gradient-problem. All these support the plaintiff's testimony that she was not able to use the road and adds further unusable state of the driveway. I do not believe the defendant in his evidence that the driveway was in fact useable. I reject his self-serving evidence in toto in this respect. Therefore, the answer to the first question is apparent. The constructed driveway was indeed defective and was not a viable motorable access.

I will now turn to the second question as to the alleged cause for the defect. Finding answer to this question is not as simple as the first as it involves mixed questions of law and facts.

Undoubtedly, the defendant has failed to construct the road in accordance with the original approved plan. The on-site presence of the plaintiff's engineer Mr Amade was only to supervise the work. It would be expected of the defendant, as a prudent and reasonable builder, first of all, to follow the approved plan even in the absence of any supervision by an engineer or otherwise. In any event, the defendant while executing the work should have sought the assistance or supervision of the engineer to ensure at every stage that work is carried out in accordance with the original approved plan. Furthermore, the reinforcement notice is an important procedural requirement that gives an opportunity to the Quality Assurance Engineer to check the reinforcement, and compliance to the approved documents prior to the casting of the concrete. However, this was not done by the defendant vide Exhibit P8. As I see it, this entire situation could have been averted had the defendant issued the required reinforcement notice prior to the casting of the concrete. In my view, this fault is the substantive cause that necessitated the plaintiff to submit a substitute plan for planning approval with a view to rectify the defect. Having said that, the evidence on record also shows that the breach of contract by the defendant was not the sole cause for the defect; the omission by plaintiff's engineer to properly supervise the work in progress has also contributed to certain degree to the cause that has resulted in the defective work.

Coming back to the contributory cause or fault or negligence of the plaintiff's engineer, here too, there should have been prudence on the part of Mr Amade, the plaintiff's engineer in ensuring that the construction, through its various stages, adhered to the approved plans in order to meet the gradient requirements for motorable access. This, albeit a minor omission, to my mind, it is a contributory cause or fault or negligence on the part of the plaintiff's engineer. Then, what is the legal effect of such contributory factor?

While the concept of a 'contributory cause' or 'contributory fault or negligence' is unknown to our law of contract, its application to our law of delict is very much an everyday occurrence. As I see it, there is not much logical heavy-lifting required to apply this concept to breach of contract as it has been applied in other civil law jurisdictions and even in the USA, Canada and St Lucia.

For instance, both France and Germany have systems of apportionment for dealing with the plaintiff's or his servant's or agent's fault. The German Civil Code (Forrester et al, *The German Civil Code* (1975) at [254]) provides that:

If any fault of the injured party has contributed to causing the damages, the obligation to compensate the injured party and the extent of the compensation to be made depends upon the circumstances, especially upon how far the injury has been caused predominantly by the one or the other party.

This paragraph applies whether the action is in contract or tort (vide *German Private and Commercial Law - An introduction* (1982) at 153). Similarly, in France too, the liability of the defendant can be reduced where there has been *faute de la victime*. This principle applies both to tortious and contractual liability, vide Mazeaud, H L & J *Traite Theorique et Pratique de la Responsabilite Civile II* (6th ed, 1970) no 1457.

It is pertinent to note what this court has also pronounced on the issue of contributory negligence in *Shami Properties (Pty) Ltd v Oliaji Trading Company Ltd and Another* (2008) SLR 176. Although the English law of tort recognizes "contributory negligence" on the part of the plaintiff or any third party as a valid defence against tortious liability, our law of delict under article 1382 to 1384 of the Civil Code does not seem to have expressly recognized the concept of "contributory negligence" as a defence against liability. Is then, contributory negligence available under article 1384(1)? The French commentators and the jurisprudence have answered that question in a positive way. It does exist under 1384(1) and likewise it should also exist under article 1382 (1) to (4).

In support of this proposition, we find for example, in *Dalloz Encyclopedie de Droit Civil 2nd ed. Tome VI, Verbo Responsabilite du Fait des choses inanimees, note 573*, which provides that -

573. Alors que le fait d'un tiers ne peut normalement entraîner qu'une exonération totale de la responsabilité du gardien, à l'exclusion d'une exonération partielle, le fait ou la faute de la victime pourra entraîner aussi Bien une exonération partielle qu'une exonération totale de la responsabilité, le problème ne se présentant pas de la même façon que pour le fait d'un tiers.

This refers to article 1384(1). This is what the commentators have said and again in *Mazeaud Traité Théorique et Pratique de la Responsabilité Civile, Tome II, note 1527* at page 637:

Aujourd'hui les arrêts affirment que le gardien doit être exonéré partiellement, dans une mesure qu'il appartient aux juges du fond d'apprécier souverainement, si le fait relevé à l'encontre de la victime, quoique non imprévisible ni irrésistible, a cependant contribué à la production du dommage.

This being so, since contributory negligence may be pleaded in a claim founded on article 1384(1) from which our article 1383(2) has been inspired, then that defence may also be pleaded in a claim based on article 1383(2) because, as I have said, that article in our Code Civil has been borrowed from article 1384(1) of the French Civil Code.

At the same time, it is interesting to note that as Laloutte JA observed in *Attorney-General v Jumaye* (1980) SCAR 348 in article 1383(2) in relation to motor accident cases, an attempt has been made to solve by legislation one of the difficulties which had arisen in France that time in connection with collision with motor vehicles. According to his interpretation, that legislature has removed "contributory negligence"

from being raised as a defence to liability under article 1383(2). Be that as it may, in the case of: D. 1982, 25 *Mandin v Foubert* - Cour de cassation - the Court in view of article 1382 of the Code Civil held -

Given that a person whose fault, even if criminal, has caused damage is partially relieved of liability, if he proves that fault on the part of the victim contributed to the harm.

Besides, it is a recognized principle in French jurisprudence that when a complainant or any person for whom is responsible, is found to have contributed to the damage caused, the courts are free to decide the extent to which each party is liable for the damage. Vide, Bull.civ. 1980 HI no. 206 Case SCI *Lacouture v Entreprises Caceres*. Indeed, in any action for damages that is founded upon the fault or negligence of the defendant, if such fault or negligence is found on the part of the plaintiff or third party that contributed to the damages, the court shall apportion the damages in proportion to the degree of fault or negligence found against the parties respectively. See, *Lanworks Inc v Thiara* (2007) CanLII 16449 (Ontario SC). Hence, in my view although the contributory negligence may not constitute a defence in matters of a breach of contract, the court shall apportion the damages in proportion to the degree of fault or negligence found against the parties respectively.

I will now turn to the third question (*supra*) as to the extent or degree of contributory cause or fault or negligence on the part of the plaintiff's engineer. The evidence on record and the surrounding circumstances clearly show that the primary cause for the defective driveway is the breach of contract by the defendant. At the same time, the fault of the plaintiff's engineer lies in that he omitted to check the work, then and there while the work was in progress. This omission is significant enough to merit consideration as a contributory cause/fault/negligence. The degree of contributory cause or fault or negligence on the part of the plaintiff's engineer, in my considered view, is a 20% responsibility for the defective work. Hence, the consequential damages payable by the defendant should be reduced by 20% on the loss and damage sustained by the plaintiff in this matter. Hence I hold the defendant liable only to the extent of 80% of the total loss and damages the plaintiff suffered. Therefore 80% of the plaintiff's claim payable by the defendant amounts to R72,000.

I therefore, enter judgment for the plaintiff in the sum of R72,000 and with costs of this action.

