

**IN THE SUPREME COURT OF SEYCHELLES**

**CIVIL SIDE: CS 433/2006**

**[2017]SCSC 45**

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**ROUCOU CONSTRUCTION (PTY) LTD**

Plaintiff

Versus

**DONALD BERTIN**

Defendant

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Heard:

Counsel: Charles Lucas for the plaintiff  
Wilby Lucas (then counsel) and Clifford Andre for the defendant

Delivered: 25 January 2017

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**JUDGMENT**

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**Robinson J**

**[1] The case for Plaintiff and Defendant**

[2] At all material times Plaintiff was a licensed building contractor. Defendant is a businessman and the owner of immovable property situated at Pointe Larue.

[3] Plaintiff claims from Defendant a total sum of Seychelles rupees 224,951.00/- representing an outstanding sum of Seychelles rupees 46,551.00/- with regards to claims 4 and 5; the balance due on extra works that amounted to Seychelles rupees 175,400.00/-; and 5 per cent retention in the sum of Seychelles rupees 23,000.00/-.

[4] In his plea, containing a counterclaim, Defendant avers that there was a "*contract vide a quotation*" dated 25 March, 2004, for what Defendant terms "*extension to shop to*

*form bed-sitter on the upper floor*"; and that the contract sum was Seychelles rupees 750,000.00/-. The counterclaim avers a "*second agreement*" for works that Defendant terms "*to renovate the existing shop*" for the sum of Seychelles rupees 106,890.00/-. Defendant contends that, with regards to the works carried out by Plaintiff, the Development Bank of Seychelles (herein "DBS") should have released to Plaintiff the contract sum of Seychelles rupees 750,000.00/- and not Seychelles rupees 850,447.00/-. In this context, Defendant contends that Plaintiff has been overpaid in the sum of Seychelles rupees 100,447.00/-. Defendant adjusts this downwards to Seychelles rupees 4,747.00/- in relation to an agreed deduction, with regards to various works not carried out at the site, in the sum of Seychelles rupees 11,190.00/-.

[5] It is also the contention of Defendant that there were defects in the works carried out by Plaintiff. Defendant claims the sum of Seychelles rupees 72,978.00/- for the alleged defects. Defendant also claims the sum of Seychelles rupees 51,310.00/- representing the amount due for works not performed by Plaintiff.

[6] Defendant moves for a judgment against Plaintiff in the sum of Seychelles rupees 129,035.00/- with interest and costs.

[7] Plaintiff avers in *limine litis* that the counterclaim of Defendant "*is time barred by prescription as it was raised and filed more than 5 years after filing of the Complaint and it ought to be struck off*".

[8] **Evidence in the case**

[9] The case for Plaintiff rested essentially upon the testimony of Cyril Roucou, a director of Plaintiff.

[10] Cyril Roucou made several points in relation to the claims of Plaintiff. In 2004, Defendant engaged Plaintiff to renovate an existing shop and construct apartments on Defendant's land at Pointe Larue. Cyril Roucou tendered the agreement made between Plaintiff and Defendant, with regards to the works, as exhibit P1. The agreement is undated. Clause 2 of the agreement, which deals with the provision for

payment, provides for an agreement sum of Seychelles rupees 750,000.00/-. DBS financed the "*project*".

- [11] At the start of the works, Plaintiff and Defendant concluded an oral agreement for extra works at the site. The agreement sum was Seychelles rupees 170,000.00/-. It appears from the evidence of Cyril Roucou that DBS financed the extra works. The court is mindful that the evidence recited in paragraph 11, of this judgment, is outside of the plaint and reply to counterclaim.
- [12] The agreement sum was paid in progress payments as and when certain phases of the works were completed. The payments were made by cheque after approval by Daniel Bradburn, a quantity surveyor, on behalf of Defendant and DBS. The quantity surveyor issued payment certificates 4 and 5 for the remittance of the sum of Seychelles rupees 367,195.00/-, by Defendant to Plaintiff, from the agreement sum. Both payment certificates were not honoured in full. DBS released only Seychelles rupees 330,644.00/- (exhibit P4). Cyril Roucou claims that Defendant owes Plaintiff an outstanding sum of Seychelles rupees 46,751.00/-. Defendant refuses to pay the outstanding sum of Seychelles rupees 46,751.00/- in spite of requests, reminders and a written notice of "*mise en demeure*" (exhibit P5). Plaintiff is, therefore, praying for a judgment ordering Defendant to pay the said sum.
- [13] Plaintiff also claims for release of retention in accordance with the agreement. Cyril Roucou explains that retention money is held back over a period of 3 months *i.e.*, the defects liability period, which covers 3 months "*following the completion date*". The purpose of this retention is for repairs to be effected to any defects that may appear during this period. At the end of this period the retention money is returned to Plaintiff if it has rectified the defects. Plaintiff applied for release of retention, which was due three months following the completion of the works carried out by Plaintiff. Cyril Roucou goes on to testify that Defendant made no requests to Plaintiff for alleged defective works to be repaired following the completion of the works in 2005. Plaintiff, therefore, claims that Defendant is withholding the sum of Seychelles rupees 23,000.00/- by way of retention in spite of requests, reminders and a written notice of "*mise en demeure*" (exhibit P6). Plaintiff is, therefore, praying for a judgment ordering Defendant to pay the said sum.

- [14] During the works, Plaintiff and Defendant concluded an oral agreement for extra works. The agreement sum was Seychelles 186,590.00/-. All extra works were to be paid by Defendant. The extra works carried out by Plaintiff are listed in an undated document made by Plaintiff. Plaintiff produces the undated document as exhibit P2. The obligations of Defendant, under the oral agreement, were guaranteed by Sheila Ah-Kong (exhibit P3). Included in that document (exhibit P2) were details on the works that were not carried out by Plaintiff. The works were valued at Seychelles rupees 11,190.00/-. The contents of exhibit P2 were not seriously disputed by Defendant, through counsel. After adjusting the sum of Seychelles rupees 186,590.00/- downwards in relation to the agreed deduction in the sum of Seychelles rupees 11,190.00/-, Plaintiff seeks payment of Seychelles rupees 175,400.00/-. Defendant refuses to pay that sum in spite of requests, reminders and a written notice of "*mise en demeure*". Plaintiff is, therefore, praying for a judgment ordering Defendant to pay the said sum.
- [15] According to exhibit P7, an undated document prepared by Plaintiff and not seriously disputed by Defendant, Defendant owes Plaintiff the total sum of Seychelles rupees 244,951.00/-. Defendant refuses to pay Plaintiff the said sum inspite of requests, reminders and a written notice of "*mise en demeure*" (exhibit P8). Plaintiff is, therefore, praying for a judgment ordering Defendant to pay the said sum with interest at the rate of 10 per cent per year with costs.
- [16] In so far as the counterclaim is concerned, Cyril Roucou claims that Plaintiff provided all the materials needed to carry out the contract works at the site. With regards to the second contract, Defendant provided a small amount of the materials required for the works. Then Cyril Roucou goes on to testify that there was only one agreement made between Plaintiff and Defendant to carry out various works at the site for the agreement sum of Seychelles rupees 750,000.00/-. He denies that the agreement covers all the works carried out, by Plaintiff, at the site.
- [17] Cyril Roucou testifies about the oral agreement made between Plaintiff and Defendant for extra works at the site to the sum of Seychelles rupees 170, 000.00/-. The court mentions that such evidence is outside of the plaint and reply to counterclaim.

- [18] With reference to the sum of Seychelles rupees 106,890.00/-, Cyril Roucou states that it concerned the extra works carried out by Plaintiff under the oral agreement made between Plaintiff and Defendant in 2005. Cyril Roucou also testifies that, in 2005, Plaintiff and Defendant concluded an oral agreement for extra works at the site. The agreement sum was Seychelles rupees 186,590.00/-. Sheila Ah-Kong guaranteed the extra works.
- [19] With reference to Defendant's claim that Plaintiff was overpaid, Cyril Roucou testifies that Plaintiff was not overpaid by DBS; and that at no point in time did Defendant inform Plaintiff that it had been overpaid.
- [20] With regards to the claim for defective works, Cyril Roucou testifies that Plaintiff did not receive any notice in writing from neither Defendant nor the quantity surveyor about the alleged defects, in accordance with clause 3 (b) of the agreement. On the same issue he states that certification of works were carried out by a quantity surveyor on behalf of Defendant and DBS and payment effected to Plaintiff upon certification of the claims.
- [21] In cross examination, Cyril Roucou confirms his evidence in chief. Cyril Roucou adds that the contract sum was Seychelles rupees 920,000.00/-; that Plaintiff prepared a quotation for extra works which provides for a sum of Seychelles 106,890.00/- for the said works (exhibit D1). The court notes that Cyril Roucou also testifies that the agreement sum for extra works was Seychelles rupees 186,590.00/-.
- [22] For Defendant the court heard evidence from Defendant, Cecile Bastille and Benjamin Rosette.
- [23] The evidence of Defendant is to the following effect. Defendant testifies that the agreement sum for the whole "*project*" was Seychelles rupees 750,00.00/-. DBS financed the whole project. Court notes that Defendant could not recall how much he and his wife had applied for from DBS. A ledger from DBS shows a loan amount in the sum of Seychelles rupees 925,000.00/-. Defendant's response to that ledger is that it was what his wife had told him. Defendant testifies that Plaintiff was paid in

scheduled progress payments as and when certain phases of the works were completed. The payments were made by cheque after approval by a quantity surveyor. Defendant collected the cheque from DBS and remitted it to Plaintiff.

- [24] During the works, Defendant did not request Plaintiff to carry out extra works. With reference to exhibit P2, Defendant testifies that Plaintiff did not request for payment for any additional works.
- [25] Defendant explains that he was made to understand that Plaintiff had been overpaid. The testimony of Defendant in relation to overpayment is vague, scant and brief.
- [26] Defendant states that Plaintiff did not complete the "*project*" as there remained a few trestles to be done. The court notes that this item has not been pleaded. Plaintiff told Defendant that he would come to complete the works, but Plaintiff never did.
- [27] During the defects liability period, Defendant had no complaints about the works carried out by Plaintiff. However, after the defects liability period, the following defects appeared; the ceiling skirting started to loosen from where it had been nailed, the ceiling had been damaged, the pipe inside the house started to leak, and the metal under the stairs broke. When queried as to whether he informed Plaintiff, Defendant states that he tried calling Plaintiff a number of times, but he got no response. Subsequently, Defendant went to see the quantity surveyor, who showed no interest.
- [28] Under cross examination Defendant could not recall much. It appears that his wife dealt with DBS, the quantity surveyor and other matters with regards to the "*project*". Defendant recalls the agreement sum of Seychelles rupees 750,000.00/-. About the extra works he testifies that he did not request for them. Defendant is not aware about claims 4 and 5 and retention money. Defendant does not recall being part of the transaction leading to exhibit P3. Defendant states that when the "*project*" was completed he showed the quantity surveyor the works that were not completed by Defendant. The carpenter and mason said they would complete the works, but they never did. With regards to the defective works, Defendant states that only the water leak was apparent during the defects liability period. The court notes that there is no evidence to support the contentions of Defendant.

- [29] Cecile Bastille, in her capacity as a quantity surveyor, presented a report – *"RE – VALUATION REPORT AND ASSESSMENT ON THE CONTRACTUAL WORKS TO THE RENOVATION AND EXTENSION TO EXISTING BUILDING"* dated 21 January, 2008 (exhibit D2). Exhibit D2 was strongly disputed by Plaintiff, through counsel. It is worth noting that there is no mention of the presence of the quantity surveyor. There is no mention that the quantity surveyor had issued a completion certificate or not. Cecile Bastille explains that she was not told about the quantity surveyor.
- [30] The court also takes note that the contents of exhibit D2 are to a large extent at odds with Defendant's pleadings. Some of the items listed under the heading *"Addition"*, namely, *"Extras Wardrobes and Kitchen cabinets, quote dated 11/02/04 39,660.00"* and *"Other extras quote dated 20/05/05 40, 040.00"* are not supported whatsoever.
- [31] Under the heading *"Omission"* she has valued works not done by Plaintiff to the sum of Seychelles rupees 57,310.00/-. Court notes that paragraph 6 of the counterclaim avers that Plaintiff and Defendant agreed to a deduction to the sum of Seychelles rupees 11,190.00/- for works not done by Defendant. The situation is aggravated in view of the fact that Defendant offers no evidence under that head of claim other than admitting to the deduction to the sum of Seychelles rupees 11,190.00/-. The evidence, in the courts view, does not substantiate the claim of Defendant.
- [32] Further, under the heading *"Omission"* she has valued the *"Defective Works"* to the sum of Seychelles rupees 74,618.00/-. The court finds no evidence to support the said valuation on a balance of probabilities. As mentioned above, Defendant's evidence is vague, scant and brief on the question of defective works.
- [33] Benjamin Rosette, a bank officer at DBS, testifies that a sum of Seychelles rupees 925,000.00/- was borrowed by Defendant from DBS. Benjamin Rosette produces the Credit Agreement made between DBS and Defendant as exhibit D3. Benjamin Rosette produces a print out of the General Ledger Listing from January, 2004, to February, 2012, as exhibit D4. Exhibit D4 shows that DBS disbursed a total of

Seychelles rupees 850,449.00/- out of the contract sum of Seychelles rupees 925,000.00/-.

[34] Plaintiff, in the absence of learned counsel, did not cross examine Benjamin Rosette. Plaintiff accepts the evidence of Benjamin Rosette.

[35] **Assessment of the respective contentions in light of the evidence**

[36] The court received written submissions only from learned counsel for Plaintiff. The court has considered the evidence in this case in light of the submissions of learned counsel.

[37] The heads of claim, as set out by Plaintiff, are as follows —

- (a) outstanding payment due for claims 4 and 5 in the sum of Seychelles rupees 46,551.00/-;
- (b) Seychelles rupees 175,000.00/- for extra works carried out by Plaintiff;
- (c) 5 per cent retention in the sum of Seychelles rupees 23,000.00/-;
- (d) interest at the rate of 10 per cent;
- (e) costs.

[38] The heads of claim as set out by Defendant are as follows —

- (a) Seychelles rupees 4,747.00/- representing overpayment made to Defendant by DBS;
- (b) Seychelles rupees 72,978.00/- for defective works carried out by Plaintiff.
- (c) Seychelles rupees 51,310.00/- for works not done by Plaintiff;



(d) interest;

(e) cost.

[39] **The dispute about outstanding payment due for claims 4 and 5 in the sum of Seychelles rupees 46, 551.00/-**

[40] The court has considered the evidence on record and is satisfied that Plaintiff has established on a balance of probabilities that Defendant owes Plaintiff the sum of Seychelles rupees 46,551.00/- for claims 4 and 5. The evidence of Plaintiff was not seriously disputed by Defendant. The position of Defendant is that he could neither recall nor is he aware about the claim. The court awards Plaintiff the sum of Seychelles rupees 46,551.00/-.

[41] **The dispute about outstanding payment for extra works in the sum of Seychelles rupees 175,400.00/-**

[42] Plaintiff claims from Defendant the sum of Seychelles rupees 186,590.00/- for extra works carried out by Plaintiff at the site. After adjusting the sum of Seychelles rupees 186,590.00/- downwards in relation to the agreed deduction in the sum of Seychelles rupees 11,190.00/-, Plaintiff seeks payment of Seychelles rupees 175,400.00/- for extra works carried out at the site.

[43] Defendant does not seriously dispute that extra works were carried out at the site. Defendant denied that his obligations were guaranteed by Sheila Ah-Kong, his daughter. Defendant's position is that the extra works were quoted to the sum of Seychelles rupees 106,890.00/- as evidenced by exhibit D1 and not Seychelles rupees 186,590.00/- as claimed by Plaintiff. Exhibit D1 contains Plaintiff's *"quotation for renovation of the existing shop as per your [Defendant's] request"* in the sum of Seychelles rupees 106,890.00/- issued using company letterhead. Exhibit P2, an undated document, prepared by Plaintiff, contains a list of what Plaintiff terms *"CONSTRUCTION OF FLATS & RENOVATION OF EXISTING SHOP AT POINTE*

*LARUE, EXTRA WORKS CARRIED OUT ON THE ABOVE MENTIONED". Exhibit P2 provides for a sum of Seychelles rupees 175,400.00/- for the extra works.*

[44] Further, the court notes that there is no proof that Plaintiff had sent any invoice to Defendant requesting payment of Seychelles rupees 175,400.00/- or Seychelles rupees 186,590.00/- for the extra works. The evidence, in the courts view, does not substantiate the amount of Seychelles rupees 175,400.00/-.

[45] In light of the above, the court awards Plaintiff the sum of Seychelles rupees 106,890.00/- for extra works carried out at the site (article 1162 of the Civil Code of Seychelles Act applies).

[46] **The dispute about 5 per cent retention in the sum of Seychelles rupees 23,000.00/-**

[47] The agreed sum is Seychelles rupees 750,000.00/-. Consequently, 5 per cent of the agreed sum is Seychelles rupees 23,000.00/-. Plaintiff claims that sum under clause 3 of the agreement. The court notes that Defendant did not seriously dispute the evidence of Plaintiff on this point. Defendant states that he did not notice any defects during the defects liability period in chief. In cross examination he mentioned the water leak which he claimed to have noticed during the defects liability period. The court notes that there is no evidence to support the assertion of Defendant. With regards to retention, Defendant's position is that he could neither recall nor was he aware about retention money.

[48] The court has considered the evidence on record and is satisfied that Plaintiff has established on a balance of probabilities that Defendant owes it the sum of Seychelles rupees 23,000.00/- in relation to retention. The court awards Plaintiff the sum of Seychelles rupees 23,000.00/-.

[49] The court considers the claims of Defendant.

[50] **The dispute about the sum of Seychelles rupees 4,747.00/- representing overpayment made to Plaintiff**

- [51] The court has awarded Plaintiff the sum of Seychelles rupees 106,890.00/- for extra works. As mentioned above, Defendant did not dispute that sum. Defendant seeks to set-off that sum. In this context, Defendant claims that Plaintiff has been overpaid in the sum of Seychelles rupees 4,747.00/-.
- [52] Defendant pleads that DBS has released the sum of Seychelles rupees 850,447.00/- to Plaintiff in 5 instalments. Defendant pleads that Plaintiff should have been paid only the agreement sum of Seychelles rupees 750,000.00/-.
- [53] Plaintiff testifies that, at the start of the works, Plaintiff and Defendant concluded an oral agreement for extra works at the site that amounted to Seychelles rupees 170,000.00/-. Plaintiff testifies that DBS financed the extra works. The agreed sum was Seychelles rupees 920,000.00/-. As mentioned above, the evidence of Plaintiff is outside of the pleadings.
- [54] Benjamin Rosette testifies that DBS extended a credit to Defendant to the sum of Seychelles rupees 925,000.00/- in terms of exhibit D3. According to exhibit D3, the money was to be used by Defendant solely for the purpose of financing the *"Project"*. Clause 3 of the Credit Agreement describes the *"Project"* as follows *"For the renovation & extension of existing shop at Pointe Larue to be used for rental purposes"*. DBS has released a total of Seychelles rupees 850,449.00/- out of the sum of Seychelles rupees 925,000.00/-. Overall, the court finds the evidence of Benjamin Rosette at odds with the pleadings of Defendant.
- [55] Further, the court notes that Plaintiff was paid only after approval of a quantity surveyor acting on behalf of Plaintiff and DBS. The quantity surveyor was not called.
- [56] In light of the above, the court is at a loss to understand the position of Defendant in relation to overpayment. The evidence does not substantiate the claim of Defendant. The court holds that Defendant has not established his claim on a balance of probabilities.

[57] **The dispute about the sum of Seychelles rupees 51,310.00/- for works not done by Plaintiff**

[58] The evidence, in the court's view, does not substantiate that certain works were not undertaken by Plaintiff. The court notes the admission of Defendant in his pleadings that Plaintiff and Defendant had agreed to a deduction of Seychelles rupees 11,190.00/- for works that were not undertaken by Plaintiff. Further, the evidence of Defendant and Cecile Bastille did not assist the court. The court holds that Defendant has not established his claim on a balance of probabilities.

[59] **The dispute about the sum of Seychelles rupees 72,978.00/- for defective works carried out by Plaintiff**

[60] The evidence, in the court's view, does not substantiate that there were defects in the works of Plaintiff. There is a lack of evidence to substantiate the claims of Defendant and the findings of Cecile Bastille. The court holds that Defendant has not established the claim on a balance of probabilities.

[61] **Plea in *limine litis***

[62] The final point for consideration is whether Defendant's claim is time barred. Plaintiff raised this objection *in limine*, but by consent arguments were reserved until the close of the evidence. Defendant, through counsel, has not offered any arguments on the objection. The counterclaim was filed on 25 September 2012. Neither the pleadings nor the evidence show that prescription was interrupted. After careful consideration of the evidence the court holds that the right of action was barred after a period of 5 years (See *Hughes and Polkinghorne v North Island Company Ltd. SLR [1984] 154*). The plea in *limine litis* succeeds.

[63] **Decision**

[64] For the above reasons the court enters judgment for Plaintiff against Defendant to the sum of Seychelles rupees 176,441.00/- together with costs of this suit and, in light of the facts and circumstances of this case, interest fixed by law on the sum of

Seychelles rupees 176,441.00/- due from 26 January, 2017, until payment in full. The court is satisfied that the counterclaim should be dismissed and orders accordingly with costs to Plaintiff.

Signed, dated and delivered at Ile Du Port on the 25 January, 2017.

**F Robinson**  
**Judge of Supreme Court**