

IN THE RESIDENT MAGISTRATE'S COURT
AT SUVA-CIVIL DIVISION

Civil Action No. MBC 362 of 2017

BETWEEN: NEW MART AUTO SALES LIMITED

1ST PLAINTIFF

AND: SAMISONI TAOBA KOROIVERE TAOBA VUGAKOTO

1ST DEFENDANT

AND: SERA CAMILLA TAGO VUGAKOTO

2ND DEFENDANT

For the Plaintiffs : Ms. Qioniwasa (*Messrs. O'driscoll & Co*)

For the Defendant : Ms. Baleilevuka (*Baleilevuka & Associates*)

Date of Hearing : 7th April 2022

Date of Judgment : 27th May 2022

Judgment

1. Listed herein are the pleadings:

- i. Writ and Statement of Claim : 13th December 2017;
- ii. Statement of Defence and Counter Claim : 6th March 2018
- iii. Reply to Defence and Defence to Counter-claim : 29th April 2020

2. The matter also proceeded to a hearing where the Plaintiff called one (1) witness¹ who was a representative of the Plaintiff, whilst the 1st Defendant and a supporting witness² gave evidence on behalf of the Defendants.

¹ Moshin Alfaz Dean

² Vulisere Tawaqa

3. A total of three (3) exhibits³ were tendered by the Plaintiff and the Defendant tendered nine (9) exhibits.
4. The respective positions of the parties in this matter are quite clear.
5. In terms of the plaintiff it is a claim in the amount of \$15,250.00 which is the balance sum claimed to be owed to them by the Defendants.
6. They qualify this position by stating that even though they had completed all stages of construction, they were locked out of the construction site and were not paid for the final two stages.
7. This was not the position as agreed to by the parties in their contractual agreement.
8. The Plaintiffs out rightly blame the Defendants for this loss.
9. The Defendants position is very clear as well.
10. It has basis on the fact that construction agreement stipulated a construction timeline of six (6) months.
11. However according to the Defendant, this was delayed by eight (8) months which prompted them to stop the works as they made financial losses and were borrowing from family members to assist them.
12. They also had hopes of renting the property once they transferred out of Suva but this did not eventuate as well.
13. They were forced to shut down the project and eventually sold the property in an attempt to recover their losses.
14. The above summary garners that the following factual matters are not in dispute:
 - a. Both parties had agreed on not one but two construction contracts;

³ Appendix A

- b. The work begun but was delayed due largely to the need to get compliant with the Engineer which was something that developed following the signing of the contractual agreements;
 - c. Three (3) out of the five(5) stages of construction have been cleared by the Local authority;
 - d. The Plaintiff has not been paid for the last two (2) stages of construction.
15. Out of the above a multitude of questions arise, however central to the conversation is the issue of contractual obligation.
16. This arises because the relationship between the parties was established by the execution of construction contracts.
17. Ideally what needs to be discussed in any construction contract is that which was espoused in *Ajmeer J's* decision (as he then was) in *Raju v Chetty* [2018] FJHC 553; HBC102.2017 (26 June 2018) when he highlighted at paragraph 14 to 16 the following:
- “[14] In construction contract cases, three categories of damages may be claimed: 1) damages for defective workmanship 2) schedule related damages, and 3) damages for failure to perform.
- [15] Generally, in construction contract cases damages are awarded pursuant to traditional common law principles of contract law. At common law, a contract is simply a promise or set of promises that the law will enforce or at least recognise in some manner.
- [16] In Fiji, there is no specific law that deals with construction contracts. In the absence of the specific law, we need to seek the assistance of common law to deal with the issues arising from construction contracts.”
18. With the above in mind in order to prove this, the standard of proof in civil matters is one of proof on the balance of probabilities.
19. In *Miller v. Minister of Pensions* 1947 2 All E.R. 372 Lord Denning stated the standard of proof regarding balance of probabilities as;
- "That degree is well settled. It must carry a reasonable degree of probability, not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'we think it more probable than not', the burden is discharged, but if the probabilities are equal it is not."*
20. The court has read both submissions of the parties and thanks them for the body of work contained therein.

21. However, the court upon looking at the documents tendered, the pleadings and the oral evidence has directed its mind towards an issue that was not addressed by either party.
22. This is the issue of ‘frustration’, by this the court notes that there was an event outside the parties control which has prevented the proper execution of the contract and would discharge the parties obligations to the contract.
23. In *Krell v Henry* [1903] 2 KB 740 the plaintiff agreed to let a room to the defendant for a day upon which Edward VII was to be crowned. Both parties understood that the purpose of the letting was to view the coronation procession, but this did not appear in the agreement itself. The procession was postponed owing to the illness of the king. The Court of Appeal took the view that the procession was the foundation of the contract and that the effect of its cancellation was to discharge the parties from further performance.
24. Whilst noting this, as a side note, there are two contracts which were executed on two differing dates, as such which exact contract is deemed to be applied is also ‘up for discussion’ and has not been addressed by the parties.
25. Be that as it may, it is not disputed by the parties that the construction was smooth sailing until the Engineer informed the Defendants of the updated engineering standards as required by the Government in the fallout of Cyclone Winston.
26. As a result the timeline of construction was turned upside down and construction works delayed. The court is careful not to attribute any timeline for delay because the two construction contracts have differing dates.
27. Defendants Exhibit No.2 lists the end date of construction as 15th April 2016, whilst Plaintiff’s Exhibit 2 lists the end date of construction date as 26th September 2016. Which date applies is not clear from the manner of litigation.
28. What is clear though by way of Defendant’s exhibit 1 was that on 16th February 2017 the building was not complete and the Defendants did not pay the remaining sum which is now being claimed. The period falls outside agreed ending dates from both contracts.

29. However the court goes back to its discussions at paragraphs 22 and 23 above-herein and firms the view that the change in engineering standards was not fathomed by both parties and this was the intervening act that ultimately caused the delay and the non-payment thereafter.
30. As such both parties obligations under both contracts (if you wish) was frustrated and in the courts view cannot be enforced.
31. Therefore as this court has deemed that the contracts were frustrated by the intervening act, the claim and the counter-claim cannot be considered as the parties in the court's view have been discharged from their obligations. They both fail as a result.
32. Any aggrieved party is at liberty to appeal to the High Court, wherein the statutory appeal period (7 days) shall apply.


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JEREMAIA .N.L SAVOU
RESIDENT MAGISTRATE



Appendix A

- **Plaintiffs Exhibit No.1** – Quotation dated 14th January 2016 from the Plaintiff.
- **Plaintiffs Exhibit No.2** – Memorandum of Terms of Building Contract executed on 1st August 2016.
- **Plaintiffs Exhibit No.3** – Invoice of the Plaintiff for Stage 4 and 5.
- **Defendants Exhibit No.1** – Copy of Correspondence from Engineered Designs dated 16th February 2017.
- **Defendants Exhibit No.2**– Building Contract Executed on 28th January 2016.
- **Defendants Exhibit No.3**– Cost to Complete Template.
- **Defendants Exhibit No.4 a**– Copy of Correspondence from Plaintiff dated 19th August 2016, confirming completion of Stage 1 and Stage 2.
- **Defendants Exhibit No.4 b**– Copy of Correspondence from Suva Rural Local Authority dated 12th August 2016, allowing continuation of works.
- **Defendants Exhibit No.5 a**– Copy of Correspondence from Plaintiff dated 14th November 2016, confirming completion of Stage 3.
- **Defendants Exhibit No.5 b**– Copy of Correspondence from Suva Rural Local Authority dated 29th August 2016, allowing continuation of works.
- **Defendants Exhibit No.6** – Loan and Construction Offer Letter
- **Defendants Exhibit No.7** – Transaction history for 23/6/2017 for Defendants.
- **Defendants Exhibit No.8** – Transaction history for the period 18/6/17 to 24/6/17 of the Defendants
- **Defendants Exhibit No.9** – Bundle of Photographs