COURT OF MAGISTRATES (MALTA)

DR. RACHEL MONTEBELLO B.A. LL.D.
MAGISTRATE

Application Number : 65/2018 RM

Andreii Geneliuk

-Vs-

Ramazan Akbulut
Rama Akbulutm

Today, 26th October 2023

The Court,

Having seen the Application filed by plaintiff, Andreii Geneliuk, in the Registry on the 20th March 2018, whereby he requested that defendants, Ramazan Akbulut and Rama Akbulut are condemned to pay him the sum of €6,445 due for works done and completed on the premises 40, Curch Street, Imsida with costs including those of a judicial letter dated 9 November 2017 and legal interest from that date to effective payment against you.

Having seen the Reply filed by defendants on the 17th October 2018, where the following pleas were raised:-

1. *Illi t-talbiet tal-attur huma nfondati fil-fatt u fid-dritt stante li x-xoghol msemmi sar hazin u mhux skont l-arti u s-sengha.*
2. *Illi minghajr pregudizzju ghall-premess ir-rikorrent thallas eccesivament ghax-xoghol utli li ghamel anzi kien sovra-pagat.*
3. *Illi ghaldaqstant, xejn m'hu dovut. In kwantu, l-konvenuti nkorrew spejjez u soffrew danni minhabba x-xoghol hazin. Ghalhekk qed issir id-debita riserva kontra l-attur ghal kull dritt u azzjoni minhabba xoghol hazin.*

Salv eccezzjonijiet ulterjuri

Having seen that by virtue of a decree given on the 8th November 2018, it was ordered that the proceedings are conducted in the English language;

Having seen the decree dated 8th November 2018 whereby with the consensus of both parties, David Pace A&CE was appointed as a technical expert in order to take cognisance of the plaintiff's claims and the pleas raised by the defendant and to relate in writing back to the Court with his findings, having also the faculty to hear witnesses under oath, collect all relevant documentation and evidence and to hold the necessary on-site inspections, with expenses to be borne provisionally by plaintiff;

Having seen the report filed by Perit David Pace on the 12th December 2022, duly confirmed on oath;

Having heard the testimony of plaintiff on the 8th November 2018;

Having seen the evidence collected by the court-appointed referee;

Having seen all documents produced in evidence;

Having seen the decree delivered on the 7th November 2022 whereby it was ordered that the testimony tendered by defendant before the court-appointed referee during the sittings held in the 9th January 2019 and the 12th March 2019 are expunged from the records of the proceedings;

Having heard the plaintiff's legal counsel during the hearing of the 4th October 2023 declare that he has no further submissions to make in addition to the evidence that already forms part of the acts of the proceedings;

Having seen all the acts forming part of the record of proceedings;

Having seen that the cause was adjourned for today for delivery of judgement;

Having considered;

Plaintiff demands in his Application that defendants are condemned to pay the balance in the sum of €6,445 allegedly due to him for works commissioned and carried out at the premises at 40, Church Street, Msida.

Defendants, on their part, contend that the works commissioned were defective and were not executed in accordance with standards of good workmanship. They also maintain that they made payments to plaintiff in excess of the amounts due to him for works carried out correctly and that they incurred expenses and suffered damages as a result of the defective works that were executed by plaintiff.

Plaintiff testified[1] that he was engaged in order to carry out various works in defendants' property in Msida. Parties verbally agreed on the works that were required to be carried out and plaintiff maintained that he did not insist on a written agreement since defendant was a good friend of his. These works consisted of both

[1] 8th November 2018.

internal and external works, including gypsum boards, works on the roof and floors, installation of apertures, electrical works, installation of gypsum boards and plastering, drains and plumbing works in the kitchen, toilets and bathroom[2]. Defendant paid the sum of €1,000 for purchase of materials prior to the commencement of the works and eventually paid a total of €13,400 by means of several payments, leaving a final balance due in the sum of €6,445. Plaintiff stated that initially, when the works were completed in May 2017, defendant did not seem to find any fault with the works that had been carried out and asked for time to pay, claiming he had problems with the bank[3]. However after a few months, he began to complain about the quality of some of the works and asked to pay a lesser price.

Perit Gene Zammit was commissioned by defendants in order to inspect the premises at 40, Church Street, Msida - which he did on the 24th October 2018 - and to comment on the quality of the works carried out by plaintiff. In his testimony before the court-appointed referee[4], he outlined the defective works which required attention and which were also listed and described in his report Dok. GZ1 and the photos attached thereto. Upon an examination of his testimony[5], it would result that the principal defects were identified in the following works:-

- Defective water supply system installed by plaintiff, resulting in leaks into third party property[6];
- Unsightly gap between steel door frame and masonry jambs[7] and mislaid wrought-iron fanlight on main door[8];
- Defects in the opening function of several apertures, which require removal and re-setting[9];
- Exposed cables under the soffit[10] and defects in other soffits[11];

[2] See documents Dok. AG1 until Dok. AG6.
[3] See messages Dok. AG7.
[4] 9th January 2019.
[5] 9th January 2019 and cross-examination on the 5th December 2019.
[6] Image 22.
[7] Image 3.
[8] Image 2
[9] Images 5 – 11.

- Defective plaster finish[12] and lack of plastering[13];
- Misalignment of several doors[14];
- Water penetration and staining in kitchen/living/dining room as a result of improperly laid membrane layer on roof[15];
- Water penetration in bathroom from a punctured drain pipe passing through the wall, resulting in wet stains and spalling on the wall[16].

Upon an examination of the report filed by the court-appointed referee, it would result that the existence of the defects outlined by Perit Gene Zammit in his testimony, was established during an on-site inspection held on the premises on the 15th January 2019. Specifically, the court-appointed expert affirmed that defendant had subsequently installed a new "*by-pass*" piping system[17] to replace the allegedly defective water supply system installed by plaintiff[18] and also observed the unplastered gap indicated in image 2[19], uneven plastering in the hall and stairwell, defectively-installed apertures, an unplastered concrete lintel, water stains on neighbour's side of party wall and mould and damp stains on the party wall in defendants' property.

On the basis of the said on-site inspection, the court-appointed expert made the following observations in connection with the defective works identified in the report of Perit Gene Zammit:-

"*Extensive indications of water leakage inside the premises; wrought iron fanlight and glass missing; incomplete finishing to plasterwork to front door jambs.*

...

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[10] Image 4 (page 5 of Dok. GZ1).
[11] Image 17.
[12] Image 4 (page 4 of Dok. GZ1) and Image 18.
[13] Image 15.
[14] Images 12 – 14.
[15] Image 16.
[16] Image 19
[17] White piping used.
[18] Grey piping used.
[19] Dok. GZ1.

Indication of damp staining around en-suite cubicle.

...

Uneven surfaces and rough patches. ...”

In fact, he concluded:-

“*The evidence on site indicates that defendants’ allegations in defective or missing works are well founded. Apart from the repairs to damages to plasterwork and other finishes, it will be necessary to replace the water supply system completely since the one installed by plaintiff has been proven to be defective.”*

He also proceeded to identify the following repairs / remedial works that he found to be necessary in order to repair the defects encountered in the works carried out by plaintiff in defendants’ property -

- *“Replacement of defective water supply system and missing fanlight and galzed aperture behind; finishing of plasterwork around door jamb.”*
- *“Sealing of shower fittings and repair / redecoration of damaged plaster and paintwork*[20]*.”*
- *“Replastering to defective areas.”*
- *“Dismantling of apertures, checking for damage, re-installation of apertures.”*
- With reference to the exposure of concrete on the unplastered lintel: “*Plaster / decoration to lintel.”*
- As for the water stains identified on the ceiling of the kitchen / living / dining room[21], he reported: “*Since the roof reportedly already has a membrane layer below the screed, a surface liquid membrane application will be necessary to avoid taking all the roofing up to detect the leak.”*
- *“Replastering to* (gypsum plaster) *ceiling”* and the opening of the access hole which had been sealed off.

[20] Ref. the leaking shower drain and the damp staining around en-suite cubicle.
[21] Image 16.

These remedial works were assessed by the court-appointed referee himself, who quantified the expense required to cover the costs of such repairs, in the total sum of €2,500.

The Court would point out that no evidence was brought to bring the court-appointed referee's conclusions into doubt. Indeed, plaintiff did not express any objection to or criticism of these findings and failed to demand an explanation or clarification thereof. He also failed to demand the appointment of additional referees in order to re-evaulate the assessment and conclusions reqached by Perit David Pace with regard to the works that were found to be defective and or the costs of the remedial works.

Additionally, the Court would point out that the conclusions reached by the judicial referee were not only based on the findings on an on-site inspection, but they also fully endorse the professional technical opinion expressed by the architect engaged *ex parte* by defendants, Perit Gene Zammit, who affirmed his observations and findings in his sworn testimony before the judicial referee. The Court therefore finds no reason to depart from the judicial referee's assessment and findings, with regard both to the sub-standard and or defective works carried out by plaintiff, and the quantification of the expenses that would be required in order to effect the necessary repairs.

In a recent judgement delivered by the Court of Appeal on the 17th February 2022, it was held:-

"Huwa risaput li min ma jaqbilx ma' rapport ta' espert imqabbad mill-Qorti, għandu rimedju, dak li jitlob il-ħatra ta' periti addizzjonali. Min ma jagħmilx uzu mill-mezzi legali disponibbli sabiex jikkontrasta rapport tal-perit tal-Qorti, ma jistax imbagħad jippretendi li l-Qorti twarrab dak ir-rapport, sempliċement peress li parti ma taqbilx miegħu, aktar u aktar fejn dak ir-rapport ikun ta' natura teknika. Għalkemm il-Qorti mhix marbuta li tadotta l-fehma tal-perit tekniku nkarigat minnha, huwa mill-aktar

inkongruwu li l-appellanti jippretendu li l-ewwel Qorti kellha tiskarta perizja teknika, meta ma jeżistu l-ebda raġunijiet validi sabiex hija tagħmel dan."[22]

Having considered;

The contract of works entered into between the parties in this case falls squarely to be regulated as a contract of *locatio operis* and thus by the provisions of Article 1633 *et sequitur* of the Civil Code.

It is an established principle of law that in a matter of a contract of works:

"*Min iwettaq bicca xoghol li ghaliha jkun gie inkarigat ghandu obbligu jaghti rizultat tajjeb u ta' vantagg ghall-klijent, u jekk jonqos li jaghti dan ir-rizultat, huwa jkun responsabbli ghad-danni, u la jista' jwahhal fl-ghodda, la fil-materjal li juza', la fl-intromessjoni tal-klijent u lanqas fl-istat jew il-kundizzjoni tax-xoghol preparatorju li fuqu jkun irid iwettaq ix-xoghol tieghu. L-appaltatur ghandu obbligu li jwettaq xoghol li jaghti rizultat konformi mal-htigijiet tal-klijent, u ghandu jirrifjuta jwettaq xoghol li jaf jew li messu kien jaf, mhux se jaghti rizultat utili.*"[23]

In a judgement delivered on the 6th October 2004[24], the Court reaffirmed the principle that the contractor is liable for all damages caused by defective works:-

"*Bhala l-ewwel principju huwa dottrinalment u gurisprudenzjalment ricevut illi l-appaltatur ghandu l-obbligu li jezegwixxi x-xoghol lilu kommess fis-sens li huwa ghandu l-obbligu wkoll li jara li dan ix-xoghol ikun sejjer isir utilment u mhux b'mod li l-quddiem juri difetti. "L'imprenditore ha l'obbligo di eseguire bene l'opera commessagli, secondo i dettami dell'arte sua, e deve prestare almeno una capacita` ordinaria" (Kollez Vol XXVII pI p373). Dan fis-sens li hu "ghandu jiggarantixxi l-bonta` tax-xoghol tieghu" (Kollez Vol XL pI p485).*

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[22] **David Brincat et v. Francis Sammut et**.
[23] **Coleiro Yacht Finishes Limited vs Easysell Kia (Malta) Limited**, decided 9th November 2012
[24] **Pierre Darmanin v. Moira Agius**.

"It-tieni principju jghid illi "l-appaltatur li jezegwixxi hazin ix-xoghol li jifforma l-oggett ta' l-appalt huwa responsabbli ghad-dannu kollu li jigi minn dik l-ezekuzzjoni hazina" (Kollez. Vol XXXVII pIII p883). Ghax kif jinsab ritenut ukoll "f'kaz bhal dan hu ghandu mill-ewwel ma jaghmelx ix-xoghol jew ikollu jirrispondi ghad-difetti li jigu 'l quddiem" (Mario Blackman -vs- Carmelo Farrugia et noe", Appell Kummercjali, 27 ta' Marzu 1972). Dan hu hekk avvolja jkun hemm l-approvazzjoni tax-xoghol (Kollez. Vol XLI pl p667) jew l-appaltatur ikun mexa skont lispecifications jew l-istruzzjonijiet lilu moghtija mill-kommittent."

In another judgement, **Francica vs Buhagiar**, delivered on the 28th April 2004:-

"*... l-appaltatur ghandu jesegwixxi x-xoghol lilu kommess fis-sens li huwa ghandu l-obbligu wkoll li jara li dan ix-xoghol ikun sejjer issir utilment u mhux b'mod li 'l quddiem juri difetti. F'kaz bhal dan hu ghandu mill-ewwel ma jaghmilx ix-xoghol jew ikollu jwiegeb ghad-difetti li jigu 'l quddiem, izda galadarba huwa accetta li jahdem ix-xoghol, dejjem jibqa' obbligat u responsabbli li jaghti lill-appaltant opera sodisfacenti u spondet peritiam artis u hu obbligat jirrezisti kwalunkwe intromissjoni tal-komittent*"

It is therefore evident that the basic underlying principle that emerges from settled case-law on this matter requires that the contractor who executes works entrusted to him, carries out those works in conformity with the employer's requirements and also in a manner that produces an advantageous and positive result to the employer, failing which he is not only not entitled to payment but he is also responsible for ensuing damages that may be suffered.

As far as the remedies available to the employer in the event that the contract of works is not executed diligently or in accordance with the instructions given by the employer or where the contractor produced defective works, the First Hall of the Civil Court in the judgement **Lawrence Formosa et vs Silvio Felice**, explained how different

remedies have been afforded according to the particular circumstances of each case, and held:-

"Kif jidher mis-sentenzi fuq citati, il-Qorti taghna f'certi kazijiet ordnaw il-hlas ta' prezz tal-appalt stabbilit "a misura" meta kien hemm difett parzjali mhux sostanzjali fix-xoghol, izda awtorizzaw lill-komittent jirritjeni parti mill-prezz sakemm l-appaltatur isewwi d-difetti. F'kazijiet ohra, fejn ix-xoghol gie ezegwit in parti sewwa u in parti hazin, giet negata lill-appaltatur kull parti mill-prezz fuq il-motiv li x-xoghol ma kienx sar skond ma titlob is-sengha. F'kazijiet ohra, l-Qorti ordnat li titnaqqas, mis-somma li tigi mhallsa, s-somma stmata mill-perit bhala kumpens ghad-difett fix-xoghol."[25]

And, in the judgement **John Borg et vs Emanuel Galea et**[26], the Court of Appeal maintained:-

"*Huwa principju assodat in materia li jekk n-nuqqasijiet riskontrati fix-xoghol esegwit huma essenzjali jew radikali, l-appaltant jista' jitlob li jigi dikjarat li l-kuntratt jinhall minhabba nuqqas ta' twettiq, u li jithallas id-danni minghand l-appaltatur. Jekk però n-nuqqasijiet riskontrati ma jkunux essenzjali jew radikali izda, jistghu jigu riparati, l-appaltatur ma ghandux jitqies inadempjenti izda, jkollu l-obbligu li jsewwi x-xoghol hazin jew jaccetta tnaqqis fil-prezz.*"[27]

It is therefore established in case-law on this matter that the contractor who carries out defective works or carries out works that are not in conformity with the standards of good workmanship or which produce no useful result to the employer, is liable for all damages that may ensue from the bad execution of the works and consequently, the employer is not only entitled to reduce the price of those defective works which have no value for him, but also to claim by way of damages, compensation for resultant defects, which compensation may consist also, as the case may be, in those expenses

[25] Cit. Nru. 1249/90, decided on the 27th June 2002.
[26] Decided on appeal, 19th May 2009.
[27] Vide also **Jesmar Valletta et v. Patrick Grech et**, First Hall, Civil Court, 20th March 2003.

which were incurred for the rectification of the bad workmanship or defective works or for the commissioning of replacement works.

This principle is also reflected in the provisions of article 1640 of the Civil Code which stipulate that in the event that the employer has valid reason for the dissolution of the contract of works, he is to pay the contractor only such sum which shall not exceed the expenses and work of the contractor, **after taking into consideration the utility of such expenses and work to the employer as well as any damages which he may have suffered**. In this matter, it has been held:-

"*34. Il-gurisprudenza taghna tghallem illi f'materja ta' kuntratti, inkluz ghalhekk il-kuntratti ta' appalt, il-ligi taghmilha cara li fejn persuna ma twettaqx obbligazzjoni li biha intrabtet li taghmel xi haga, il-kreditur taghha jista' jigi moghti s-setgha li jiehu hsieb iwettaqha hu bi spejjez tad-debitur. Tghid ukoll li min jonqos li jwettaq obbligazzjoni li ntrabat biha, obbligat ihallas id-danni li ghandhom jaghmlu tajjeb ghat-telf li l-persuna l-ohra tkun garrbet u l-qligh li tkun tilfet.*"[28]

Applying these principles to the case at hand, the Court, after considering the nature of the defective or sub-standard works executed by plaintiff in defendants' property and the fact that these are susceptible to being repaired, is of the view that the amount representing the expenses that are required in order to carry out the necessary repairs to the defective works, as quantified by the court-appointed expert, is not due to plaintiff who, in line with the principle enunciated in article 1640 of the Civil Code, has no right to expect any payment for works that were not carried out diligently, fall below the required standard and or cause damage to the employer. This means that defendants would be entitled to deduct an amount from the price of the works, representing the expenses required to remedy the defects or to remove the substandard works and carry them out afresh.

[28] **Borg et vs Galea et**, *supra.*

While it is true that the defendants did not raise a counter-claim in this suit in order to demand payment of the expenses required to repair the defective works carried out, in their Reply[29] they claimed to have incurred expenses and suffered damages as a result of the faulty installations and fittings. The Court upholds the view already expressed in the judgement in the names **Robert Ellul Kennely et v. Josie Farrugia et[30]**:-

*"... **il-Qorti tqis illi anke fin-nuqqas ta' kontro-talba mill-komittent imharrek ghall-hlas tax-xoghol ezegwit fl-appalt, fil-komputazzjoni ta' dak li huwa dovut lill-atturi, ghandu jittiehed in konsiderazzjoni sija l-valur tax-xoghol imwettaq hazin u sija wkoll id-dannu li jkun garrab l-appaltatur bhala rizultat tax-xoghol difettuz, purche` izda dawn id-danni ma jeccedux il-valur komplessiv tal-partita tal-appalt li hija afflitta mid-difett riskontrat.***

...

*B'referenza ghal dak sottomess mill-abbli difensur tal-atturi waqt it-trattazzjoni dwar il-htiega li, sabiex jistghu jirreklamaw b'success id-danni sofferti minhabba x-xoghol hazin li sar u l-ispejjez li ntefqu ghat-tiswija tal-hsara, il-konvenuti komittenti kellhom jitolbu l-hlas tad-danni separatament permezz ta' kontro-talba, il-Qorti tqis illi bl-applikazzjoni tal-principju fuq enuncjat, l-atturi ghandhom xorta wahda ibatu din in-nefqa zejda galadarba ntwera li din saret mehtiega bi htija tal-atturi appaltaturi ghax ix-xoghol ma ghamluhx kif iridu l-arti u s-sengha. Madanakollu, billi effettivament ma saret ebda kontro-talba f'din il-kawza ghall-hlas tad-danni naxxenti mill-adempiment siewi tal-appalt, **il-Qorti hija tal-fehma illi dawn l-ispejjez ghandhom jitnaqqsu mill-prezz tal-partita relattiva tax-xoghol li ma jkunx twettaq skont is-sengha u l-arti biss sal-limitu tal-valur ta' dik il-partita partikolari tal-appalt li ma kellu ebda siwi ghal min ikun ta x-xogħol.**"*

Consequently, even though defendants failed to file a formal counter-claim for the payment of damages occasioned by the faulty and substandard works executed by plaintiff, the Court agrees that the amount representing the expenses required for the

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[29] Plea raised in the third paragraph of the Reply.

[30] Decided by this Court on the

rectification of the faulty or sub-standard works must be deducted from the balance of the price claimed by plaintiff for the execution of the works. While this means that the balance due to plaintiff is of three thousand nine hundred and forty five Euro (€3,945), it also follows that that the defendants' second plea in their Reply is unfounded.

In conclusion, the Court would point out that while plaintiff requested that interest is to run on the amount which defendants are condemned to pay, begins to run from the 9th November 2017, that is the date of filing of a judicial letter, he brought no evidence whatsoever that he called upon defendants by means of a judicial act or that defendants were duly notified, not even by means an informal copy of the said act or an indication of the number assigned to it. The Court is therefore of the view that interest on the amount due must being to run as from the date of the filing of the judicial demand in this case for the payment of a determinate sum of money, duly notified to defendants, that is from the 20th March 2018.

For these reasons, the Court while upholding defendants' first and third plea, raised in their Reply, accedes only limitedly to plaintiff's demand and condemns defendants RAMAZAN AKBULUT and RAMA AKBULUT to pay unto ANDREII GENELUIK the sum of three thousand nine hundred and forty five Euro (€3,945) for the reasons stated in the Application, with interest from the date of filing of the Application, that is 20th March 2018, and with costs to be borne equally between the parties.

DR. RACHEL MONTEBELLO
MAGISTRATE.