Anscombe v Indian Ocean Tuna Ltd

(2010) SLR 182

Antony DERJAQUES for appellant
Pesi PADIWALLA for respondent

Judgment delivered on 13 August 2010

Before MacGregor P, Hodoul, Domah JJ

This is an appeal against the decision of the then Ag Chief Justice who dismissed an action which the appellant had brought against the respondent company for breach of contract.

The appellant, a landlady and a business woman who owned a house at Belonie, had rented it to the respondent company on a written contract at a monthly rent of R14,000 stated to start on 1 December 2003. It was her case that while the lease was subsisting a "preposé" of the respondent, Mr Joe Madnack, the Operational and/or Financial Manager represented to her that should extensions and renovations be carried out in the said premises, the respondent company would enter into a new lease agreement with the appellant for a substantial monthly rental. She further averred that she relied on his word and carried out the extensions and renovations and that she even altered the character of the accommodation to suit 50 employees but that, by letter dated 22February 2005, the respondent terminated the agreement. She claimed the sum of R 209,770 as damages which included R40,000 as moral damages.

The respondent, in its plea, admitted that there was a lease agreement between them for R14,000 starting from 1 December 2003 but denied any representation that it had made to the appellant to bring about changes to the accommodation for an enhanced return to the landlord for her investment.

The record of proceedings in the Court below shows that the case was a non-starter. The situation of the appellant was one of oral contract going *"outre et contre"* the written word in the lease agreement. When counsel attempted to adduce evidence to prove an oral contract which exceeded the prescribed amount of R5,000, counsel objected under article 1341 of the Civil Code, and rightly so.

However, the record also shows that counsel for the respondent did hint that there was a special procedure that was required for the same to be done. But, the proceedings show a blissful oblivion of it. Neither counsel for the appellant nor the Court applied its mind to that special procedure.

Be that as it may, the matter proceeded with that procedural impediment, the appellant deposed to what she did, to what she spent, to the hassles she underwent to effect alterations to the property - construction of extra and additional toilets, showers, soak pits, septic tanks; partitioning of the lounge area to create more rooms; painting of the property and landscaping of the yard etc. The reason was that

they needed the place for 50 employees. Her prejudice amounted to R209,770 as damages which included R40,000 as moral damages. However, when it came to the question of proving the contract between the appellant and the respondent, there was an objection by counsel for the defence on the basis of article 1341 of the Civil Code, which was sustained by the learned Ag Chief Justice. Counsel decided toappeal against that ruling but since it was still an interlocutory matter, no appeal was possible except by closing the case.
As it happened, at the close of the case for the plaintiff, counsel for the respondent moved that the company had no case to answer. The Judge ruled that this was so and gave judgment with costs in favour of the respondent company.

It is against that judgment that the appellant is appealing on the following five grounds:

1. The Honourable Judge erred in law and principle in holding that the plaintiff's oral testimony was inadmissible in law;

2. The Honourable Judge erred in law in failing to determine that the appellant and the respondent were both merchants and the transaction was a commercial transaction and the commercial code applied;

3. The Honourable Judge erred in law in failing to determine that plaintiff's evidence was an exception to article 1341 of the Civil Code of Seychelles-,

4. The Honourable Judge erred in law in failing to find that there was sufficient evidence in writing providing initial proof in writing and thereby admitting into evidence appellants and testimony;

5. The Honourable Judge erred in law in failing to determine that either plaintiff or defendant was a merchant thereby the transaction was a commercial transaction rendering the oral testimony of the plaintiff admissible in law.

All the above matters raised in appeal relate to the same question of law and procedure which counsel for the respondent had hinted to counsel and the court: How does one go to prove oral evidence in a contract above the prescribed amount of R5,000 where it concerns traders or where there is a beginning of proof in writing? The rule is that provided in article 1341 of the Civil Code which requires that all contracts above R5,000 be in writing and that no oral evidence may be adduced *"outre et contre"* the written word in a contract.

The rule is stated in article 1341 of the Civil Code which provides:

> Any matter the value of which exceeds 5000 rupees shall require a document drawn up by a notary or under the private signature, even for a voluntary deposit, and no oral evidence shall be admissible against and beyond such document nor in respect of what is alleged to have been said prior to or since the time when such document was drawn

up, even if the matter relates to a sum of less than 5000 rupees.

Article 1341, however, must be read with, inter alia, article 1347 of the Civil Code which provides for the exception in that that rule will not apply where there is a beginning of proof in writing or as the original or source French text puts it *"a commencement de preuve par écrit."*

Article 1347 of the Civil Code thus provides:

> The above-mentioned rules shall not apply if there is writing providing initial proof.
>
> This term describes every writing which emanates from a person against whom the claim is made, or from a person whom he represents, and which renders the facts alleged likely.

Admittedly, professionals exposed to the procedure applicable in the common law system and unexposed to the civil system would be excused for little suspecting the existence of this special procedure. That is why *we* thought of dwelling for a moment on the important matter of the procedure.

Where a party seeks to admit oral evidence for the purposes of proving a contract above the prescribed amount which in this case is R5,000, he or she should first make an application to the judge to do so under the procedure known as Personal Answers or *ExamensurFaitset Articles.* On this matter, the paragraphs on *Encyclopédie Dalloz, Répertoire de Procédure Civile, V° "Comparution Personnelle et Interrogatoire ",* nos 12, 32 would be of immense value to those who want to know more.

On Personal Answers, article 162(1) of the Code of Civil Procedure provides:

> 162. (1) Any party to a cause or matter may examine the adverse party on his personal answers as to anything relevant to the matter at issue between the parties.

Now there are preliminaries for triggering this procedure. There should be, as a rule, an advance application which should indicate that the purpose is for examination under Personal Answers. This is akin in purpose to interrogatories in the common law jurisdictions but quite different. Even if it is more safely made prior to the date of hearing, it may even be made by way of motion in certain circumstances on the very day of the hearing:

> 163. Whenever a party is desirous of obtaining the personal answers not upon oath of the adverse party, he may apply to the Judge in court on the day fixed for the defendant to file his statement of defence or prior thereto, or he may petition the court ex parte at any time prior to the day fixed for the hearing of the cause or matter to obtain the attendance of such adverse party and the court on sufficient ground being shown shall make an order granting the application or petition. And the party having obtained such order shall serve a summons,

> together with a copy of the order, on the adverse party to appear in court on the day stated therein.

The above article speaks of application by petition but it may also be made by motion on the day of trial in certain cases such as when the adverse party is in attendance:

> 164. If a party to the cause or matter is present in court at the hearing of the case, he may be examined on his personal answers with the permission of the Judge, without any previous application.

It needs to be stated that where the adverse party is a corporate body, it would not be in order to await the day of trial to make the motion. The reason lies in the fact that the person representing the corporate body may simply come into the witness box and answer in the negative to every question asked and defeat the purpose of the *examen.* Article 162(2) takes care of this when it requires the corporate body to mandate someone to *give* the answers, whence the necessity of advance application.

The advance application and the measures to be taken by the corporate body applies also to the Republic, a public body or any corporate body:

> (2) Ifa party to a cause or matter be the Republic, a public establishment (établissement public), a corporation or body having a legal entity, such party shall be bound to appoint a special attorney to give his personal answers in such cause or matter If, on the day fixed for the appearance of any such party to give personal answers, no such attorney appears on behalf of such party, and no satisfactory reason for such attorney's non-appearance is give, the facts, matters and things alleged by the adverse party may be held to have beenadmitted.

That does not prevent a party from calling a representative of a corporate body, be it public or private, where the person required to depose in court is the person who has personal knowledge of the facts necessary for this case. The proviso to article 162(2) addresses this issue:

> Provided however that administrators, managers or agents of such party may also be called upon to give their personal answers on matters which are within their personal knowledge, and the court may in its discretion attach whatever weight it thinks fit to such answers.

For the sake of completeness, one may take note of the rest of the article which has to do with parties who lack legal capacity:

> (3) If a party to a cause or matter be incapable in law of contracting (incapable), he shall give his personal; answers through his guardian, curator or other legal representative.

Thesource of the procedure obtaining under article 161 of the Seychelles Code of

Civil Procedure which is akin to the procedure of interrogatories in common law jurisdictions but hardly comparable to it resides in article 324 of the French Code de Procédure Civile on *Examensur Faits et Articles.* Further guidance may be sought on how that article is interpreted and applied in practice, more particularly on how the courts assess the answers given to decide whether oral evidence may be admitted or not in the circumstances: see *Ex parte Esmael* (1941) MR 17; *Bouvet v Mauritius Turf Club* (1962) MR 213; *Dubarry Babbea*(1983) MR 52; *Chatharoo v Bappoo* (1968) MR 74;*Soormally v Soormally* (1971) MR 115; *New Goodwill v Tuyau* (1977) MR 329.

In accordance with the special procedure, it was open to Mr Derjacques to make timely application for the procedure on *Faits et Articles* inasmuch as the defendant was a corporate body which needed advance notice to supply the answers in court, which answers would have been received, not under oath and by cross-examination of the company representative. It was also open to Mr Derjacques, on the day of hearing to call Mr Joe Madnack on account of his personal knowledge of the impugned transaction. But he did neither.

The purpose of his cross-examination should have been to secure a certain number of admissions following which he would have tried to show that the matter they were dealing with was either of a commercial transaction or rendered the existence of a contract likely or *"vraisemblable".* After this session of answers received in open court as part of the case, counsel for the respondent would have been able to re-examine the defendant on the answers he gave, if he felt any need for same.

After the re-examination, counsel for the plaintiff would have moved for a ruling so that he is allowed to adduce oral evidence on the basis that the answers showed that the transaction was of a commercial nature or that they rendered *vraisemblable* the existence of a contract. The Court would then have given a ruling one way or the other. If he were allowed, the case would have proceeded as any other civil case on the appreciation of evidence and witness depositions are received on oath or solemn affirmation. If he were not allowed, that would have been the end of the claim.

What we find, however, is that counsel for the appellant sought to adduce evidence by the normal procedure applicable to a civil case rather than the special procedure, even if he had been given the hint of its existence.

Without intending to be exhaustive, the profession may stand guided by the following decisions on the issues raised. In *Daniel Savy v Bella Rassool* (1981) SLR 201,the plaintiff transferred his right in a succession to the defendant reserving for himself usufruct of the property. The deed was set aside in appeal to the Court of Appeal. The plaintiff claimed that he had not received the purchase price. Objection was taken to any oral evidence being adduced. Thereafter, the defendant was called on his personal answers in terms of 161(1) and 163 of the Code of Civil Procedure (Cap 50) in which she referred to a document signed by her father relating to the receipt of the purchase price. In the light of this the plaintiff renewed his motion to adduce oral evidence *"outre et contre"* or contrary to what was stated in the document to the effect that no money has changed hands, the notary stating that he had only presumed that no money had been given.

The Court held that:

1. Oral evidence to prove receipt of purchase price was in the circumstances admissible.

2. Hearing to proceed to hear plaintiff on oral evidence and determine whether the plaintiff had proved the case against the defendant on the evidence adduced.

Oral evidence to prove non-receipt of the purchase price was, in the circumstances, admissible under article 1347 of the Civil Code.

In the case of *Barry Lee Cook and Anor v Philip Lefevre* (1982) SLR416,the Court held that the procedure for the admissibility oforal evidence is not applicable in the case of a contract where the issue is the determination of the intention of the parties in a contract.

In *Wilmot v WC French (Seychelles) Ltd*(1972) SLR 144, Sauzier J held, inter alia, that the deed of sale in the case was ambiguous and oral and extrinsic evidence was admissible because of such ambiguity, and also because no formal objection had been raised on behalf of the plaintiffs who had thus tacitly waived their right to object to the hearing of such evidence.

Ladouceur v Bibi (1975) SLR 279involved a case of interpretation of the true intention of the parties. Sir Georges Souyave CJ held that oral evidence was not admissible to decide the matter as there was an agreement on the correctness of the statement recorded and attested by the notary. The only question was the construction of the expressions used.

In the case of *Leong Keev Chinchen* (1978) SLR 55, Sauzier J held that albeit that a land surveyor cannot be said to be practicing a trade under the law so as to bring the case under commercial law, oral evidence was admissible so as to interpret the obscure and ambiguous clauses included in the agreement or to make certain the terms thereof which have been expressed in imprecise language.
In *Eric Bossy v Rodolfo Redaelli* (1982) SLR 438,the Court held that article 1341 would not apply in cases of commercial transactions. However, in this case the lease was for a civil transaction and had nothing to do with commercial matters either in terms of parties or the property involved. Hence it was held that article 109 of the Commercial Code did not apply as a derogation from article 1341 of the Civil Code.

Counsel for the respondent also referred to article 1771 of the Civil Code of Seychelles to argue that such a lease may only be proved by oral evidence provided that there is a "*commencement depreuve par écrit*"- that the party against whom proof of such an oral lease is alleged may be examined on his personal answers with a view to obtaining an *aveu*or admission of the existence of the lease or the commencement of the execution of a lease: see *Estralle v Michaud* (1962) SLR 316.Counsel, however, conceded that his reason for citing this article was not for its applicability to the present case but for the analogy with the procedure applicable.

So much for the law. As we remarked at the hearing, we were unable to reconcile a

few material facts in the case. The plaint speaks of a contract period starting on 1 December 2003 at a monthly rent of R14,000 and its termination after two years by letter dated 22 February 2005. But the evidence shows that major part of the works had been carried out in the year 2002. When and what was the actual representation allegedly made by the defendant's representative to the appellant is very much unclear.

The flaw, in our view, with respect to the case of the appellant, lies not in the judgment but in the procedure adopted and in the very evidence of the appellant. All the grounds raised above fail. The appeal is dismissed with costs.

Record: Court of Appeal (Civil No 40 of 2009)