

# IN THE SEYCHELLES COURT OF APPEAL

**[Coram:** S. Domah (J.A) , M. Twomey (J.A) , A.Fernando (J.A) ]

## **Civil Appeal SCA 22/2014 (Appeal from Supreme Court Decision CS 30/2012)**

---

Ixora Construction & Civil Engineering  
Ltd

Appellant

Versus

Gemina Sophola

Respondent

---

Heard: 14 December 2015

Counsel: Mr. Basil Hoareau for Appellant

Mr. Nichol Gabriel for Respondent

Delivered: 17 December 2015

### **JUDGMENT**

S. Domah (J.A)

**[1]** This is a civil appeal against the decision of the learned judge of the Supreme Court who in a dispute regarding the construction of a residence which the appellant had undertaken for the respondent found for the respondent against the appellant and awarded her damages in the sum of SR927,517.88 cents together with interest at the legal rate of 4% as from the date of the plaint, with costs. Aggrieved by the decision, the construction company has appealed.

**[2]** There are 8 grounds, which are as follows:

1. The Learned trial Judge erred in law and on the evidence in failing to rely on the admission of the Respondent during her testimony that the road and/or external wall were not part and parcel of the terms of the original contract.
2. The Learned trial Judge erred in law and on the evidence in failing to conclude that the evidence established that there was an agreement for extra work between the Appellant and the Respondent and consequently that the Appellant was entitled to the damages claimed in the counterclaim.
3. The Learned trial Judge erred in law and on the evidence in failing to hold that the Appellant legally suspended the work.
4. The Learned trial Judge erred on the evidence in relying on the testimony and report of Quantity Surveyor Nigel Roucou instead of relying on that of Quantity Surveyor Neil Mederick.
5. The Learned trial Judge erred in law and on the evidence in disregarding the evidence of the extra work, on the basis of Article 1341 of the Civil Code, in view that there was no objection on the part of the Respondent to the admissibility of such evidence.
6. The Learned trial Judge erred in law and on the evidence in holding that paragraph 3 of Article 1184 was applicable to the facts of the suit.
7. The Learned trial Judge erred in law and on the evidence in holding that the Respondent had treated the contract as having been discharged.
8. The Learned trial Judge erred in law and on the evidence in awarding moral damages to the Respondent for the loss of rental and moral damages and consequently awarded the damages on the wrong principle of law.

**[3]** The facts of the case are as follows. The respondent is an entrepreneur and she decided to start the business of running guest house from scratch. For its construction, she took a loan from the bank and contracted with the appellant, a construction company, run by Mr Simon Gill, for the construction of a building comprising four units of self-catering apartments at Sailfish Estate, Anse La Mouche, Mahe. The sum agreed upon was Rs1,691,221.88 cents and the completion date was twenty five weeks from the date of the agreement. The funds were to be disbursed periodically 25% upon signature, 20% upon

completion of the foundation works, 20% upon completion of the first floor concrete floorings, 20% upon completion of the first floor block up to lintel level, 10% upon completion of roofing and plastering and 5% for the finishing of the internal and exterior works. It was the case of the respondent at the court below that the appellant abandoned site after completing only 60% of the work on the ground that she was resisting payment for the additional work undertaken. Her explanation was that there was no additional work done. According to her, all works were included in the contract itself. Appellant was of the view that, with the oral agreement of the respondent, he had effected additional work such as the repositioning of the building on site, the relocation and extension of the road as well as the construction of a retaining wall. While he was insisting on updated payment before resumption of work, she was holding to the view that he had been overpaid.

#### GROUNDS 1, 2 AND 5

- [4] Grounds 1, 2 and 5 may be taken together. They deal with the same issue of the construction of the road and/or external wall, as to whether they could be said to be extra works which justified the counterclaim which was dismissed and whether the learned judge was justified in applying article 1341 to ignore the oral evidence on the matter. The appellant takes the view that there was an oral agreement for their construction. On the other hand, the respondent takes the view that there was no agreement other than that which was contained in the written document pertaining to the construction of the house. They both refer to the same part of the transcript in support of their respective contentions.
- [5] The learned judge who heard the plaintiff found the respondent a credible witness. We have to say that the transcript of proceedings barely bears this out on account of the contradictions, incoherence and exaggerations patent in her version. However, he did not rely only on the credibility of the witness to decide for the plaintiff. He also referred to the relevant part of the contract which specified that “the said concrete access road and the boundary wall were included in the list and scope of work in terms of clause 2(ii)

whereby the construction of the building included some external work and external work is defined as being “inclusive of concrete road access 25mtrs x 3 mts x 100mm and a boundary wall of 1.8 mtrs.”

- [6] We have examined the evidence. In our view, the learned judge was sadly confused on two aspects of the case. One, he had confused the construction of the boundary wall with that of the retaining wall. Two, the access road as per contract and the access road as constructed which had been moved and stretched to 30 metres from 25 metres. We would also add that he had paid scant regard to the evidence of witness Gill who had underlined the fact that this was not a case of just taking over the site and starting construction thereon as per plan. Before he could start at all, he saw a problem of topography. He discussed it with the respondent. The engineer had to be consulted following which the building had to be repositioned on the drawing. As a result, the excavation work increased with additional rock wedging and extra digging. The road which was as per contract of one length was moved and extended with a difference of 5 mtrs. The retaining wall had to be built to quieten an unneighbourly neighbour. Clearly, the learned judge failed to take those aspects of the evidence into account.
- [7] The other issue on which the learned judge slipped into error, lies in law. He applied article 1341 of the Civil Code to ignore completely the oral evidence which had been admitted without objection from the respondent. He could have used the article if an objection had been taken by the respondent against the admission. But the mere fact that no objection had been taken and he had allowed the evidence, his judgment should have been based integrally on the oral as well as the documentary evidence. There was admitted evidence on record to justify extra work as well as the basis for a counterclaim. The case of **Paul Michaud v Lucia Ciunfrini SCA 26 of 2005** is clear on this point. If a party does not object to oral evidence being adduced to prove a contract, that evidence is admissible and should be taken into account in the general appreciation of the case.
- [8] Grounds 1, 2 and 5 have merits. There was evidence of extra work which had been overlooked by the learned judge. As a result the counterclaim was wrongly dismissed on the ground that there was no “admissible evidence on record.”

### GROUND 3

- [9] Ground 3 relates to the question whether the appellant abandoned the site permanently or simply suspended the work to resume it at some later stage. It is the contention of the appellant that he did not do so but merely suspended it. On the other hand, the respondent takes the view that the contractor had abandoned the work which was in many ways defective for which she had to deploy extra resources to make good. On the point of whether there was a breach by the appellant, this is what the learned judge stated. The respondent “absolutely refused to perform the contract and complete the building alleging non-payment by the plaintiff.” He went further and stated that “while plaintiff was performing her part of the contractual obligation as to payment, the defendant stopped work and left site for no valid reason in the eye of the law.” He added at an earlier stage of his reasoning that the site had been abandoned without notification.
- [10] We have gone through the documentary as well as the oral evidence – which we have said was admitted by the learned judge without objection by the respondent and by that fact duly formed part of the evidence as per law. Had not the learned judge ruled out the oral agreement on the extra work involved in the repositioning of the building and the construction of the retaining wall, it is our view that his conclusion would have been different. It is logical to give credence to Mr Gill that the construction was stalled by the non-payment of instalment which had fallen due. There was no permanent abandonment of site but only suspension until the outstanding payment was effected. We have to note that businesses run neither as banks nor as charities. Payment schedules have to be respected. Non payment has ricochet effect on the payment obligations of businesses. In this case, there is evidence that while earlier payments had been done by the bank, the respondent was privy to the non payment of the current “*tranche*” had become due and remained unpaid.
- [11] With regard to the contract, those two facts alone – stopping of work in itself by the appellant and non payment of instalment due by the respondent - cannot be taken to be breaches by either party resulting in contract termination. For that to happen, there is a need for more unequivocal acts or omissions such as due and formal notification or

inaction after service of *mise en demeure*. In **Paul Chow v Josselin Bossy SCA 7 of 2005**, the Court of Appeal did stress the fact that law and fairness require that before bringing a claim for failure to perform the obligations of a contract, the alleged defaulter should be put on notice of the default and given a chance to fulfil his obligations. None of these defining steps had been taken by either party. In the absence of such a notification by the respondent to the appellant, the evidence is tenuous that the company illegally terminated the contract in the light of its position that payment of the last instalment had been stopped by the respondent.

#### GROUND 4

- [12] Ground 4 relates to the question as to which report is more reliable between that of Quantity Surveyor Nigel Roucou and Quantity Surveyor Neil Mederick for the purposes of determining the issues in this case which essentially had to do with evaluation of works carried out and works remaining. Appellant's QS, Neil Mederick, prepared a detailed report making an audit of the extra works and giving the figure of for the complete project at SR2,056,955.41. Respondent's QS, Nigel Roucou, worked from the contractual figure of SR1,691,221.88 stated in the written document and did not concern himself with extra works.
- [13] It is the contention of the appellant that the report of Neil Mederick is the better one for the details and the professionalism with which it has been made whereas the report of Nigel Roucou is less detailed, ignores the extra works done and quantifies the value of the work done at SRs1,180,500.00.
- [14] The learned judge relied on the report of Nigel Roucou. Obviously, since he had himself ruled out the oral evidence, he preferred Nigel Roucou's report to Neil Mederick's. These two reports differed in the following respects. Nigel Roucou assessed the work already done at 72% while Neil Mederick gave it at 78%. Obviously the cost of outstanding work as per Nigel Roucou was SRs 473,521.88 while the figure given by Neil Mederick was SRs439,787.51.

[15] Our conclusion on the two reports is that there is not much difference between the two. Nigel Roucou has made a clear statement in his report that his evaluation is based on “the agreed contract sum of SR1,691,221.00” whereby the total work carried out was in the region of SRs769,200.00. Under the heading Exclusions, he does state that, inter alia, the following are excluded from his report: “Works outside the scope of the contract and Variation works.”

[16] Thus, while one report excludes the extra works in its consideration, the other includes it. But barring that, both are by and large in agreement subject to permissible margins of variance. There is not much substance in Ground 4.

#### GROUND 6 AND 7

[17] Under Grounds 6 and 7, the common issue is whether the learned judge was correct in applying article 1184 alinéa 3 to the facts of this case. This alinéa states as follows:

*“If before the performance is due, a party to a contract by an act or omission absolutely refuses to perform such contract ..., the other party shall be entitled to treat the contract as discharged.”*

[18] We agree with the submission of the appellant that the facts of the case do not suggest an application of article 1184-3 which has to do with refusal before performance is due. We are dealing with a case where there was substantial performance. As per one QS, it is 72% and as per another it is 78%. To the respondent whose evidence is noted for exaggeration, it is 60%.

[19] The facts are consistent with the application of article 1184-1, the relevant section of which reads:

*“The party towards whom the undertaking is not fulfilled may elect either to demand execution of the contract, if that is possible, or to apply for rescission and damages. If the contract is partially performed, the Court may decide whether the contract shall be rescinded or whether it may be confirmed, subject to the payment of damages to the extent of the partial failure of performance.” (underlining ours)*

There is merit under Grounds 6 and 7.

[20] In the light of the above, the appeal is allowed partially and the judgment of the learned judge reversed insofar as it decides that the appellant had been in breach, for which reason also, his counterclaim was dismissed. The counter-claim has merits for the reasons given above.

[21] On the facts, the appellant insisted that he should be paid as per the agreement reached. On the other hand, the respondent refused to sign the papers for the payments from her loan to be made to the appellant on the ground the appellant had been overpaid. As a result, the goal post for completion of works kept moving from March 2011 to July 2011 and still further away. At no time did the respondent treat the contract as terminated but kept insisting on its completion which, in turn, was stalled by her non payment for work done. Both parties are entitled to their *quid pro quo*. However, on account of factors beyond their control which have paralysed the progress of the project, we have no choice in the circumstances but to rescind the contract, but with an order for the payment of damages to the extent of the respective failures of the parties in their claim and counter claim.

[22] We declare that the contract rescinded for the above reasons. We proceed to consider the quantum of damages under Ground 8.

#### GROUND 8

[23] Under Ground 8, the appellant questions the quantum of damages awarded by the learned judge. On this issue, we have to say that an appellate courts will not lightly interfere with the quantum of damages awarded by the trial court. It will intervene only for good and valid reasons such as error in estimate, wrong principle of law applied, excessively large or low or - we have to add - manifestly unjustified or unsupported by common sense: see **Seychelles Breweries Ltd v Bernard Sabadin SCA 21 of 2004**.

[24] The award of the learned judge is impugned on the ground that he should not have awarded moral damages in the absence of evidence on the matter. On this issue, we agree with the submission of the respondent that there was evidence of distress and anxiety on



the part of the respondent justifying an award of moral damages. She gave evidence of the extent of the hassle with her bank, her quest for peace and sleep for which reason she had to take pills. We shall not interfere with that. We would allow for SRs 100,000 for moral damages which we think fair and reasonable.

**[25]** On the other hand, we see that he awarded SRs473,521.88 for the completion of remaining incomplete works. That claim as well as that award flouts common sense. She had claimed in her plaint SRs679,600 from the builder to complete the remaining part of a project. If the builder has not been paid for the remaining part of the work, why should she claim from him to complete the work with his money? How this simple logic did not strike counsel and court below is beyond our imagination. This claim would have made sense if it was a turnkey project with full payment having been made. That item is simply discarded as inadmissible.

**[26]** Now as regards the loss of rental, evidence is tenuous. The respondent's assumption that she was going to start having such high returns for her investment in the rental business is unrealistic. We are prepared to allow a figure of SRs 50,000 for repeated false starts in her enterprise on account of delay. Businesses take time to establish themselves. We agree with the learned judge that the claim of SRs450,000 has been another figure plucked from midair on an item which has been in turn exaggerated. We would not allow that.

**[27]** We have found merit in the cross-action. Appellant has claimed SRs270,000 for the extra work. This should be allowed to him. He should also be entitled to receive the outstanding payment on the works already completed. With regard to the percentage of work done, Nigel Roucou is of the view that it is around 72% whereas Neil Mederick is of the view that it is 78%. A fair assessment would be in between the two figures of 75%.

**[28]** To calculate the damages to be paid to the appellant, we take into account the contract price of SRs2,056,955.41 which we think is justified on the evidence of extra works. Since we have assessed that 75% of the work has been performed, the money due to him

would be SRs 1,542,716.55 of which SRs1,434,733.20 has been paid, thus leaving a balance of SRs107,983.35.

**[29]** We allow the appeal and make the following orders:

In the claim of the respondent against the appellant, the appellant is to pay the sum of SRs150,000 to the respondent as per the calculation arrived at above.

In the counter-claim of the appellant against the respondent, the respondent to pay the sum of 107,983.55 which represents 75% of the work done minus the amount already paid to him.

New contract price with extra work	2,056,955.41
75% of the work completed	1,542,716.55
Payment already made	<u>1,434,733.20</u>
Payment due	<u>107,983.35</u>

**[30]** We accordingly order the Appellant to pay to the Respondent the sum of SRs150,000 and the Respondent to pay to the Appellant the sum of Rs107,983.35 cents.

Each party to bear half the costs of this appeal and the costs below.

S. Domah (J.A)

**I concur:.** .....

A.Fernando (J.A)

**I concur:.** .....

M. Twomey (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 17 December 2015