

IN THE SEYCHELLES COURT OF APPEAL

[Coram: A.Fernando (President) , M. Twomey (J.A), F. Robinson (J.A)]

Civil Appeal SCA 47/2017

(Appeal from Supreme Court Decision CS 111/2014)

Frank Panagary 1st Appellant

Winnie Panagary 2nd Appellant

Versus

Bertha (Proprietary) Ltd Respondent

Heard: 06 August 2020

Counsel: Ms. Lucie Pool for the Appellants

Mr. N. Gabriel for the Respondent

Delivered: 21 August 2020

JUDGMENT

F. Robinson (J.A)

1. This is an appeal against the judgment of a learned Judge of the Supreme Court, whereby she found that a lease agreement entered into by the appellants (the defendants) and the respondent (the plaintiff) on the 1 November 2013, should be terminated on the ground of breach of the lease, and ordered the appellants to pay the respondent the amount of (i) SCR 526,884.31 as damages as opposed to the amount of SCR 750,000 claimed jointly against them and (ii) SCR 75,000 as moral damages as opposed to the amount of SCR 150,000 claimed jointly against them.
2. There was no appeal lodged against the dismissal of the counterclaim by the learned Judge.
3. There are five grounds of appeal as follows —

"1. The Learned Judge failed to address her mind to the real issues in dispute between the parties which, principally was a breach of contract pleaded by both Parties.

2. In determining the outcome of the case, the Learned Judge was wrong to lay all emphasis on the Appellants not having obtained a certificate of occupancy from the Planning Authority and further she was equally wrong to hold that the Appellants concealed the absence of said occupancy certificate from the Respondent with the intention of deceiving him.

3. The Learned Judge ought not to have relied on extrinsic evidence which was immaterial and outside the terms and conditions of the contract.

4. The Learned Judge failed to comprehensively assess all the evidence placed before her and as a result due consideration was not given to the relevant factors.

5. The award of R 525,884.31/- is grossly exaggerated and excessive in all the circumstances of the case and further the Learned Judge should not have awarded moral damage in an action involving a commercial contract".

4. The record of proceedings revealed that, on the 24 June 2015, the respondent made an application to amend the plaint, which application was not granted by the learned Judge. The learned Judge stated in the ruling, with respect to the application to amend, that *"justice will be done to both parties if evidence is adduced in support of the original pleadings"*. Thus, the case at first instance proceeded on the basis of the plaint filed on the 3 November 2014. Mr Gabriel did not represent the respondent in the case at first instance.
5. We remark that the plaint filed on the 3 November 2014, was not a model of felicitous drafting.
6. The plaint appeared to aver a breach of contract as the cause of action of the respondent against the appellants. Surprisingly, only paragraph 7 of the plaint alluded to such a breach as follows: *"7. In breach of this agreement and inspite of repeated requests the Defendants have failed, refused or neglected to perform specifically so that the plaintiff can start operation."* Emphasis supplied. The plaint did not state what the breach of contract consisted of. Moreover, the respondent never applied for rescission of the lease agreement, it only applied for damages.

7. The plaint also appeared to raise the issue of fraud "*dol*" in terms of Article 1116 of the Civil Code of Seychelles. The averments with respect to fraud were that the appellants "9. [...] *throughout their agreements [...] have concealed from the plaintiff the fact that the defendants had not obtained the indispensable approval of the Planning Authority to operate the premises*". There was no prayer connected to the proposed issue of fraud.
8. The defence treated the respondent's plaint as one founded on a breach of contract. As you would have thought, faced with the respondent's pleadings, the defence categorically alleged that the appellants had not breached any contract. Moreover, the appellants' defence had subsumed the proposed issue of fraud in the proposed issue of breach of contract.
9. The learned Judge appeared to have wanted to do justice to both sides. In so doing, she appeared to have been carried away into a detailed consideration of the issue of fraud under Article 1116 of the Civil Code of Seychelles, which she had subsumed in the issue of breach of contract. She insistently made reference in her judgment *inter alia* to the fact that the appellants, at the time of execution of the lease agreement, was perfectly aware that they would not be able to obtain a certificate of occupancy for the premises and decidedly kept quiet about that fact. We mention in passing that culpable silence, which is referred to in the French Doctrine as *reticence*, may constitute fraud. Nevertheless, the learned Judge terminated or rescinded the lease agreement in the absence of any prayer for its termination.
10. We state that fraud as a cause of action under Article 1116 of the Civil Code of Seychelles does not fall within the realm of breach of contract. Fraud is a cause of nullity of the agreement under the said Article 1116.
11. At the appeal, Counsel for the appellants was adamant that the respondent's case was founded on a breach of contract. We observe that grounds 1, 2, 3 and 4 of the grounds of appeal challenged the findings of the learned trial Judge that the appellants were liable for breach of contract. Counsel for the respondent, who had based his whole submissions, in his heads of argument, on the issue of fraud, was during the course of the hearing of the

appeal, equally convinced that the plaint averred, as the cause of action of the respondent against the appellants, a breach of contract.

12. We are not going to let ourselves get carried away into a consideration of the grounds of appeal. On the state of the pleadings, the learned Judge was not entitled to come to the conclusion that the appellants were liable for breach of contract as the plaint did not disclose a cause of action against the appellants for breach of contract, in accordance with section 71 of the Seychelles Code of Civil Procedure, which reads —

"Particulars to be contained in plaint

71. *The plaint must contain the following particulars:*

(a) the name of the court in which the suit is brought;

(b) the name, description and place of residence of the plaintiff;

(c) the name, description and place of residence of the defendant, so far as they can be ascertained;

(d) a plain and concise statement of the circumstances constituting the cause of action and where and when it arose and of the material facts which are necessary to sustain the action;

(e) a demand of the relief which the plaintiff claims;" Emphasis supplied

13. For example, in *Gallante v Hoareau [1988] SLR 122*, the Supreme Court, presided by G.G.D. de Silva Ag. J, at p 123, at para (g), stated —

"[t]he function of pleadings is to give fair notice of the case which has to be met and to define the issues on which the Court will have to adjudicate in order to determine the matters in dispute between the parties. It is for this reason that section 71 of the Seychelles Code of Civil Procedure requires a plaint to contain a plain and concise statement of the circumstances constituting the cause of action and where and when it arose and of the material facts which are necessary to sustain the action".

14. Section 92 of the Seychelles Code of Civil Procedure provides —

"92 The court may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer ...". We order accordingly.

- 15.** For the reasons stated above, we allow the appeal of the appellants, but for the reason that the plaint discloses no reasonable cause of action against the appellants. In view of the facts and circumstances of this case, we order costs in favour of the respondent.

F. Robinson (J.A)

I concur:. A.Fernando (President)

I concur:. M. Twomey (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 21 August 2020