

IN THE COURT OF APPEAL OF SEYCHELLES

Reportable/ Not Reportable / Redact
[2020] SCCA 18 December 2020
SCA 34/2018
(Appeal from CC 26/2018)

DHEVATRA PROPERTIES Co. LTD
(rep. by Mr. Guy Ferley)

Appellant

and

ADAM UMARJI
(Self represented)

Respondent

Neutral Citation: *Dhevatar Properties Co. Ltd v Umarji* (SCA 34/2018) [2020] SCCA - (18 December 2020).

Before: Twomey, Tibatemwa-Ekirikubinza JA, Dingake JA

Summary: Breach of oral lease agreement – proof of consequential damages and period when interest arising from breach of contract starts to run.

Heard: 3 December 2020

Delivered: 18 December 2020

ORDER

The appeal fails. Consequently this Court upheld the Judgment and orders of the trial Judge.

JUDGMENT

TIBATEMWA-EKIRIKUBINZA JA

Facts

[1] This appeal concerns a dispute arising from breach of an oral lease agreement. The facts accepted by the trial Judge are that Umarji (the respondent) is the landlord and property owner of premises located at Praslin comprised in title number PR1981.

- [2] On 10th November 2009, Dhevatarara (the appellant company) took possession of the premises for a term of 12 months at a monthly rent of USD 3100. Dhevatarara paid 3 months deposit at the beginning of the lease period. The agreement required Dhevatarara to use the demised premises for the dwelling of about eight or nine of its employees. In mid-2010, via email, the respondent-Umarji communicated to Dhevatarara's representative over the condition and overcrowding of the premises.
- [3] After expiration of the initial term of the lease in 2010, the lease was renewed for different periods of time until about May 2012 when the respondent by email notified Dhevatarara of the rental increase to USD4000 if it did not communicate a date when it would vacate the premises. Dhevatarara did not serve a notice of termination but communicated via email that it would vacate the premises by 14th August 2012 and will restore the demised premises to its original condition after the termination of the lease.
- [4] After Dhevatarara vacated the premises, the appellant sent a quantity surveyor- Mr. Roucou to inspect the state of his premises. Photographs depicting the state of the premises were taken and compared with photographs before Dhevatarara had taken over the premises. It was alleged that Dhevatarara's employees had left the premises in a dilapidated state and that some of the furniture went missing during their stay. Umarji therefore sued Dhevatarara claiming USD 48,000 for one year loss of rental income given the difficulty of restoring the premises to its original condition. He also claimed for rent arrears in the sum of USD 4,000 for the period of 15th July 2012 to August 2012 as well as arrears of rent shortfall of USD 1800 for the period of 15th May 2012 to 14th July 2012. At the hearing in the trial Court, Umarji stated that he was no longer seeking to recover the short fall in rent arrears and was only claiming damages in the sum of USD 3,100 for unpaid rent.
- [5] On the other hand, Dhevatarara through its representative-Mr. Westlake denied Umarji's allegations and claims. Mr. Westlake testified that there were only nine members of staff staying on the premises and was not aware of the dilapidated condition of the premises. He however complained that there were issues with the overflowing septic tank, cleanliness of the premises as well as the air conditioning units. Mr. Westlake further testified that he gave notice of termination of the lease on 27th May 2012 when Mr. Umarji wanted to increase the rent from USD 3,100 to USD 4,000. Regarding the rent

shortfall of USD 1,800 for the period covering 14th June-14th July 2012, Mr. Westlake testified that it was never agreed that they should pay USD 4,000. He stated that three months' notice was an unacceptable period for the release of the demised premises.

[6] The trial Judge held that Umarji had, on a balance of probabilities, proved his claim for unpaid rent covering the period of 15th July 2012-14th August 2012 in the sum of USD3,100. The Judge therefore granted the claim.

[7] In regard to the sum of SR 101,030.00/= for works to re-instate the demised premises to its original condition, the trial Judge held that there being no documentary evidence of an inventory being carried out prior to Dhevatarata taking occupancy of the premises, Article1731 of the Civil Code of Seychelles Act applied. The Article is to the effect that if no inventory to the condition of the premises has been made, the tenant is presumed to have received the premises in good repair suitable for the tenancy and shall return them in the same condition unless there is evidence to the contrary. On the premise of Article 1731, the trial Judge awarded Umarji 95% of the sum claimed (SR 97,530.00/=) for works required to re-instate the demised premises.

[8] The trial Judge also awarded Umarji the sum of SR 136,849.50/= for missing furniture and equipment as well as USD48000 for loss of rental income for the period it would take him to restore the premises. The Judge also ordered Dhevatarata to pay costs and interest at the legal rate payable from 29th August 2013.

[9] Being dissatisfied with the trial Judge's decision, Dhevatarata appealed to this Court on the following grounds:

- 1. The learned Judge erred in law in relying on the evidence of Nigel Roucou, the Quantity Surveyor, to award SR 136,849.50 being 95% of the sum claimed, to the respondent for missing/ damaged furniture, fittings and equipment, whilst accepting that "there is no evidence be it documentary or otherwise to support Mr. Umarji's contention that an inventory of the demised premises between Mr. Umarji and Dhevatarata was conducted before Dhevatarata took possession of the demised premises."**

2. **The learned Judge erred in law in awarding the respondent USD 9300 for consequential loss of rent. This award has no basis in law and was not proven by evidence.**

3. **The learned Judge was wrong to award interest at the legal rate payable as from 29th August 2013, the date of filing the plaint as the inordinate delay from filing of the plaint to the delivery of the judgment was in no way attributed to any fault on the part of the appellant.**

Prayers

[10] The appellant prayed that this Court allows the appeal and sets aside the awards made by the trial Court.

Ground 1

Appellant's submissions

[11] The appellant's counsel submitted that it is trite law that any finding of facts must be underpinned by supporting evidence. That the learned trial Judge erred in awarding Umarji SR 136,849.50/= for the missing items yet he had accepted that there was no evidence be it documentary or otherwise to support Umarji's contention that an inventory of the premises was conducted before Dhevatarra occupied the premises. Counsel further submitted that court relied on the evidence of Mr. Nigel Roucou-the Quantity Surveyor to award the said sum. That Mr. Nigel testified that he had based his report on an inventory provided to him by the respondent which he compared with his observation on site. Counsel argued that the said inventory was not signed by the appellant which made the document questionable. Counsel argued that the Judge should have disregarded the document and should not have attached weight to it.

[12] Furthermore, it was submitted that the respondent himself did not produce any supporting evidence as to the prices of the alleged missing and damaged items.

Respondent's reply

- [13] The respondent submitted that the appellant company misunderstood the learned Judge's findings. The learned judge considered the evidence from Mr. Roucou and Umarji which was to the effect that an inventory was carried out between the representatives of Umarji and Dhevatarara at the onset of the lease albeit it not being signed. That after evaluating the evidence, the learned Judge came to the conclusion that there was no evidence that an inventory had been conducted between Umarji and Dhevatarara. That the foregoing conclusion was made only in the context that the inventory was not signed but the actual carrying out of the inventory was conducted.
- [14] Furthermore, the respondent submitted that the learned Judge's findings were informed by the expert evidence of Mr. Roucou-the quantity surveyor. That having regard to the inventory list provided by Umarji, Mr. Roucou came to an assessment of the cost of replacement for the damaged as well as missing items; and the said assessment was not rebutted by any evidence from the appellant.
- [15] Notwithstanding the foregoing arguments, the respondent in his oral submissions argued that the appellant's contentions regarding Mr. Roucou's report was a new matter which was not raised in the lower court. It was therefore not permissible for the appellant to seek to challenge Mr. Roucou's evidence and undermine his credibility. That in fact, the learned Judge came to the conclusion that Mr. Roucou's report was demonstrably valid, reliable and borne out of an objective evaluation and assessment.
- [16] In the written submissions, the respondent also referred to the finding by the learned Judge that the appellant company neither adduced a counter report nor did it object to the testimony of Mr. Roucou.
- [17] The respondent therefore submitted that for the above reasons, this Court should dismiss ground 1 of the appeal on the premise that it was misconceived and disclosed no arguable error of law.

Court's consideration

[18] This ground of appeal is based on factual findings. The trial Judge made a finding that no evidence of an inventory list was adduced prior to Dhevatara Co. Ltd taking occupancy of the premises. The trial Judge however considered the report produced by Mr. Roucou marked as exhibit P2A and P2B in which an amount of SR 152,055/= was tagged as the replacement cost for the missing/damaged items. The trial court stated that, on a balance of probabilities, the expert report was credible evidence on which it can safely act. Furthermore, that the conclusion made in the report was demonstrably valid, reliable and borne out by an objective evaluation and assessment.

[19] I note that the trial Court in considering the report did not merely award the sums claimed. The court considered each of the items categorized as missing/ damaged. Through a diagnosis of each item which was alleged as missing/damaged, the court did not award the following items valued in the sum of SR 3,500/=: attentive works at electrical/TV incoming mains- SR 2,000 and attentive works to roof above apartment 3- SR 1,500.

[20] On the premise of the above, it cannot be said that the trial Court premised its award of SR 136,849.50/= for missing/damaged furniture and fittings without evidence. Hence, the appellant's argument is not sustainable.

[21] I therefore find that ground 1 of the appeal fails.

Ground 2

Appellant's submissions

[22] Under this ground, the appellant company faulted the trial Judge for awarding Umarji the sum of USD 9,300 for consequential loss of rent. In its view, the award was not supported by evidence. That the respondent produced no evidence to show as to what amount of time it will take or was taken to remedy the alleged damages. In any event, the damages were cosmetic as confirmed by Mr. Roucou's (quantity surveyor) report.

[23] Counsel submitted that in order to establish an entitlement to substantial damages for breach of contract, the injured party must establish that:

- (a) a loss has been caused by the breach
- (b) the type of loss is recognized as giving an entitlement to compensation;
- (c) the loss is not too remote;
- (d) the quantification of damages to the required level of proof.

[24] Counsel argued that the staff of the appellant company vacated the premises on 14th August 2012. The respondent filed the plaint on 29th August 2013. There was no evidence adduced by the respondent as to the repair program or when the repairs took place.

[25] Furthermore, counsel argued that there was no written rental agreement *per se* between the parties. That the rental agreement referred to in the proceedings was never signed by the parties therefore there was no agreement with respect to damages as a result of breach as averred in the particulars of the plaint. What existed between the parties was a statutory tenancy in terms of the Control of Rent and Tenancy Agreement Act. Such a tenancy is a month to month tenancy. Thus, Articles 1142, 1146 and 1150 of the civil code are applicable.

Respondent's reply

[26] In reply, the respondent submitted that the learned trial Judge observed that the evidence before her in relation to loss was scant and brief and that the respondent did not file any expert evidence in relation to this issue. That having considered the claim fully, the learned Judge went on to conclude that on the balance of probabilities an order awarding three (3) months' loss of rental income was reasonable in all the circumstances.

[27] The respondent considers that this finding was plainly open to the learned Judge having particular regard to the findings the learned Judge had made elsewhere in the judgment relating to the lack of upkeep of the demised premises. The learned Judge came to a view - in the light of the photographic and expert evidence before her that remedial works were necessary and during such time that those works were being carried out, the appellant would be unable to obtain any rental income from the premises. In the respondent's view, the learned Judge was right to award consequential damages in those

circumstances and the appellant has demonstrated no error of law to suggest that this finding should be set aside. He therefore prayed that this ground too should be dismissed.

Court's Consideration

[28] The arguments raised by both counsel rotate around the consequential loss doctrine. Furthermore, the arguments also rotate around the failure by the appellant to prove the claim for consequential loss of rental income.

[29] Consequential loss according to **Black's Law Dictionary (10th edition, 2014)** is defined as losses that do not flow directly and immediately from an injurious act but that result indirectly from the act.

[30] It is trite that according to **Articles 1142, 1146 and 1150** of the **Civil Code** which were cited by the appellant's counsel, if a debtor fails to perform an obligation under a contract, it gives rise to damages.

[31] **Article 1149** of the **Civil Code** goes ahead to give the categories of damages recoverable arising from breach of Contract as follows:

1. The damages which are due to the creditor cover in general the loss that he has sustained and the profit of which he has been deprived, except as provided hereafter.

2. Damages shall also be recoverable for any injury to or loss of rights of personality. These include rights which cannot be measured in money such as pain and suffering, and aesthetic loss and the loss of any of the amenities of life.

3. The damages payable under paragraphs 1 and 2 of this article, and as provided in the following articles, shall apply as appropriate to the breach of contract and the activity of the victim. (Emphasis of Court)

[32] Following the above provision of law, the appellant's argument that Umarji was solely entitled to damages resulting from the breach and nothing more cannot be sustained. As correctly found by the trial Judge, Umarji was entitled to the award of consequential damages even if they were not a direct result of breach of the lease agreement.

[33] I now turn to the issue of failure to prove the claim for consequential damages. The evidence considered by the trial Court in this regard was as follows:

“Mr. Umarji in his plaint averred that he has suffered loss and damages as a result of breach of lease by Dhevatarra as follows: Consequential loss of rent as a result of the breach by Dhevatarra and the time it will take to reinstate the demised premises to its original condition SR 638,400.”

[34] Having evaluated the evidence the trial Court held that:

*“The evidence under this head is scant and brief. Mr. Umarji did not provide this court with any expert evidence in relation to the issue in question. He only stated that it would be difficult to restore the demised premises to its original condition within a specified period of time and therefore he was claiming one year “loss of rent” in the sum of USD 48,000. Having considered the claim of Mr. Umarji, on a balance of probabilities, this court makes an order awarding him USD 9,300 under this head, which it considers to be reasonable in all the circumstances of the case. [USD 3,100*3 months’ rent].”*

[35] I find no fault with the award made by the trial Court. It is clear that the court did not award Umarji the sum of USD 48,000 he claimed in the plaint due to scanty expert evidence on how long it would take to carry out the repairs and thereby halting the leasing of the premises for habitation. I hold that the trial court correctly exercised its discretion to grant a reasonable sum. Furthermore, the court did not zero down on an arbitrary sum but provided a formula by which it arrived at the sum. i.e [USD 3,100 (which was the agreed rent) * 3 months]. The sum of USD 9,300 is therefore upheld.

[36] Thus, Ground 2 of the appeal fails.

Ground 3

Appellant’s submissions

[37] The appellant faulted the learned Judge for awarding interest from the date of filing the plaint. That the learned Judge should have taken cognizance that parties completed their

respective cases and judgment was reserved for 13th March 2015 but was delivered on 30th May 2018. Justice would be better served if the interest run from the date of judgment.

Respondent's reply

[38] The respondent conceded to this ground of appeal and submitted that the correct date from which interest should run was the date of judgment rather than the date the plaint was filed.

Court's consideration

[39] The appellant company claimed that the interest which was awarded by the trial court should run from the date of judgment as opposed to when the claim was filed.

Section 3 of the Interest Act provides that:

Whenever the rate of interest shall not be fixed by contract, the legal rate of interest shall be four per centum per annum in civil or commercial matter.

[40] The above provision of law applies to the instant case since the contract did not establish the rate of interest in case of breach. Indeed, the Supreme Court Judge ordered that the interest payable is at the legal rate.

[41] Furthermore, the Judge ordered that the interest was to start running from 29th August 2013. It is this part of the order that the appellant company is challenging before this Court.

[42] Whereas the respondent conceded to the appellant's arguments raised on this point, this Court ought to determine the underlying legal question:-

Whether the interest awarded in this case should have accrued from 29th August 2013- the date when the claim was lodged or the date of judgment?

[43] I am alive that this appeal stems from an action for breach of an oral lease agreement and that the respondent was demanding rent arrears. It follows therefore, that the rental arrears bore interest from the date of the breach as opposed to when judgment was given. I

accordingly find no fault in the order given by the trial Judge that the interest payable runs from the date of the claim which is 29th August 2013.

Therefore, ground 3 of the appeal fails.

[44] Having found that all the grounds of appeal fail, I hereby dismiss the appeal and uphold the judgment as well as the orders of the Supreme Court.

Signed, dated and delivered at Palais de Justice, Ile du Port on 18 December 2020



Tibatemwa-Ekirikibinza JA

I concur

Twomey JA

I concur

Dingake JA