

IN THE COURT OF APPEAL OF SEYCHELLES

Reportable

[2021] SCCA 38 13 August 2021
SCA 67/2018
(Appeal from CC 25/2015)

Brian Quilindo as EMS Building

Appellant

(rep. by Ms. Tamara Christen)

and

Frida Jupiter

Respondent

(rep. by Mr. Basil Hoareau)

Neutral Citation: *Brian Quilindo as EMS Building v Jupiter* (SCA 67/2018) [2021] SCCA 38
(Arising in CC 25/2015)
13 August 2021

Before: Fernando, President, Tibatemwa-Ekirikubinza JA, Dingake JA

Summary: Appellant alleged he entered into an agreement with the Respondent to renovate and extend her house - whether court below erred in law and on the facts when ruling that the documents disclosed by the Plaintiff (Appellant) could not be relied on having been disclosed too near to the hearing date – held documents should have been admitted as there was nothing to show that the Respondent would suffer any prejudice.

Heard: 5 August 2021

Delivered: 13 August 2021

ORDER

The Appeal succeeds. We order that this matter should be remitted back to the Supreme Court for a fresh hearing. We make no order as to costs.

JUDGMENT

DR. O. DINGAKE, JA

INTRODUCTION

1. This is an appeal against the decision of Supreme Court judgment in which it dismissed the Appellant's claim brought against the Respondent for breach of a building contract.
2. The matter was brought before the Supreme Court by way of a plaint on 20 May 2015, the Plaintiff (Appellant in this case) then was cited as EMS Building Contractors (represented by Mr. Brian Quilindo, of North East Point, Mahè), as the owner of a Company engaged in the business of building construction and renovation in Seychelles. The Defendant (now Respondent) was cited as a sole trader in the Plaint, but it later transpired that she was not a trader.
3. The Appellant alleges that he had entered into an agreement in April 2013 with the Respondent for the renovation and extension of the Respondent's residential home in Turtle Bay. This entailed demolishing existing building works carried out by a third party, and then renovating certain parts of the house and adding an extension to the said house.
4. The Appellant being dissatisfied with the decision of the Supreme Court, which found in favour of the Respondent by virtue of there being no written evidence, now appeals to this Court against the whole decision.

BACKGROUND

5. The parties entered into an oral agreement. According to the Appellant, the arrangement was that the Respondent would make payment in regular instalments while the Appellant carried out the work. The Appellant alleges that in early 2014 the Respondent stopped paying her instalments and as a result of the non-payment the Appellant (Plaintiff) was forced to cease work.
6. The Appellant alleges that after an evaluation of the work was carried out, it was found to amount to SR 908,337.10 and the Respondent had only paid SR 475 000 and there is therefore an outstanding balance of SR 433,337.10 which the Appellant is claiming.
7. The Appellant placed the Respondent on notice by registered letter on 5 September 2014 for the outstanding amount of SR 433,337.10. This letter and a quantity surveyors report were listed in the Plaint as documents that would be relied on by the Appellant and were available for viewing at the Appellant's Counsel's office.

8. In her defence the Respondent claimed that she legally suspended payment due to plaintiff failing to carry out the work diligently/ and or in a workmanlike manner, in breach of contract.
9. The parties did not make any written submissions, but their counsel made oral submissions in Court on the day of the hearing on 13 July 2017. Appellant's Counsel called Mr. Ziggy Adam, a legal officer from the Fair Trading Commission and a quantity surveyor who had valued the property to give evidence, but their testimony was not allowed.

GROUND OF APPEAL

10. The Appellant appeals the decision by the Supreme Court, per Robinson J, on the following grounds:
 - 10.1 the judge erred in law and on the facts when ruling that the documents disclosed by the plaintiff could not be relied on having been disclosed too near to the hearing date;
 - 10.2 the judge erred in law and on the facts when ruling that oral evidence could not be led by the plaintiff;
 - 10.3 the Appellant seeks that the orders of the judge be overturned; and
 - 10.4 that this Court remit the matter to the Supreme Court for a fresh hearing.

LEGAL QUESTIONS

- 11 The legal questions are therefore whether:
 - 11.1 the judge was justified in ruling that the documents disclosed by the plaintiff could not be relied on since they were disclosed too near to the hearing date; and
 - 11.2 the judge erred in law and on the facts in ruling that the plaintiff could not lead oral evidence

APPLICATION OF THE LAW TO THE FACTS

- 12 On the first ground of appeal and whether the judge was justified in ruling that the documents disclosed by the plaintiff could not be relied on since they were disclosed too near to the hearing date. We propose to look at the law relating to evidence and the disclosure of documents in

accordance with the Seychelles Code of Civil Procedure, the Civil Code of Seychelles Act and the Commercial Code;

- 13 The Seychelles Code of Civil procedure in sections 74 and 77 requires that copies and lists of documents in support of a claim are annexed to a plaint, and where these are not available these should at least be listed in the plaint and a reasonable time within which to view these before the hearing is provided.

Copies and lists of documents

74. *If the plaintiff sues upon a document other than a document transcribed in the Mortgage Office of Seychelles, he shall annex a copy thereof to his plaint. If he relies on any other documents (whether in his possession or power or not) as evidence in support of his claim, he shall annex a list thereof to his plaint and shall state where the same may be seen a reasonable time before the hearing. (emphasis added)*

List of defendant's documents

77. *If the defendant intends to produce any documentary evidence, he shall annex a list thereof to his statement of defence and shall state where the same may be seen a reasonable time before the hearing.*

Failure to supply lists of documents

81. *If either the plaintiff or the defendant omits to comply with sections 74 and 77 he shall not be allowed to produce in evidence on his behalf at the hearing any document in respect of which such omission has been made without the leave of the court and subject to such terms as the court may direct. (emphasis added)*

Exception to section 81

82. *Nothing in sections 74 and 77 applies to documents produced for cross examination of the witness of the other party, or in answer to any case set up by the defendant or handed to a witness merely to refresh his memory. (emphasis added)*

- 14 In accordance with section 81, failure to provide the list of documents to be relied on will mean that the Plaintiff will not be allowed to produce these documents in evidence without the leave of the court.
- 15 Section 82 provides exceptions to section 74 and documents produced for cross examination of a witness of the other party, or in answer to any case set up by defendant can be relied on.
- 16 In all the circumstances of this case it seems to us that the documents produced by the Appellant could have been relied on since they are in answer to a case set up by the defendant at the FTC.
- 17 Further, after evaluating the Commercial List Rules below, and the disclosure documents it can be concluded that the Court could have allowed the Appellant to rely on the documents in accordance with rule 5 (3) (a), because contrary to the Courts view, a significant part of the documents disclosed were all documents that the Respondent would have been aware of, i.e.: the quantity surveyor report; letter to respondent from FTC; house plans; an FTC internal closure memo with a summary of their findings on investigation which had been included in the letter sent by the FTC; the FTC complaint form completed by Respondent; site visit report; and the FTC report of meeting with both Appellant and Defendant. The other documents are receipts of confirmation of letters sent, pictures of renovation work done at the premises and the Appellants certificate of registration.

Supreme Court (Commercial List) Rules 2012

“5. (1) The court shall hold a preliminary hearing to determine the issues between the parties and ascertain whether the matter may be submitted to mediation after all pleadings have been closed;

(2) The parties shall attend the preliminary hearings in person or with their counsel if they have instructed them in the matter.

(3) (a) At least forty-eight hours ,prior to the date fixed for the preliminary hearing, a party shall file, in the registry of the Supreme Court and serve on other party all documents to be relied on at the hearing of the matter;

(b) Subject to paragraph ,(c) a party shall not be allowed to rely on any documents not disclosed in accordance with paragraph (a);

(c) The court may allow, a party to rely on documents not otherwise disclosed in accordance with paragraph (a) if such disclosure will not prejudice the other party;

(5) The parties shall abide by the time limits set by the Court, failing which the Court may —

(a) refuse adjournments;

(b) dismiss the action or enter judgement;

(c) award costs

18 Article 1341 provides that:

Any matter the value of which exceeds 5000 Rupees shall require a document drawn up by a notary or under 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 at or since the time when such document was drawn up, even if the matter relates to a sum of less than 5000 Rupees. (emphasis added)

19 Article 1347 provides that:

“The aforementioned 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.” (emphasis added)

20 Article 1348 provides that:

They shall also be inapplicable whenever it is not possible for the creditor to obtain written proof of an obligation undertaken towards him.

This second exception shall apply:

1st To the obligations that arise from quasi-contracts and delicts or quasi-delicts.

2nd To necessary deposits made in case of fire, ruin, riot, or wreck and to those made by travellers staying at an hotel or guest house, and all this in accordance with the standing of the persons and the circumstances of fact.

3rd To the obligation undertaken during unforeseen accidents when the persons were unable to enter into written transactions;

4th To the case in which a creditor has lost the document which served as written proof as a result of an accident which was inevitable and unforeseen and which was the consequence of an act of God.

- 21 The above provisions are without prejudice to the rules prescribed in the law relating to commerce in Seychelles and although Article 1341 requires a written agreement, this is seen as more of an evidentiary requirement than a formal requirement as stated in the Court of Appeal case of *Nathalie Weller v Sarah Walsh* (Civil Appeal SCA03/2015) [2017] SCCA 47 (07 December 2017).
- 22 In *Dogley v Renoud* (1982) SLR 187 the Court held that oral evidence relating to the transaction was admissible under Article 1347 of the Civil Code as the plan for a plot was a writing providing initial proof and it emanated from the defendant when she accepted it and took it to the notary.
- 23 In *Seychelles Construction v Braun* SCA 9/2004, LC 264 also provided that documentary evidence may be admissible where:
 - “(a) the document forms part of a record compiled by a person acting under a duty, who has personal knowledge of the matters contained in the document; and
 - (b) the person who supplied the information is dead or by reason of his bodily or mental condition unfit to attend as witness.”
- 24 André Sauzier has written extensively on the Law of Evidence in Seychelles and in his book, *“Introduction to the Law of Evidence in Seychelles” (Second Edition) 2011*, states that:

“Article 1347 provides that the rules (both rules) in Art 1341 do not apply if there is a writing providing initial proof. A writing providing initial proof is writing —

(a) Which emanates from the person against whom the claim is made or from a person whom he represents and

(b) Which renders the facts alleged likely.

- 25 Appellant’s Counsel raised the exception in Article 1347 during Mr. Adams’ (from the FTC) testimony when she attempted to examine him on a letter dated 20 August 2014 prepared by Naomi Lewis, a compliance Officer with the FTC, but this was objected to by the Respondent’s Counsel on the basis that Mr. Adams was testifying on a document that he did not prepare. The Court ruled that the writing must be one which emanates from a person against whom the claim is made or a person whom he represents, and that the plaintiff had not provided the Court with any evidence about the representation of FTC in relation to the defendant.
- 26 The FTC investigated the complaint lodged by Respondent and it was specifically investigated by Naomi Lewis, the compliance officer at the FTC.
- 27 There were several other documents that would have been interrogated, but these were not admissible and the Court declined to hear any evidence on them. The Appellant and other witness were also interrupted in their testimony by the Respondent’s objections and so their testimonies were not completed.
- 28 It is our view that the exception in 1347 would apply in this case. The Respondent lodged a complaint against the Appellant with the FTC on 24 April 2014, this consumer complaint form contains information that would provide initial proof of an agreement between her and the Appellant that renders the facts alleged likely. In the complaint form the Respondent confirms that she acquired the services of the Appellant to finish work on her house located at Turtle Bay. She confirms that there was no written agreement or a quotation. An amount of SR 575 000 was agreed upon to complete the project and she paid SR 475 000. The Respondent even states that she would pay the outstanding amount if this can be justified.

- 29 This document is contained in annexure G11 of the bundle of documents in the record, and should have been interrogated, particularly because it is written, signed and dated by the Respondent in her handwriting.
- 30 In *Coopoosamy v Duboil* (SCA 1 of 2011) [2012] SCCA 15 (31 August 2012) a judgment was delivered by this court in which the Appellant was claiming \$20 000 that had been loaned to the Defendant and there was no written agreement. The Defendant raised the objection under article 1341 of the Civil Code, to which the Court held that:

“...There are however several exceptions to this general rule, some are provided by the Code itself and some by jurisprudence. An objection under article 1341 of the Civil Code of Seychelles stems for the fact that French law from which we have inherited the Code insists on contracts being proven in writing unless of course the significance of the matter at issue is small, hence the stipulated value of R5000 in our Code. The purpose of article 1341 however, is not to restrict oral evidence in a contract but rather to restrict evidence that a written document, if it exists does not faithfully reproduce all that has been agreed by the parties and to exclude what is known in the common law of contract as parole evidence...”

There are however two rules contained in article 1341: the first relates to an objection relating to the juridical act itself - in this case the loan and repayment of the money i.e. an oral agreement not evidenced in writing; the second relates to the circumstances where a document is available and produced and a party tries to bring evidence “against and beyond” the terms of the agreement itself. The present case only concerns the first rule as there is no document produced relating to the agreement.

*It is this distinction between the two rules that caused the confusion in this present case. In the case of *Michaud v Cuinfrini* SCA 26/2005, 24 August 2007; LC 302 it was the second rule that was involved as there was a document produced. In such cases oral evidence may be heard but if an objection is made at any time during the trial relating to the agreement produced, the trial judge hears all the evidence and at the end of the case decides whether the oral evidence is “against and beyond” the agreement.” (emphasis added)*

- 31 In *Michaud v Cuinfrini* (Supra) the plaintiff alleged that that the defendant breached a loan agreement and therefore owed a sum of money plus interest. The Supreme Court decided in favour of the plaintiff on the basis of oral evidence and the defendant appealed.
- 32 On appeal the Court noted that the defendant had not raised the issues of moral impossibility and/or writing providing initial proof and nor was she called upon to adduce evidence in support of either. The Court held that:

“that the rule and exceptions cannot be invoked by the trial judge proprio motu

“...the correct procedure is that whenever, in the course of the proceedings, a party objects to oral evidence on the ground of non-compliance with art 1341, the other party intimates that he/she relied on an exception to the rule, the presiding judge must proceed to hear evidence, as required, and arguments to determine whether an exception under act 1347or 1348 does exist. He must give his ruling on the admissibility or otherwise of oral evidence before proceedings are resumed...”(emphasis added)

- 33 The Court in *Coopoosamy* held that:

“Four instances of where this exception applies are then given in the Code. To further temper the strict applicability of article 1341 and its unjust consequences to certain parties in some circumstances, jurisprudence has provided further exceptions. Further, the Court of Cassation of France has stated that the exceptions provided in article 1348 of the Code are not exhaustive and that where it is impossible to secure written proof it is certainly possible to bring proof of an obligation either by oral evidence or by presumptions. (Cass 17 déc 1982, Pas 1983 I P 478; R W 1982 -1983 col 2451; Cass 6 déc 1988. See also De Page t III 3e ed no 904).”

“One of these exceptions has been the moral impossibility to provide such proof arising from the relationship between the parties. Not all relationships even between close family members give rise to his exception. There must also exist a close ties as a result of the family relationship (lien de famille), friendship or trust. In this respect the Court is vested with immense power and discretion to appreciate each case on its own facts to determine whether there is such a moral impossibility in any particular relationship to bring written proof...”

CONCLUSION

- 34 In light of the above discussion, the view we take is that the Appellant has a case and the *court a quo* should have allowed oral evidence in compliance with the correct procedure to interrogate objections to Article 1341 as confirmed in *Michaud v Cuinfrini* (Supra). Accordingly, where a party objects to oral evidence on the ground of non-compliance with art 1341, and the other party intimates that he/she relied on an exception to the rule, the presiding judge must proceed to hear evidence, as required, and arguments to determine whether an exception under act 1347 or 1348 does exist. In this case the testimonies were often interrupted and since all the evidence was not heard, the rulings on the objections were made prematurely.
- 35 On whether the late disclosure documents should not have been a reason to prohibit the oral evidence by the witnesses, the Court had a discretion to allow the late discovery, and it should have been taken into account that significant part of the disclosed documents were documents that the Respondent was already aware of.
- 36 Furthermore, in all the circumstances of this case, we fail to appreciate in what way the Respondent would have been prejudiced by the documents sought to be disclosed given that although admittedly not all those documents were already in the possession of the Respondent, a significant portion of those documents were.
- 37 Moreover, even if the documents were not allowed, the Court is obliged to hear oral evidence in order to make a ruling, and their late disclosure should not have prevented oral testimony by the witnesses.
- 38 On that basis, we agree with the Appellant that the Judge erred in not allowing oral evidence.
- 39 In the premises the appeal succeeds.
- 40 We order that the matter should be remitted back to the Supreme Court for a fresh hearing. We make no order as to costs.

Dr. O. Dingake , JA

FERNANDO, PRESIDENT

The Court had a discretion to allow the late disclosure of documents since a significant part of the disclosed documents were documents that the Respondent was already aware of and thus no prejudice would have been caused to the Respondent. I therefore agree that the appeal be allowed

and the case remitted back to the Supreme Court for a fresh hearing. I agree that there should not be any order as to costs.

Fernando, President

I concur

Dr. L. Tibatemwa-Ekirikubinza, JA

Signed, dated and delivered at Ile du Port on 13 August 2021