

IN THE COURT OF APPEAL OF SEYCHELLES

Reportable

[2021] SCCA 53 (7 September 2021)
SCA 16/2019
(Appeal from CS 27/2010 & 29/2010)

NSJ CONSTRUCTION (PTY) LTD

1st Appellant

GREGOIRE PAYET

2nd Appellant

(rep. by Mr. Frank Elizabeth)

and

F. B. CHOPPY (PTY) LTD

Respondent

(rep. by Mr. Wilby Lucas)

Neutral Citation: *NSJ Construction (Pty) Ltd & Anor v F. B Choppy (Pty) Ltd* (SCA 16/2019)
SCCA 53 [2021] (Arising in CS 27/2010 & 29/2010)
(7 September 2021)

Before: Robinson JA, Tibatemwa-Ekirikubinza JA, Dingake JA

Summary: Contract-Breach of construction contract-Public Policy.

Where a contract is not ex facie illegal and one party's conduct violates public policy, the innocent party can claim under the contract

Heard: 5 August 2021

Delivered: 7 September 2021

ORDER

The appeal is dismissed with costs to the respondent.

JUDGMENT

DR. LILLIAN TIBATEMWA-EKIRIKUBINZA, JA

The Facts

1. The Respondent (**F.B. Choppy (Pty) Ltd**) entered into a building Contract with the 1st Appellant (**N.S.J. Construction Pty Ltd**) for the construction of self-catering Chalets on property located at La Digue. The Respondent in its pleadings averred that the 2nd Appellant (**Gregoire Payet**), a director of the 1st Appellant was also a personal guarantor for the 1st Appellant's obligations under the building contract dated 11/04/2008.
2. The parties agreed on a contract price and a completion date. The contract included other terms which for purposes of this appeal we need not go into.
3. The appellant commenced with the work but disputes arose along the way. Subsequently, the respondent through a letter dated 14/01/2010, terminated the Contract. The Respondent also filed a suit - CS No. 27 of 2010 in the Supreme Court against the Appellants for breach of contract. The respondent alleged that the 1st appellant had failed to complete the work within the stipulated period and for alleged defects in the work. The 2nd Appellant was sued as a guarantor. The Respondent prayed for damages in the sum of SR2, 376,013.00 and €81,669.24.
4. The 1st Appellant filed a counter-claim - CS No. 29 of 2010 against the Respondent alleging that the cause for the delay was due to the respondent's late payment for the works and that the full amount for 99% of the completed works was unpaid. In this regard, the 1st appellant stated that there was an outstanding balance of SR 3, 137,748.66 with interest at a commercial rate of 10 %. The 1st appellant furthermore prayed for an order of inhibition to prevent the respondent from dealing with the suit property.
5. In its defence to the counterclaim the respondent averred *inter alia* that at the time of tendering to carry out the work, NSJ (the appellant) had failed to disclose that it lacked the requisite licence to carry out the work. At the trial an officer from the Seychelles Licensing Authority testified that the licence held by NSJ was for building maintenance and did not authorize the company to engage in construction of buildings.

6. The Supreme Court Judge, Vidot, J, made the following findings:
 - (i) There were delays in the works occasioned by both parties;
 - (ii) For at least an entire year, June 2008 to July 2009, the Appellant was not in possession of a valid license and that Court could not condone such disregard for the law and thus in operating without a license, the 1st Appellant was acting against public policy;
 - (iii) The plaint in CS No. 29 of 2010 despite rehearsing and pleading aspects of the Agreement between the parties fell afoul of section 71 of the SCCP because no cause of action was specifically pleaded therein. Relying on section 92 of the SCCP, the plaint was struck out.
 - (iv) There was breach of the Agreement and that some of the breaches cannot be attributable to the 1st Appellant only.
 - (v) Loss of business was occasioned to the Respondent.

7. The trial Judge then entered judgment in favor of the Respondent. Based on a detailed analysis of the claims and evidence adduced by the parties, the court ordered the appellants jointly and severally to pay damages in the sum of SR682, 595.06. The Judge however declined to award any interest and costs of the suit on the premise that the Respondent did not make any claim in respect of the same.

8. The judge also held that in operating without a licence NSJ was acting against public policy.

9. Dissatisfied with the judgment of the Supreme Court, the appellants appealed to this Court on the following grounds:
 - 1. The presiding Judge erred when he delivered judgment in favor of the Respondent after having concluded that the Contract is against public policy, he could not rely on it to make an award of damages for the Respondent.**

 - 2. The presiding Judge erred when he concluded that the license was valid for the first year that the Contract existed and only lapsed when it was not renewed by the Appellants in the second year.**

3. **The presiding Judge erred when he made the award of damages in favor of the Respondent.**
4. **The presiding Judge erred when he dismissed the 1st Appellant's plaint.**

Prayers

10. The Appellant s prayed that this Court sets aside the Judgment of the Supreme Court Judge and allows the appeal.

Appellant's submissions

11. In his oral submissions counsel for the appellant conceded that the appeal for all intents and purposes raises a single ground of appeal: *the presiding judge erred when he awarded damages in favour of the Respondent on a contract which he had found to be against public policy.* Counsel submitted that it is settled law that an agreement, whose object is contrary to law or public policy, would be invalid and its breaches would not be justiciable. That neither the respondent nor the appellant in its counterclaim could rely on such a contract to claim a remedy.

Respondent's reply

12. At the trial court the respondent averred in their pleadings/defence to the counter claim brought against it, that at the time of tendering to carry out the work, the appellant had failed to disclose that it lacked the requisite licence.
13. Counsel argued that the presiding judge exercised the court's equitable powers under **Section 6 of the Courts Act** to award damages to the respondent. It was his argument that since Choppy had no knowledge that NSJ was operating without a licence the respondent had come to court with clean hands.

Court's consideration

14. According to **Article 1149** of the **Civil Code**, damages which are due to a person cover the loss sustained as well as the deprivation of profit.

15. It is indeed a general principle of law that the effect of breach of a contract is that it gives the victim the option to terminate the contract, sue for specific performance or compensatory damages. Andrew Burrows¹ notes that where a party sustains loss by reason of a breach of contract, he is, so far as money can do it, be placed in the same situation, with respect to damages, as if the contract had been performed.
16. However, in the present case, the trial Judge came to the finding that the building contract was against public policy for failure by the appellants to hold a valid construction licence. The Judge stated *inter alia* as follows:
“... NSJ did not possess a ‘Building Contractor’ licence as required by the Licences Act. They possessed at the time of the agreement a class 4 licence that only permits carrying out of maintenance works. That was a misrepresentation of NSJ.

... the Court cannot condone such disregard for the law ... *In operating without a licence NSJ was acting against public policy.*” (My emphasis)
17. The fact that NSJ knew that he did not have the requisite licence from the Seychelles Licensing Authority was admitted by counsel for the appellant. He nevertheless faulted the Trial Judge for awarding damages to the respondent arising from a contract tainted with illegality. Counsel supported his contentions with statutory as well as case law.
18. **Article 1131 of the Civil Code** provides that, an *obligation which is against public policy shall have no legal effect* and **Article 1133** of the Code provides *that, the object of an agreement is unlawful when it is prohibited by law or when it infringes the principles of public policy.* And according to **Article 6 of the Civil Code**, it shall be forbidden to exclude the rules of public policy by private agreement. Rules of public policy need not be expressly stated.

¹ Andrew Burrows, A Case Book on Contract (3rd edition) at page 348.

19. Counsel cited two authorities of this Court which establish the principle that a court cannot endorse an agreement that is against public policy - **Berard Monthy vs. Alex Buron**² and a most recent case **DF Project Properties (Pty) Ltd vs. Fregate Island Pvt Limited**³ In **Berard Monthy vs. Alex Buron**⁴ Twomey, JA said:

A Court cannot endorse an agreement that is against public policy. The rule is contained in the maxim of *ex turpi causa* which is also a concept known to the English common law. In *Euro-Diam Ltd v Bathurst* [1990] 1 QB 1, the Court of Appeal held that “*The ex turpi causa defence ultimately rests on a principle of public policy that the courts will not assist a plaintiff who has been guilty of illegal (or immoral) conduct of which the courts should take notice. It applies if in all the circumstances it would be an affront to the public conscience to grant the plaintiff the relief which he seeks because the court would thereby appear to assist or encourage the plaintiff in his illegal conduct or to encourage others in similar acts.*”

20. Twomey, JA was emphatic that, *the Court would not be drawn into considering the merits and demerits of a contract that is against public policy.*
21. **In DF Project Properties (Pty) Ltd vs. Fregate Island Pvt Limited (supra)** Twomey, JA again affirmed that, *it is settled jurisprudence that an agreement, whose object is contrary to law or public policy, would be invalid and its breaches would not be justiciable.*
22. Counsel for the appellant concluded that regarding the matter before us, once the Trial Judge had made a finding that the contract was against public policy, he could not thereafter award damages.

² SCA No.6 of 2013.

³ SCA 56/2018 and SCA 63/2018

⁴ SCA No.6 of 2013.

23. I have no doubt in my mind that courts are averse to lending their aid to a contract against public policy and enabling an individual to gain from an illegal activity. However the case we are dealing with can be distinguished from the authorities cited by the appellant in support of his case. The said cases involved situations where both parties were aware of the illegality of the contract.
24. I consider the **Monthy vs Buron (supra)** appeal to be the *locus classicus* case on the principle that a court cannot enforce an agreement which is against public policy. And it is this case I have sighted rather extensively in this judgment. The facts of the case were that the Appellant entered into an agreement with the Respondent for the construction of a house at Gaza, Anse aux Pins, Mahé. The agreement was evidenced by a quotation from the Appellant submitted by e-mail to the Respondent and accepted by the Respondent by fax. It is not disputed that the contract price was SR 864,000. A total of £33,000 was paid to the Appellant by the Respondent for the construction of the house at the date when the contract was unilaterally rescinded by the Appellant.
25. At trial the evidence of both parties revealed that although the contract price was expressed in Seychelles rupees there was an agreement between the parties that the contract price would be paid in pound sterling but that rate would be the one obtaining on the black market at the time and not the legal bank rate. The evidence of the parties on this issue was at variance. The Appellant deponed that the rate of the rupee against the pound sterling agreed by the parties in 2005 was SCR23 whilst the Appellant maintains that it was SR12 or SR 14. The Central Bank has confirmed to this Court that the average official rate for the year 2005 at the time was 1GBP = 9.6126 SR.
26. The learned trial judge - Renaud - preferred the evidence of the Respondent over that of the Appellant and found that £33,000 x 23 (black market rate in 2005) = SR759, 000 (about 88% of the contract price) was paid by the Respondent for the construction of the house. He accepted the surveyor's report that only 40% of the construction work on house had been completed. He concluded therefore that as the Appellant had received nearly 88% of the contract price but had only performed 40% of the building work, he

should pay the value of the works left to be performed. He found that the sum of SR780, 000 was due together with moral damages of SR50, 000 and costs of the action.

27. Although the Appellant appealed against this decision on 7 grounds altogether, this Court resolved the appeal only on one ground which in the court's view was the crux of the appeal - Can the court enforce an agreement, the *object* of which is against public policy?

28. Twomey JA held that:

Whilst the object of the contract between the Appellant and the Respondent was the construction of a house, the reason that drove the parties to the agreement was that payment for the contract would be made in foreign exchange at the black market rate. Both parties testified to this. What they now disagree on is the black market rate applicable in 2005. Whichever way we consider the matter, we remain firmly of the view that dealing with currency at the black market rate cannot be a valid reason for entering into a contract. It clearly offends against the provisions the Exchange Control Act 1954 which was replaced by the Foreign Exchange Act 2009. A Court cannot endorse an agreement that is against public policy. We refuse to be drawn into considering the merits and demerits of a contract that is against public policy. (My emphasis)

29. It is clear that in the **Monthy** appeal both parties had guilty knowledge that their agreement contravened the law, was against public policy. The Court therefore allowed the appeal regarding the contention that a court could not enforce an agreement the object of which is against public policy and consequently set aside the decision of the Supreme Court. Furthermore, the court dismissed the counter appeal. The court did not go into the merits and demerits of the claims by either party. And Court made no order as to costs.

30. The second case relied on by the appellant was **DF Project Properties (Pty) Ltd vs. Fregate Island Pvt Limited (supra)**. The relevant facts of this case are that DF Project Properties (Proprietary) Ltd (hereinafter DF) entered into a written agreement with

Fregate Island Private Limited (hereinafter Fregate) to build a 5-star holiday resort on Fregate Island, Seychelles. The Agreement provided that if any dispute arose from or with the agreement, the same would be resolved by arbitration rules (of the Wirtschaftsvereinigung Bauindustrie e. V. North Rhine Westphalia) in Germany. A dispute arose and was arbitrated in Germany and the Arbitral Tribunal issued an award in favour of DF on 9 July 2009 for US\$ 1,941,669.13 plus interest together with two-thirds of the costs incurred in the arbitration proceedings. Fregate appealed to the Dusseldorf Higher Regional Court to revoke the award of the Arbitration Tribunal but later withdrew the application for revocation. After obtaining the three German Court Orders, DF unsuccessfully sought their enforcement as foreign judgments and execution in the Supreme Court of Seychelles. The Supreme Court agreed that the English Rules on the Conflicts of Laws should apply. However, it held that certain conditions under the rules were not satisfied, namely that, it was not satisfied that the Orders were final and conclusive judgments in terms of Rules 200 and 190 and were not binding on the rights and liabilities of the parties settling the existence of the debt between them to become *res judicata*. DF appealed against the decision of the Supreme Court.

31. Fregate also cross-appealed on the ground that DF, an overseas company, contravened section 309 of the Companies Act 1972 and other mandatory requirements in performing disputed agreements underlying the German court orders and consequently evaded taxes after revenue. That the learned judge ought to have concluded that all the German court orders were against the fundamental rules of public policy and thus unenforceable in Seychelles. In addressing this ground, Twomey, JA held as follows:

... it is clear that the government was not paid taxes by a business concern that had not been exempted from the payment of taxes, social security and other benefits under Seychellois laws. While both parties to the Agreement benefitted from this illegal conduct, and it is being relied on by Fregate as a defence to DF's claim, the fact remains that the contracts were contrary to fundamental rules of public policy. Why should Fregate benefit from this illegality? ... (My emphasis)

Our laws concerning the enforcement of foreign judgments enjoin the Court to make sure that any foreign judgment sought to be enforced is not contrary to any fundamental rules of public policy. The foreign judgment and its execution in this jurisdiction cannot be divorced ... This Court cannot endorse the enforcement of a decision on a contract which had as one of its ‘causes’ the avoidance of the payment of taxes and other dues in Seychelles.

Our law is categorical in relation to breaches of public policy; it does not provide for a balancing test to be carried out to examine the underlying purpose of the prohibition which had been contravened and whether that purpose would be enhanced by the denial of the claim or whether the denial of the claim would be a proportionate response to the illegality.

32. Like it was in **Berard Monthy**, both parties in the **DF Project Properties (Pty) Ltd** case were aware of the illegal conduct. Contrary to the circumstances of the said authorities, in the present appeal, one party (N.S.J) was aware that he was acting in breach of the law. On the other hand Choppy had no knowledge that NSJ was operating without a licence. Unlike the appellant, the respondent came to court with clean hands.
33. Can it be said that the “innocent” party stands in the same position as their counterparts and cannot claim under the contract?
34. In the English case of **Archbolds (Freightage) Ltd vs. S. Spanglett Ltd**⁵, the facts were that the plaintiffs employed the defendants for reward to carry and they carried, a third party’s goods by road. The motor vehicle in which the goods were carried had a “C” licence, not an “A” licence. The defendants knew this fact, but the plaintiffs neither knew it nor should have known it. As a result of the defendant’s negligence the goods were stolen in the course of transit. In an action by the plaintiffs for damages the defendants

⁵[1961] 1 All E.R. 417.

contended that the contract was illegal by reason of the Rail Traffic Act 1933, which prohibited the use of a goods vehicle on a road except under licence, and of the fact that the “C” licence, as distinct from an “A” licence, did not permit the defendants to carry other persons’ goods on the vehicle for reward. The court assumed that the contract was for carriage in the particular vehicle which in fact the defendants used.

35. The Court of Appeal of England held that: the plaintiffs were not debarred by the illegality of the defendants’ use of their vehicle from recovering damages for breach of the contract of carriage for the following reasons – (i) the contract of carriage was not forbidden by statute, since, although a contract for the use of an unlicensed vehicle on a road might have been impliedly prohibited by Section 1(1) of the Road and Rail Act, 1933, a contract for the carriage of goods by road was collateral to the licensing control established by Part 1 of that Act and was not impliedly prohibited by statute (ii) the defendants, being ignorant of the fact that there was only a “C” licence for the vehicle, were innocent parties to the contract of carriage, which was not *ex facie illegal*.
36. In the appeal before us, a contract to construct self-catering Chalets was not forbidden by the law of Seychelles. However, the construction of such property by a contractor with *a class 4 licence that only permits carrying out of maintenance work* was impliedly prohibited. The respondent pleaded ignorance of the fact that the appellant did not possess the requisite licence. The appellant did not refute the respondent’s ignorance of this fact, neither did they adduce evidence to show that the respondent ought to have known this fact. The appellant however contended that neither of the parties to the contract can claim damages arising from a contract against public policy.
37. Following the persuasive authority of **Archbolds (Freightage) Ltd vs. S. Spanglett Ltd (supra)**, I hold that the respondent being ignorant of the fact that NSJ did not have the requisite licence could sue on the contract since it was not *ex facie illegal*.
38. In arriving at this decision I am fortified by the provisions of the law which recognise the equitable powers of courts of law. In urging this Court to uphold the decision of the Supreme Court, the respondent argued that the presiding judge exercised the court’s

equitable powers under **Section 6 of the Courts Act** to award damages to the respondent.

The section is as follows:

“Equitable powers

39. 6. *The Supreme Court shall continue to be a Court of Equity and is hereby invested with powers, authority, and jurisdiction to administer justice and to do all acts for the due execution of such equitable jurisdiction in all cases where no sufficient legal remedy is provided by the law of Seychelles.”*

40. I opine that this Court derives its equitable jurisdiction from **Article 120(3) of the Constitution** which provides that:

120. (3) The Court of Appeal shall, when exercising its appellate jurisdiction, have all the authority, jurisdiction and power of the court from which the appeal is brought and such other authority, jurisdiction and power as may be conferred upon it by or under an Act.

41. The contravention of public policy arose out of the conduct of the appellant. The respondent had done nothing to breach the statute. In contrast, even if the Supreme Court had not dismissed the appellant’s “plaint” for flouting Section 71 of the SCCP the appellants could not have recovered damages arising out of the counter claim as they had breached the licencing statute. Indeed, it is in regard to the appellant that Twomey JA’s holding in **Berard Monthy** below would apply, to wit “the courts will not assist a plaintiff who has been guilty of illegal conduct ... it would be an affront to the public conscience to grant the plaintiff the relief which he seeks because the court would thereby appear to assist or encourage the plaintiff in his illegal conduct or to encourage others in similar acts” The same cannot be applied to the respondent who came to court with clean hands.

Conclusion

42. The appeal is dismissed with costs to the respondents.

Lusabemwa.

Dr. Lillian Tibatemwa-Ekirikubinza, JA.

I concur

Dr. O. Dingake, JA.

Signed, dated and delivered at Ile du Port on 7 September 2021.