

IN THE COURT OF APPEAL OF SEYCHELLES

Reportable

[2021] SCCA 54 (7 September 2021)
SCA 71/2018
(Appeal from CS 118/2012)

Mr. Andre Bristol

Appellant

(rep. by Mr. Wilby Lucas)

and

Dr. Ellen Astrid Corina Rosenbauer

Respondent

(rep. by Mr. Guy Ferley)

Neutral Citation: *Bristol v Rosenbauer* (SCA 71/2018) [2021] SCCA 54 (7 September 2021)

Before: Twomey, Tibatemwa-Ekirikubinza, Dingake, JJA

Summary: Contract-Breach of Building Contract

Heard: 4 August 2021

Delivered: 7 September 2021

ORDER

Save for partial success of Ground 1, on the whole, the appeal fails. The respondent is awarded damages for breach of contract in the sum of SR 448,560.75 as well as interest at the commercial rate from the date of filing the plaint.

Costs for this appeal are awarded to the respondent.

JUDGMENT

DR. LILLIAN TIBATEMWA-EKIRIKUBINZA, JA

The Facts

1. On 05/09/2009, the appellant (**Andre Bristol**) entered into a building contract with the respondent (**Dr. Ellen Astrid Rosenbauer**) for the construction of a house at Baie Lazare, Mahe. In consideration for the said construction, the appellant was to be paid SR 1,455,750/-. It was *inter alia* an agreed term of the contract that the appellant should complete the construction by November 2010.
2. The appellant did not finish construction within the stipulated deadline. Subsequently, the respondent sued the appellant for breach of contract. The respondent alleged that:
 - (a) the appellant failed to construct the house within an agreeable time frame;
 - (b) provided defective workmanship; and
 - (c) retained materials supplied by the respondent for the construction in the sum of SR 23,424/-.
3. The respondent claimed a total sum of SR 562,898.75/- which comprised of material and labour to repair and rectify the defects; moral damages for distress, anguish and stress; and materials retained by the appellant.
4. The appellant denied all the respondent's claims but admitted that works were delivered late. He however reasoned that the delays were attributable to adverse weather conditions and the respondent who continuously asked for changes to be made to the building.
5. Furthermore, the appellant raised a counterclaim in which he claimed that the respondent too had breached the contract by failing to make timely payments which affected the project time line and caused serious prejudice. The appellant also claimed for the costs of redoing the door and windows, changes made in the ceiling and the electrical wiring all of which were not included in the signed contract. For this, the appellant claimed a sum SR 354,000/=.
6. In her plea, the respondent denied the appellant's claims, asked the trial Court to enter judgment in her favor and dismiss the counterclaim.

7. The Trial Judge, Robinson. J, *inter alia* found that:
- (i) The respondent was a straightforward and truthful witness; the Appellant on the other hand was not an impressive witness;
 - (ii) The appellant admitted that the contract was terminated in July 2012, but that he had already vacated the site in April 2012 and that at this stage the house had not yet been completed;
 - (iii) It was proved on a balance or probabilities that the appellant was liable to the respondent in the sum of SR 478,074.75 for the defective works undertaken by him;
 - (iv) The respondent was entitled to moral damages of SR 10,000/- and SR 23,424/- for the respondent's items that were in the appellant's custody.
 - (v) The appellant had not made out a case as stated in his counterclaim since the oral evidence was scanty, very unsatisfactory and unreliable.
8. The Trial Judge entered judgment in favour of the respondent and awarded her a total sum of SR 520,498.75 as well as interest at the commercial rate from the date of the plaint.
9. Dissatisfied with the judgment of the Supreme Court, the appellant appealed to this Court on the following grounds:
- 1. The learned Trial Judge erred in awarding the total sum of 520,498.75 Rupees with interest to the Plaintiff, an award which is not supported by the evidence on record.**
 - 2. The learned Trial Judge erred in entering judgment for the Plaintiff and dismissing the counter claim of the Defendant in the absence of any breach of contract by the Defendant.**

3. **The learned Trial Judge erred in law in entering judgment for the Plaintiff in the absence of any serious lapses by the Defendant during the construction phase of the house of the Plaintiff.**
4. **The learned Trial Judge erred in dismissing the Defendant's evidence as being an unimpressive witness and a disorganized businessman**
5. **In all circumstances of the case the Judgment of the learned Trial Judge was against the evidence given during the hearing.**

Prayers

10. The appellant seeks from this Court an order to quash the judgment of the learned trial Judge.

Ground 1

Appellant's submissions

11. Appellant's counsel submitted that the award for defective works was not supported with evidence. That the receipts adduced in evidence by Ms. Rosenbauer had nothing to do with rectification of the alleged defects but payment for additional work.
12. In support of the above submission, counsel highlighted the evidence of Mr. Bernard Laporte- the carpenter who was hired to do remedial work on the roof and ceiling. Mr. Laporte testified that he had made replacement of some iron sheets and wood covering the roof but did not remove the entire roof coverage.
13. Furthermore, counsel challenged the evidence of Mr. Nigel Valentin-the Quantity Surveyor who made the assessment report of the defective works. Counsel argued that the report contained exaggerated sums which were not supported with evidence. For instance, counsel pointed out that SR 176,475 which was the sum for roofing sheets represented the coverage for the whole house yet the evidence of Mr. Laporte showed that he made replacement to a few sheets.

14. Counsel further argued that during cross-examination Mr.Nigel was queried about the exaggerated sums in the report and the fact that the figures were arrived at without a site visit being made but there was no response from him.
15. On the premise of the above incidents, the appellant's counsel faulted the trial Judge for awarding a total sum of SR 520,498.875 and for finding that Mr.Nigel's report was unchallenged yet it was.

Respondent's reply

16. Counsel submitted that evidence was adduced to support the averments and claims raised in the respondent's plaint. That the report of Mr. Nigel contained assessment of the defects in the work done by the appellant. Counsel further referred to the respondent's evidence which was to the effect that she took photographs of the defects in the building between January and April 2012. That the said photographs were admitted in evidence and marked exhibits P30-P53.
17. Furthermore, that the respondent deponed and produced receipts proving the purchase of materials for the construction, payments and expenses which supported her claim for economic loss.

The respondent prayed that this ground be dismissed.

Grounds 2

Appellant's submissions

18. The appellant argued that there was no breach of contract on his part. That it was in fact the respondent who breached the contract by making late payments which led to delay in the construction.

19. Regarding the dismissal of the appellant's counter claim, counsel submitted that there was supporting evidence to show that the construction involved extra works. The said evidence was given by Mr. Prea-the Engineer who was recruited to oversee the construction of the house. The Engineer produced a report indicating that there were a number of changes to the structural plan made by the respondent. The report was adduced in evidence and marked as an exhibit. That the claim for extra work was not included in the quotation which was presented at the time of signing the contract.
20. Counsel therefore faulted the trial Judge for dismissing the counter claim for lack of evidence yet the claim was in fact supported by evidence.

Respondent's reply

21. In regard to the structural changes which led to extra works, the respondent's counsel submitted that the letters adduced by the appellant containing the scope of extra works were not part of the signed original contract. That the said letters could not in law vary the said contract.
22. In respect of the counter claim, counsel submitted that the trial Judge was correct in dismissing the appellant's counterclaim since he failed to prove on a balance of probabilities the averments in the claim raised.

Ground 3

Appellant's submissions

23. Counsel submitted that the appellant's work was not defective.

Respondent's reply

24. Counsel argued that there were serious lapses/defects in the appellant's work. Counsel referred to the testimonies of Mr. Laporte-the carpenter as well as Mr. Nigel-the Quantity Surveyor who testified to the defects in the construction work. That the said testimonies

were not challenged and corroborated the respondent's testimony. Counsel further submitted that the testimonies were evaluated by the trial Judge who came to the conclusion that the value of the defective works had been established on a balance of probabilities and the appellant was liable in law.

Ground 4

Appellant's submissions

25. Under this ground, counsel faulted the trial Judge for attaching so much weight and value to the respondent's testimony yet she did not have the opportunity of assessing her demeanour during cross-examination. That it was Egonda Ntende CJ who presided over the larger part of the cross-examination. Counsel also submitted that the respondent was occasionally evasive during cross-examination and was untruthful.

Respondent's reply

26. In response, the respondent's counsel submitted that a court is at liberty to consider the credibility of a witness. That a credible witness is determined by their testimony. Therefore, the trial Judge had discretion to decide which witness was credible. That according to the trial Judge, the appellant's demeanour was one of a disorganized businessman and his evidence was not impressive.

Ground 5

27. The appellant's submissions made under this ground were repetitive of those made under ground 1. They will therefore not be reproduced.

Court's consideration

Grounds 1 and 5

28. Under **Article 1149 of the Civil Code**, a party is entitled to compensation for all prejudice suffered both moral and material.

29. An appellate court will be reluctant to review damages decided by a trial Judge unless it is satisfied that:-

- (i) the grounds were unsatisfactory,
- (ii) wrong inferences were drawn from the facts,
- (iii) erroneous findings were made by the trial court. (**Government of Seychelles v Shell Company¹**).

30. The appellant hinges his argument to have the damages reviewed on the premise that there was no evidence supporting the award and that wrong inferences of fact were made by the trial Judge.

31. The respondent in her plaint claimed damages for a total sum of SR562,898.75. The breakdown of the said sum was as follows:

i. Material and labour to repair and rectify the defects and deficiencies	SR 489,474.75
ii. Moral damage for distress, anguish and stress	SR 50,000
iii. Plaintiff's materials retained by defendant	SR 23,424.

	Total SR 562,898.75

32. In order to address the appellant's argument that the award of damages was not supported with evidence, I will consider below each item of claim contained in the respondent's plaint.

(i) Material and labour to repair and rectify defects

¹ SCA No.11 of 1988.

33. The respondent claimed that SR 489,474.7 was required to make good the defects for the appellant's workmanship. The sum was arrived at following the evaluation report for defective works compiled by Mr. Nigel (the Quantity Surveyor). The report was admitted in evidence and marked exhibit P253.
34. Mr. Nigel testified that upon request by the respondent, he conducted a site visit of her house on 18th July 2012 and cited several defects in the construction. He testified that before embarking on the visit, he made a call to the appellant who was the contractor of the building project but he did not turn up. The evaluation therefore proceeded without the appellant.
35. Furthermore, Mr. Nigel testified that upon reaching the site, he cited the following defects: rusted roofing, wrongly placed fascia boards, poor electrical installation, incomplete ceiling works, unfinished drainage system and poor paving. He stated that the amount of money needed to rectify the defects was SR 489,474.75.
36. When asked during cross-examination how the above figure was arrived at, Mr. Nigel explained that the amount was arrived at by multiplying a square meter of the particular item that needed replacement following its current market price and the quantity required. He also explained that the costs incurred in making good the defects were high because it involved removal of the defect first and then replacing it as opposed to the low cost involved in simply fixing the item.
37. The trial Judge found the evidence and report of Mr. Nigel satisfactory because it was not contested on a material aspect. She however reduced the sum of SR 489,474.75. She stated as follows: "*The dispute about defective works in the sum of SR 489,474.75, I have to minus the award for road access concrete surface 1440. Its not part of the contract so I have to award 487,074.75.*"
38. I note however that although the trial Judge stated that Mr. Nigel's report was not contested, it was in fact disputed during the cross-examination of the witness. Be that as

it may, from my analysis of the record, I find that Mr. Nigel satisfactorily explained how he arrived at the amount being contested in his report. This showed that the sum claimed in the plaint was not merely concocted or exaggerated as argued by the appellant. On this premise, I am unable to fault the trial Judge on her finding that Mr. Nigel's evidence and report were satisfactory. I also find that the trial Judge did not draw a wrong inference of fact by concluding that the cost for defective works had been established in the report.

39. I now turn to address the appellant's argument that there was disparity in the amount quoted to repair the roof. The appellant submitted that although the rust affected a small portion of the roofing, Mr. Nigel quoted an amount for replacement of the entire roof coverage. That in fact Mr. Laporte the carpenter testified during examination in chief that he had replaced a few sheets and wood on the roofing.
40. The answer to resolve this argument lies in the testimonies of Mr. Nigel, the respondent and Mr. Laporte.
41. The respondent-Ms. Rosenbauer testified during examination in chief that Mr. Laporte replaced the whole roof because it was full of rust. That the cost for re-doing the entire roof was SR 161,000 which was paid to Mr. Laporte in three (3) installments between September and October 2012. The first installment was for a sum of SR 37,000, the second one was SR 10,000 and the third was SR 19,607. The materials for the roof cost SR 37,930. The receipts for the aforementioned payments were admitted in evidence and marked exhibits P117, P118 and P116 respectively.
42. During cross-examination, Mr. Nigel explained that the reason as to why he had quoted a sum for repairing the entire roof was that removing or painting of the defect only would lead to a colour contrast between the repaired part and the rest of the roof coverage. That therefore to avoid the contrast, he advised the respondent to replace the entire roof. The sum quoted by Mr. Nigel for replacing the entire roof was SR 176,475.00.

43. Mr. Laporte testified that together with three hired employees he removed a few sheets from the roof which were not in good condition. That the respondent bought the roofing sheets herself and he was paid between SR 35,000- SR 40,000 for his labour.
44. I note that there is disparity in the evidence concerning repairs carried out on the roof. Whereas Mr. Nigel and the respondent testified to repairs for the entire roof, Mr. Laporte who carried out the actual work testified that the roof repairs were carried out on only the section which was affected by rust.
45. Furthermore, there is also disparity in the sum claimed for repairing the roof. Whereas Mr. Nigel quoted a sum of SR 176,475.00, the respondent testified that the total sum for redoing the roof was SR 161,000. Be that as it may, the installment payments of (SR 37,000+ SR 10,000 + SR 19,607 + SR 37,930 for roofing material) claimed to have been paid by the respondent to Mr. Laporte when added up do not lead to the total of SR 161,000 but rather to SR 104,537.
46. From the foregoing analysis, I find that the appellant's argument that there was disparity on the sum quoted for roofing repairs is successful.

(ii) Moral damages

47. In respect to moral damages, the trial Judge held that this claim was justified through the respondent's testimony that the appellant had abandoned his work without notice and that the work he carried out was either incomplete or faulty. The respondent also testified that it was difficult for her to find another contractor after discovering the shoddy work done by the appellant since she was a foreign national.
48. Moral damages reflect the psychological suffering, pain, trauma and anguish suffered by the victim as a result of the breach. **Article 1149 (2)** of the **Civil Code** provides for recovery of these damages as follows:

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

49. It has been emphasized by this Court in **Michel & Ors vs. Talma & Anor**² that it is a difficult task to determine the exact amount of moral damages that should be rewarded to a suffering applicant. For the Court to place a price on the suffering of an individual is extremely challenging.
50. Nevertheless, where evidence has been adduced and an amount is proposed by the claimant, the court in its assessment can adjust the figure upward or downward depending on the circumstances of the case. In the present case, the amount (SR 50,000) which was proposed by the respondent as moral damages was reduced to SR 10,000. Given the fact that there is no stringent formula for assessing moral damages, I find no reason for interfering with the discretionary award of the trial Judge.

(iii) Materials retained

51. Regarding the claim of SR 23,424.00 for the materials retained by appellant, the trial Judge premised her award on the appellant's admission that he held in his possession certain items belonging to the respondent which he had not yet returned because the matter was pending in court. The trial Judge held that the appellant did not dispute the value of the items and therefore awarded the sum of SR 23,424. I however find this was contradictory to the earlier statement captured in the trial Judge's decision at paragraph 4. While referring to the appellant's counterclaim, the trial Judge noted as follows:

“Moreover, Defendant [Andre Bristol] admitted he will hold in his possession certain items belonging to the plaintiff [Ellen Rosenbauer], which items he is willing to return and which value is disputed and puts the plaintiff to proof thereof.”

²SCA 22 of 2010.

52. It is clear from the record that although the appellant admitted to holding onto the respondent's items, the value was disputed. With due respect, I find that the trial Judge made a wrong inference of fact that the value of retained materials was not disputed. On this premise, this Court will go ahead and interrogate the respondent's claim for SR 23,424.00 as the value of the materials retained by the appellant.
53. On the record is a handwritten document marked exhibit P134. It is dated 20th August 2012 detailing a list of items with corresponding prices. The document indicates that the items were received by the appellant-Mr. Bristol and were in his possession. The total amount of the items indicated in the said document is 1464 Euros and an equivalent amount in Seychelles Rupees of 23,424. There also appears on the record a document marked exhibit P135 which also indicates items which were in the appellant's possession but does not bear corresponding prices. The two documents were not objected to by the appellant. On that premise, it can safely be concluded that exhibit P134 which bore an equivalent sum of SR 23,424 supported the respondent's claim for the value of materials retained by the appellant.
54. Arising from the above analysis, although the Trial Judge made a wrong inference, the sum of SR 23,424 awarded by the Trial Judge stands.

Ground 2

55. The appellant submitted that he performed his obligation in compliance with the original contract. That the trial Judge failed to take into consideration the subsequent alterations made by the respondent which led to delayed completion of the building and resulted into an increase in the original estimated amount. For this, the appellant argued that it was the respondent who breached the contract.
56. A careful analysis of the trial Judge's decision shows that the finding for breach of contract by the appellant was on the premise that he carried out defective works which the respondent had to rectify by hiring another contractor. Indeed, Mr. Laporte testified

that he made replacement to part of the roofing sheets which were in a bad condition. Mr. Nigel also testified that the construction was of poor workmanship. Furthermore, the trial Judge premised her finding of breach of contract by the appellant on the fact that the appellant abandoned the respondent's site long before she ever terminated his contract.

57. In regard to the counter claim, the appellant argued that trial Judge erred in dismissing the claim yet he did not breach the contract. The counterclaim was for a total of sum of SR 354,000 together with interest and costs. The particulars of the counter claim were as follows:

- (i) balance on additional/extra works ----- SR 206,000
- (ii) Cost of additional work and materials- SR 42,300
- (iii) Cost of material- SR 10,000
- (iv) Cost of tools and equipment- SR 80,000.
- (v) Planning of wood, Cost of bed and transportation - SR 6,000
- (vi) Moral damages— SR10,000

58. The trial Judge dismissed the appellant's counterclaim on the premise that the appellant did not provide reliable evidence to back up his claims. The trial Judge held as follows:

"This court, having considered the evidence of defendant [Andre Bristol] with care, is satisfied that there was no reliable evidence about the items claimed in the counter claim and that the defendant gave no evidence which provided a reliable foundation for a proper assessment of damages. Defendant has not established the value of the heads of claim ... on a balance of probabilities. For example, in relation to balance for extra works in the sum of SR 206,000/= was for, Defendant answered: 'because it is for the job that I did again after I had done it first time to break them and then to do them again. Like I did the ceiling, there is extra payment to be done for this because it was not part of the quotation.' Defendant has clearly failed to establish the precise nature and extent of such works or the reasonable cost of such works. Consequently, it is not possible for this court to make any finding in relation to the claims based on the oral evidence of the Defendant. This court also bears in mind that the thinner the documentary evidence, the

more skeptical the court is entitled to be about the credibility of oral evidence on the point.

59. In order to substantiate the counter claim, the appellant adduced evidence of email correspondences between himself and the respondent. The correspondences generally were updates of the progress of work at the site. In a correspondence letter dated 29th September 2010 and marked exhibit D6, the appellant informed the respondent that construction was halted until she would clear the bill of SR 350,000 for extra works on the foundation. I note that the respondent complied and cleared the bill and she adduced evidence of a receipt dated 23rd October 2010 bearing the amount of SR 350,000.
60. The other correspondence adduced by the appellant was a letter admitted in evidence and marked D11 (A) in which the appellant's lawyer informed the respondent that out of the balance of SR 386,000 owed to the appellant, she had cleared SR 180,000 and SR 206,000 remained unsettled. This is the sum claimed by the appellant as cost for extra works. There were no further documents adduced to substantiate this claim. Indeed, the trial Judge noted that assessing the appellant's claim was rather a difficult task given the scanty information availed. I would not fault her for making this inference.
61. Nevertheless, even though the appellant did not produce sufficient documentary evidence, the receipts adduced by the respondent show that the counter claim would still be unsuccessful. On record are uncontroverted receipts marked exhibits P6 and P14 bearing the amount of SR 100,000 each for extra works. Exhibit P6 specifically mentions that SR 100,000 was a second installment for extra work. Exhibit P14 bears amount of SR 100,000 for extra works. Exhibit P76 bears the amount SR 10,000 as extra money. The total sum contained in Exhibits P6, P14 and P76 is SR 210,000 which sufficiently covered the appellant's claim of SR 206,000 for extra works.
62. Regarding his claim for materials, equipment, making of bed and its transportation, I note that there are several receipts adduced by the respondent showing that she used to buy most of the material required for the construction. This perhaps explains the reason as to

why the appellant failed to bring sufficient documents like receipts to substantiate his claim.

63. Therefore, I cannot fault the trial Judge for dismissing the counter claim.

Ground 2 therefore fails.

Ground 3

64. The appellant's submission under this ground are not sustainable. The appellant faults the learned Judge for entering judgment in favour of the respondent and yet in his view there were no serious lapses during the construction.

65. As stated in my analysis of Ground 2 above, judgment was entered in favour of the respondent on the premise that the appellant breached the contract by abandoning the construction site and leaving defective and uncompleted work.

66. I therefore find no merit in Ground 3.

Ground 4

67. Under this ground, the appellant faulted the trial Judge for the observations she made on the witnesses. Whereas the respondent was found to be a straightforward and truthful witness, the appellant was found to be a disorganized businessman whose record keeping was almost non-existent. The Trial Judge concluded that he was an unimpressive witness.

68. The appellant specifically argued that the above observations could not be made by a Judge who was not present when the respondent gave her testimony.

69. It is on record that the hearing of this matter commenced in the Supreme Court on Monday 8th October 2012 before Egonda-Ntende CJ. Several adjournments were made and the matter was finally fixed for hearing on 31st May 2013. Both the appellant and respondent's counsel informed court that they would each call 3 witnesses. The first

witness was the respondent. Before cross-examination of the respondent was done, an adjournment was sought and Egonda Ntende granted it. He however ordered that since he was soon retiring, the case be re-assigned to Judge Robinson for fresh hearing.

70. On 14th May 2014, Judge Robinson commenced with the hearing. Counsel for the Respondent-Mr.Dejacques requested that the exhibits which had earlier been tendered in when Justice Egonda was presiding be released to him. On 4th November 2014, Judge Robinson granted the order and on 25th January 2017, the matter continued with cross-examination of the respondent.
71. It is clear from the above chronology of events that Judge Robinson presided over the matter when the respondent was to be cross-examined.
72. It is my considered view that a Judge can make impressions of a witness even during cross-examination and an appellate Court will not readily overturn the factual findings of a trial Court, specifically because the appellate court *is disadvantaged in that it has to weigh these matters with only the record of proceedings before it and cannot observe the witnesses at first hand to gauge their truthfulness.*³
73. Following the above position of the law, this Court cannot interfere with the factual findings made by the trial Judge regarding the witnesses because the Court did not have the opportunity to view them. But even a more important reason is that the trial Judge did not draw wrong inferences of fact about the appellant as a witness. The record clearly shows that he failed to produce sufficient evidence to support his counter claim.

I therefore hold that Ground 4 also fails.

Conclusion

74. Arising from my analysis above, I order as follows:

³ Beeharry v R (2010) SLR 470, at para [15].

1. On the whole, I find that the appeal fails.
2. Having found that the cost for repairing the roof was SR 104,537 and not SR 176,475.00, I will deduct the difference between the amount claimed and the correct figure. Therefore, the respondent is hereby awarded damages for breach of contract in the sum of SR 448,560.75 as well as interest at the commercial rate from the date of filing the plaint.

Costs

75. Costs for this appeal are awarded to respondent.



Dr. L. Tibatemwa-Ekirikubinza, JA.

I concur



Dr. M. Twomey, JA.

I concur

Dr. O'Dingake, JA.

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