

IN THE COURT OF APPEAL OF SEYCHELLES

Reportable

[2021] SCCA 67 (17 December 2021)
SCA 18/2019
(Appeal from CV 7/2013)

Francois Labiche

Appellant

(rep. by Mr. S. Rajasundaram)

and

Rode Company Limited

Respondent

(rep. by Mr. Guy Ferley)

Neutral Citation: *Labiche v Rode Company Limited* (SCA 18/2019) [2021] SCCA 67
(17 December 2021) (Arising in CC 7/2013)

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

Summary: Breach of Contract

Heard: 2 December 2021

Delivered: 17 December 2021

ORDER

The appeal is dismissed with costs to the respondent company.

JUDGMENT

DR. LILLIAN TIBATEMWA-EKIRIKUBINZA, JA

1. It is common cause that the appellant entered into a building agreement with the respondent company. The respondent was to construct the main body and roof of the appellant's house at Fisherman's Cove Estate at Belombre, Mahe for a consideration sum of SR 975,000/=. The said sum was to be paid in seven (7) instalments.

2. It was the contention of the respondent that at the request of the appellant, it was verbally agreed by the parties that the respondent company would carry out additional works whose consideration was to be determined upon completion of the same.
3. Upon completion of building the roof and the additional works, the respondent company submitted two invoices to the appellant for payment. One of the invoices bore the sum of SR 298,000 for additional works and the other bore a sum of SR 235,000 for completion of the building. The appellant refused to pay the sums indicated in the invoices.
4. Subsequently, the respondent company sued the appellant in the Supreme Court for breach of contract. The plaint was filed on 25th March 2013.
5. The company alleged that due to the appellant's failure to pay the sums indicated in the two invoices, it had suffered loss and damages as a result. The respondent prayed that the Supreme Court enters judgment in its favour and awards it interest as well as costs of the suit.
6. On the other hand, the appellant in his defence and counter claim denied instructing the respondent to carry out additional works and thus the amount of SR 298,000 reflected in the invoice could not arise. The appellant also averred that he had duly paid the respondent through its representative- Mr. Ah-Wan a total sum of SR 740,000 for the completed works but the respondent company did not disclose the same in their pleadings.
7. Concerning the sum of SR 235,000, the appellant stated in his defence that the respondent was only entitled to payment of the said sum upon completion of the contracted work.
8. Furthermore, the appellant faulted the respondent company for not carrying out its obligations under the contract. That for instance, the appellant had on several occasions informed the respondent company and its workers about the poor quality and sub-standard works on the ceiling and suggested remedial works to be done. That following this, a misunderstanding erupted between the appellant and the respondent company's workers which made the appellant stop the workers from proceeding with the construction. This was

followed by the appellant registering a complaint dated 21st February 2013 with Fair Trading Commission as well as with the Planning Division of the Ministry of Land and Urban Housing (MLUH).

9. On the basis of the above, the appellant made a counter-claim against the respondent company as follows:
 - (i) Out of the contractual sum of SR 975,000, the appellant had paid the respondent a total sum of SR 740,000 even though it left incomplete works.
 - (ii) The valuation report for the completed works was assessed at SR 638,349.15 which meant that out of SR 740,000 paid by the appellant, the respondent company had been overpaid SR 101,650.85. The appellant claimed a refund of the money paid in excess.
 - (ii) For gross neglect and omission to complete the works, the appellant claimed SR 125,000.
10. In total, the appellant claimed a sum of SR 226,650.85 from the respondent company as well as costs.
11. In response to the appellant's counter-claim, the respondent company stated that it was the appellant himself who had frustrated the completion of the construction by ordering the workers to vacate the site and confiscating their tools. In the respondent company's view, the counter claim for SR 226,650.85 was vexatious and lacked merit.
12. At the trial, the following three issues were framed for determination:
 - (i) Whether or not the appellant was under an obligation to pay the respondent company the sum of SR 235,000.
 - (ii) Whether or not the appellant overpaid the respondent company in respect of the completed works.
 - (iii) Whether or not the appellant unlawfully stopped the work.

13. The trial Judge entered judgment in favour of the respondent company and dismissed the appellant's counter-claim. The Judge specifically held that the appellant did not refute the fact that there remained an outstanding balance of SR 235,000. The Judge further held that the appellant's failure to pay the said sum should be based on supportable grounds which were non-existent in the present case. The Judge therefore held that since the respondent had fulfilled its obligations under the contract and the defects in the ceiling had been resolved by Mr. Cedras, an architectural technician), the appellant had to pay the outstanding sum of SR 235,000. Furthermore, the Judge awarded costs of the suit to the respondent company.
14. Dissatisfied with the trial Judge's decision, the appellant appealed to this Court on the following grounds:
- 1. The learned Judge failed to appreciate the available evidence of poor and sub-standard incomplete work on the roof and ceiling of the appellant's house. The learned Judge while having taken cognizance of all the prompt 5 payments/installments to the respondent for the progressive stages of the construction without fail and or delay, failed to analyze the reasons supported by the evidence that the appellant did not choose to pay due to the valid reason that the last stage of the work on the ceiling and roof remained not only incomplete but of poor and sub-standard works.**
 - 2. The learned Judge erred to hold that her rightful dismissal of the respondent's claim of "extra works" had a direct nexus in the appellant's refusal to pay the last and sixth installment of incomplete, sub-standard and poor work of the ceiling and roof. Thus, the decision and the judgment of the learned Judge in allowing the plaintiff claim of SR 235,000 against the appellant is erroneous.**
 - 3. The appellant averred in his defence, vide paragraph 6 that the sum of SR 235,000 shall only be paid in the event of completion of all works while the learned Judge erroneously concluded that the defence contained no plea in**

relation to the roof and the averments are to be read with the plaintiff averments specifically paragraph 5 of the plaintiff.

- 4. The learned Judge failed to analyze that the details of the appellant's counter claim including over payment was available to the court and the lower court's logic of disallowing over payment was wrong in law and fact.**

Prayers

15. The appellant sought the following reliefs from this Court:
 1. The judgment of the lower court be set aside and the counter claim for the sum of SR 226,650.85 be allowed.
 2. The appellant be declared not liable to pay SR 235,000 to the respondent.
 3. Any decision that meets the end of justice.
 4. Costs of the appeal as well as those in the court below be granted.

Submissions

Appellant's submissions

Ground 1

16. Counsel for the appellant submitted that evidence was adduced to show that the respondent's work on the ceiling was poor and substandard in nature and it was for this reason that the appellant refused to pay the last installment of SR 235,000. Counsel specifically referred to the evidence of Mr. Vincent Cedras (an Architectural technician) who was called by the appellant to prove that the work on the ceiling was substandard. Furthermore, counsel referred to the testimony of Mr. Chang Tave (the Director for Development Control with the Planning Authority) who visited the appellant's site and advised that the timbers on the roof were not properly used. Counsel therefore argued that premised on the testimonies of Mr. Vincent Cedras and Mr. Chang Tave, the learned Judge came to a wrong conclusion in ordering the appellant to pay the respondent the last installment yet the executed work was incomplete and substandard.

17. Furthermore, counsel faulted the learned Judge for coming to the conclusion that the complaint registered with Fair Trading Commission was lodged 3 months after the appellant had filed his defence. Counsel contended that the complaint letter which is on record and marked exhibit D4 is dated 21st February 2013. The defence is dated 24th May 2013 and was received in court on 4th June 2013. Counsel- therefore argued that the complaint was genuine and was in fact lodged before the plaint which is dated 7th March 2013.

Ground 2

18. The appellant faulted the trial Judge for dismissing the respondent's claim for extra works and yet on the other hand upheld the claim for SR235,000/=. According to the appellant's counsel, both claims were interlinked such that dismissal of the claim for extra works would automatically lead to the same fate for the claim of SR 235,000/=.

Ground 3

19. Under this ground, the appellant faulted the trial Judge for stating that the defence contained no plea in relation to the roof.

Ground 4

20. The appellant's counsel submitted that the trial Judge failed to evaluate the evidence regarding overpayment of the respondent company. That the valuation report indicated the value of the executed works at SR 638,349.15. Counsel argued that the respondent company ought to have carried out a valuation to support its allegation of having completed its obligations under the building agreement but it did not. For the foregoing argument, counsel relied on **Article 1315** of the **Civil Code** which provides that:

A person who demands the performance of an obligation shall be bound to prove it. Conversely, a person who claims to have been released shall be bound to prove the payment or the performance which has extinguished his obligation.

21. Counsel argued that the valuation report by the Surveyor (Mr. Quatre) showed that the respondent company had been overpaid SR 101,650.85 yet it had left incomplete works. On

the premise of the foregoing, counsel argued that the appellant proved his counter claim and the trial Judge ought to have allowed it.

Respondent's reply

22. The respondent's counsel argued grounds 1-3 together and ground 4 separately.
23. In respect to grounds 1-3, the respondent's counsel argued that the claim for SR 235,000 was rooted in the building agreement and not the extra works carried out. That according to the said agreement, SR 235,000 was to be paid upon completion of stage 6 of the construction phase which involved completion of the roof and ceiling. Counsel submitted that the appellant's witnesses like Mr. Quatre (the surveyor) and Mr. Vincent Cedras (the Architect) both stated that the roof and ceiling were completed when they visited the site.
24. Counsel for the respondent submitted that although there was adequate evidence that the appellant instructed the company to carry out extra works as a result of adjustments to the approved plan of the house which affected the roof design, the respondent had not cross appealed on the matter. What he was claiming was payment rooted in the building agreement.
25. In regard to ground 4, the respondent's counsel submitted that there was no evidence supporting the appellant's counter claim. That the counter claim was an afterthought in order for the appellant to mitigate the outstanding amount being claimed.

Court's Consideration

Ground 1

26. The essence of the appellant's arguments under this ground is that in light of the evidence adduced at the trial and the reasons given for the appellant's refusal to pay the outstanding sum of SR 235,000, the trial judge erred in arriving at the finding that the respondent had fulfilled his contractual obligation of constructing the roof and ceiling of the appellant's house. That had she properly appreciated the evidence adduced, she would have found in favour of the appellant that the work was not only incomplete but of substandard quality. Furthermore, in his oral submissions, counsel for the appellant faulted the Trial Judge for

her finding that the principle of “*l’exception d’inexécution*” was not applicable in the circumstances of the present case. He argued that in light of the personal economic circumstances of the appellant, SR 235, 00.00/= is not a small amount.

27. In **Monthy v Payet**¹ it was held that this Court can only interfere with a trial Judge’s decision if the Judge failed to properly analyze the entirety of the evidence. The failure must be sufficiently material to undermine the conclusions.
28. To support the case of the appellant, the following witnesses were called: the appellant-Francois Labichhe, Ziggy Adam, a Legal Officer at the Fair Trading Commission, Lester Jude Quatre a Quantity Surveyor who the appellant commissioned to evaluate the constructed work and Gilbert Madelein, whose testimony focused on the quality of materials at the appellant’s house and the soil, but the Court found his testimony to be outside the pleadings.
29. For the respondent company, the following 4 (four) witnesses were called: Robert Ah-Wan-the Managing Director of the Respondent Company, Vincent Jean-Marc Cedras-an Architectural Technician, Ronny Jean-an engineer with the Planning Authority and Whittington Chang-Tave, Director for Development Control, Planning Authority.
30. A look at the judgment shows that the Trial Judge reviewed the essence of the testimony of each witness. Regarding the appellant, the court formed the view that in some respects he was not a reliable witness and that his recollection of key events was confused and not convincing.
31. On the other hand, the court found the respondent’s witness - Robert Ah-Wan - to be straight forward, truthful and helpful. Court believed his testimony that although there were issues with the roof at one point in time, they were attended to and resolved. Court noted that this portion of the evidence was confirmed by Mr. Cedras, an architectural technician who had been commissioned by the appellant to draw the house plans. Mr. Cedras had henceforth been informed by the appellant that there were some issues with the roofing. Cedras testified that he visited the site and realized that extensions had been made to the house and this had

¹ SCA 17/2019.

resulted into a necessity to fix the roof. His role was to fix the roof problem and the problem was fixed on that day. On three other occasions he visited the site with the Fair Trading Commission and noticed that the roof and ceiling were completed, the roof was done properly.

32. A clear reading of the record indicates that the witnesses of the respondent company were consistent in their testimony. The testimonies of the witnesses also corroborated each other's statements. The trial court analysed the testimony of Ronny Jean, an engineer with the Planning Authority who went to the site to investigate a complaint filed by the appellant complaining about the standard of the work of the plaintiff. In his report which was entered as an exhibit, Jean reported that the roof had been done correctly. Whittington Chang-Tave, Director for Development Control, Planning Authority also testified that the roof had been built.
33. The court also analysed the witnesses called by the appellant. Court made a finding that the testimony of Gilbert Madelein, which testimony focused on the quality of materials at the appellant's house and the soil was outside the pleadings. Another of the appellant's witnesses was Lester Jude Quatre, a Quantity Surveyor who was commissioned by the appellant to evaluate the constructed work. Whereas the witness in examination in chief testified that the roof was incomplete "because the rain gutters had not been finished" in cross-examination he conceded that "what the respondent had been contracted to do had been done, including the roof."
34. Arising from the above it cannot be said that the judge did not appraise the evidence in its entirety. It is clear that the appellant's evidence was considered and evaluated alongside the respondent's evidence before the judge could arrive at her finding: the finding that the respondent company fulfilled its obligations under the contract.
35. Counsel also for the appellant also faulted the Judge for applying the principle of "*l'exception d'inexécution*" to the circumstances of this case. The concept is to the effect that where a party breaches a term of the contract, the other party has a defence not to honour their obligations. In simple terms, the concept provides for exceptions for non-performance of a contractual obligation.

36. The trial Judge discussed at length instances when the concept can be invoked and held that, *not every breach of an obligation would bring about the operation of “l’exception d’inexécution”*. That the breach complained of must be of a serious nature.
37. In support of her statement that it is only a serious breach which would lead to an application of the concept of the Trial Judge relied on local authorities as well as persuasive authorities including **Marlene Hoareau v A2B (Pty) Ltd**². The judge also rightly stated that it is the party who seeks to rely on the exception that bears the burden of establishing that the conditions for the application of the exception exist.
38. Reflecting whether or not there were any breaches in the execution of the work and whether the breaches were sufficiently grave as to entitle the appellant to withhold payment of the outstanding sum, the Judge held as follows:
39. “As this court understands it, there remains an outstanding amount of SR 235,000 on the Building agreement ... Having considered the evidence of the defendant (now appellant) and the opinion of the Quantity Surveyor, Mr. Quatre, this court is at loss to understand which work was outstanding ... In relation to the ceiling, the Quantity Surveyor’s report did not disclose defects to the ceiling and that the plaintiff had not completed the ceiling. The defence contained no plea in relation to the roof ... Having considered stage six of the building agreement, it is clear that the plaintiff (now respondent) was required to build a roof and install plywood ceiling and has fulfilled this important stage of its contractual obligation. This court accordingly finds that the defendant has not been able to establish the existence of ‘une inexécution qui presente un caractere suffisament grave’ as a result of which the defendant is entitled to raise successfully a defence of “l’exception d’inexécution.” (Emphasis of Court).
40. Whereas the judge indeed went at length to engage with the impugned principle, what is important is that based on the evidence adduced in court, her finding was that the respondent company had fulfilled its contractual obligations of constructing the roof and ceiling of the appellant’s house. It was not the holding of the court that there existed breaches in the execution of the work which however were not sufficiently grave as to entitle the appellant

² SCA 34 of 2012) [2014] SCCA 13 (11 April 2014)

to withhold payment of the outstanding sum. The Judge's finding and holding was that the respondent company had fulfilled its obligations.

41. **I therefore find that Ground 1 lacks merit.**

Ground 2

42. The appellant faulted the trial Judge for holding that the claim for extra works had a direct nexus to the appellant's refusal to pay the outstanding sum of SR 235,000.

43. I am at pains to comprehend the essence of this ground of appeal. A look at the trial Judge's decision shows that the claim for additional works was dismissed on the premise that there was no written document adduced in evidence to support the respondent company's claim. The Judge handled the claim for additional works independent of the claim for the outstanding sum of SR 235,000. It cannot therefore be said that the impugned statement caused prejudice to the appellant.

Ground 2 therefore fails.

Ground 3

44. Under this ground, the appellant faulted the trial Judge for stating that the defence contained no plea in relation to the roof.

45. It is trite law that a party is bound by their pleadings. And **Section 75 of Seychelles Code of Civil Procedure** provides that the statement of defence must contain a clear and distinct statement of the material facts on which the defendant relies to meet the claim.

46. I have carefully read the trial Judge's decision and this is what she stated: "*In relation to the ceiling, the Quantity Surveyor report did not disclose defects to the ceiling, and that the plaintiff had not completed the ceiling. The defence contained no plea in relation to the roof.*"

47. On record is the appellant's written statement of defence. In paragraph 7 of the said document, the appellant averred that he was dissatisfied with the respondent's works on the

roof and lodged a complaint with the Fair Trading Commission as well as the Planning Division in MLUH. As a matter of fact, the appellant's counter-claim revolved around the dissatisfaction with the roof. The appellant claimed a sum of SR 125,000 for the loss and damage caused by the respondent's incomplete work.

48. Having analyzed the trial Judge's decision alongside the statement of defence, I find that although the appellant averred that the work on the roof was sub-standard, he did not provide evidence to back up the claim for SR 125,000.

49. Arising from the above analysis, I hold that ground 3 of the appeal fails.

Ground 4

50. The appellant argued that the trial Judge failed to evaluate the evidence regarding overpayment of the respondent company. The trial Judge held as follows:

"The building agreement contained the price for each stage of work. Mr. Quatre re-measured the building and external work. The building agreement is not a re-measurement contract. No provision is made in the building agreement for re-measurement.

In light of the above, this Court is not satisfied that the defendant is entitled to claim the sum of 101,650.85 for re-measurement. This Court disallows the sum of 101,650.85 claimed by the defendant in respect of overpayment."

51. I find no fault with the above findings. The Surveyor's valuation report of the completed works was independent of the building agreement. In fact it is on record that at the time of carrying out the valuation of completed works, Mr. Quatre had no knowledge of the written agreement. Therefore, the figures presented in the report cannot speak authoritatively to the contents of the agreement.

52. Furthermore, once the court determined that the respondent company had fulfilled its contractual obligation, what was in essence a counter claim by the appellant could not stand.

53. **I therefore hold that ground 4 also fails.**

Conclusion

54. Having found no merit in all the grounds of the appeal, it is hereby dismissed.

Orders

55. The appellant to pay the outstanding sum to the respondent with interest and costs.

DR. LILLIAN TIBATEMWA-EKIRIKUBINZA, JA

I concur

Fernando, President

I concur

Dr. M. Twomey, JA.

Signed, dated and delivered at Ile du Port on 17 December 2021.