

IN THE COURT OF APPEAL OF SEYCHELLES

Reportable

[2021] SCCA 81
Civil Appeal SCA 29/2019 &
SCA 41/2019
(Appeal from CS 11/2016) SCSC

In the Matter Between

Harini & Company Proprietary Limited
(rep. by Mr Serge Rouillon)

Appellant

And

Bajrang Builders Proprietary Limited
(rep. by Mr Guy Ferley)

Respondent

And in the Matter Between

Bajrang Builders Proprietary Limited
(rep. by Mr Guy Ferley)

Cross-Appellant

And

Harini & Company Proprietary Limited
(rep. by Mr Serge Rouillon)

Cross-Respondent

Neutral Citation: *Harini & Company Proprietary Limited v Bajrang Builders Proprietary Limited (SCA 29/2019) [2021] SCCA 17 December 2021; Bajrang Builders Proprietary Limited v Harini & Company Proprietary Limited SCA 41/2019 [2021] SCCA 17 December 2021*

Before: Twomey, Robinson, Dingake JJA

Summary: Contract - Breach of Building Lease Agreement - Damages - Proof of damages - Defective pleadings. Appeal is dismissed - Cross-appeal is dismissed - No order as to costs.

Heard: 7 December 2021

Delivered: 17 December 2021

ORDER

- (1) Appeal is dismissed
 - (2) Cross-appeal is dismissed in its entirety
 - (3) Order awarding the Appellant the sum of SCR75,000 as special damage is quashed
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- (4) Order awarding the Respondent/Counterclaimant the sum of SCR2,531,348 is upheld
(5) No order as to cost for the appeal and cross appeal.
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JUDGMENT

ROBINSON JA (TWOMEY, DINGAKE JJA concurring)

- [1] I state at the outset that this appeal is not without its challenges. I have given it my best consideration.
- [2] The Appellant (the Plaintiff then) filed a plaint against the Respondent (the Defendant then) for damages for breach of a building lease agreement made between the Appellant and the Respondent over two parcels of land, namely parcels V15933 and V15978, located at Providence, Mahe on the 24 September 2010, hereafter the "*Building Lease Agreement*". The Appellant holds a sixty-year lease over the two parcels of land, on which it was desirous of building a commercial building for its use and long term subleasing. The Respondent set up a counterclaim in the Appellant's action.
- [3] I pause here to state that it is necessary to reproduce the pleadings, so far as they are relevant, given the issues of pleadings in this case.
- [4] I turn to the Appellant's amended plaint, in which the Appellant claimed that the Building Lease Agreement was made in consideration of the Respondent agreeing to expend a sum of money in constructing the commercial building, within eighteen months from the date of that Agreement, on conditions that —
- (a) it shall get a rent-free lease of half of the commercial building for ten years from the date of its completion;
 - (b) the Appellant shall reimburse the Respondent half of the costs incurred in constructing the commercial building by monthly instalments of SCR25,000 payable within the first six years of the sublease period, which payment shall commence from the sublease date.

[5] The Building Lease Agreement also recited that the Respondent shall carry out the construction of the commercial building professionally as per the approved plans, law and building practices.

[6] Paragraph 5 of the plaint averred that the Respondent had acted in breach of the Building Lease Agreement as follows —

"5. [...] by failing to complete the agreed construction with due diligence in a professional and workmanlike manner and in accordance with the agreed plan and all existing laws, regulations and acceptable building practice within the agreed time period or at all and [...] in the following additional manner:

a. without the Plaintiff's written approval, the Defendant has altered the building plan.

b. without planning approval the Defendant built their own temporary workers accommodation.

c. without the Plaintiff's permission or planning approval the Defendant set up their own carpentry workshop and have been running their own business.

d. that the poor workmanship has finally caused the planning department to issue a letter confirming the unsatisfactory state of the building".

[7] The Appellant stated that it was desirous of terminating the Building Lease Agreement as the Respondent had failed to complete the works under the Building Lease Agreement, and the commercial building does not have a completion certificate.

[8] The particulars of loss and damage are contained in paragraph 9 of the plaint —

"a. The plaintiff has been unable to carry out his business in his building because of the lack of a completion certificate for licence purposes;

b. The plaintiff has to pay a monthly rent paid to Fish Leather & Co of R 37,500/- for the use of alternate premises since January 2012 and this now amounts to a sum of RS1,875,000.00/- for loss of use of premises and opportunities during the default period by the Defendant and continuing;

c. special damage for displacement and inconvenience costs of:

i. Cost of remedying defects in the building and the cost to complete the building to a satisfactory and licensable state;

- ii. *Commercial rental cost for the last five years to be paid by the Defendant, for their occupation of the premises and running their own business;*
- iii. *payment of lease instalments by the Plaintiff to the Government.*
- d. *interest on the above amounts due at commercial rates."*

[9] In its plaint, the Appellant prayed for the following orders (paragraph 10) —

- "a. rescinding the Building Lease Agreement [...]; and*
- b. ordering the Defendant to —*
 - i. immediately stop operating the workshop inside the leased premises or any activities whatsoever and to vacate the premises forthwith;*
 - ii. remove all temporary sheds, containers and workers accommodation and personal belongings;*
 - iii. remove all construction materials, debris and machinery immediately;*
 - iv. to allow an architect to be appointed to finalise the cost of the building and include the default cost in his final report; and*
 - v. cover any rents by the Plaintiff to third parties, namely Fish leather & Co since January 2012 at R37,500/- per month for carrying out its business activities;*
 - vi. pay the Plaintiff the sum of R200,000/- as special damages;*
 - vii. pay interest on the above amounts at commercial rates from the date of filing of this suit until the whole amount claimed is paid in full; and*
- c) pay costs of this action."*

[10] In its statement of defence, the Respondent denied and disputed the Appellant's claims that it had acted in breach of the Building Lease Agreement by —

- (a) being in occupation of a part of the uncompleted and uncertified premises;
- (b) failing to secure approval to alter the building plan;
- (c) building temporary accommodation for its workers.

- [11] Moreover, the Respondent denied the Appellant's claim that it was responsible for getting the completion certificate to complete the commercial building. Instead, the Respondent alleged that it was the duty of the Appellant under the Building Lease Agreement to obtain a completion certificate. The Respondent went on to state that the Appellant refused to get completion and occupancy certificates upon completion of the commercial building because it wanted to renege on its obligation under the Building Lease Agreement to seek the Government's permission to sublease half of the commercial building to it.
- [12] The Respondent also denied that the Appellant has been unable to use the leased premises and averred that the Respondent has been using the leased premises for the last five years and is currently using the leased premises.
- [13] Overall, the Respondent denied that its actions have resulted in the Appellant being served with an eviction notice by the Town and Country Planning Authority.
- [14] The Respondent, in its counterclaim, alleged that it has invested an amount of SCR3,000,000 on the leased premises and that the actions of the Appellant have highly prejudiced it in the said investment. The Respondent also claimed an extra SCR3,000,000 in compensatory damages, which sum I am not concerned with.
- [15] In its defence to the counterclaim, the Appellant agreed to compensate the Respondent for the works carried out as contemplated under the Building Lease Agreement as per the valuation of an independent quantity surveyor, subject to any set-off amount for the inconvenience, loss and damage it has suffered. [In parenthesis, I state that, in the court below, Mr Bhupesh Hirani, the Managing Director of the Appellant, PW-2, in the course of examination-in-chief, repeated that the Appellant had agreed to pay the Respondent *"the cost of the building as per the QS report"*]¹. I state no more about the averments made by the Appellant in its defence to the counterclaim as those averments are irrelevant to the determination of this appeal. Moreover, the written submissions offered on behalf of the Appellant did not dispute the value for works carried out as contemplated under the Building Lease Agreement as per the valuation of the quantity surveying expert, Mr Nigel Stanley Valentin, PW-1, who prepared a quantity surveying report —

¹ The record of proceedings at the appeal, Volume II p. 141.

"VALUATION OF DEVELOPMENTAL WORK ON LAND PARCEL PLOT No. V15933 AND V15978 AT PROVIDENCE, MAHE, SEYCHELLES", exhibit P1.

- [16] During the hearing of this case in the court below, the learned trial Judge dealt with the prayers at paragraphs "*b(i)*", "*b(ii)*" and "*b(iii)*", repeated in paragraph [9] hereof, by way of interim orders arising out of Interlocutory Applications. Also, prayer "*b(iv)*" had been made redundant as the Appellant had sought the services Mr Nigel Stanley Valentin, PW-1.
- [17] The learned trial Judge made an order terminating the Building Lease Agreement. Neither the Appellant nor the Respondent has challenged that order.
- [18] With respect to the plaint, the learned trial Judge dealt with the following heads of claim—
- (a) the Appellant's claim of SCR1,875,000 representing rent paid by the Appellant to "*Fish Leather & Co*", from January 2012, for renting commercial space at "*Fish Leather & Co*" to carry out its business activities; and
 - (b) the Appellant's claim for special damage in the sum of SCR200,000.
- [19] Concerning the Appellant's claim for rent in the sum of SCR1,875,000, the learned trial Judge held that the Appellant was claiming that sum from January 2012 until the filing of its plaint. She went on to conclude that, as the Appellant had been carrying out commercial activities on the leased premises from 2013 to 2016, the rent amount claimed for that period should be deducted from the amount claimed. She went on to state that "*the equivalent shall be paid accordingly by the Defendant to the Plaintiff*".
- [20] Concerning the claim for special damage in the sum of SCR200,000, the learned trial Judge concluded that the Appellant was entitled to special damages because the Respondent had acted in bad faith in its dealings and, thus, prevented the Appellant from applying for the certificate of completion timeously. Hence, she made an award of SCR75,000 as special damages in all the circumstances of the case. The Appellant has challenged this finding and award of the learned trial Judge.

[21] As for the counterclaim, the learned trial Judge considered the claim of the Respondent that it had invested SCR3,000,000 on the leased premises. Based on exhibit P1, she concluded that it was undisputed that the Respondent had completed a substantial amount of works on the uncompleted commercial building. Thus, she ordered the Appellant to pay the Respondent the sum of SCR2,531,348 invested by the Respondent on the commercial building before its completion by the Appellant. The Respondent has challenged this award.

[22] The learned trial Judge concluded that the Respondent was not entitled to special damage because it had failed to prove its claim for special damage. There was no challenge to this finding.

The appeal and cross-appeal

[23] The Appellant dissatisfied with the findings of the learned trial Judge has appealed against them on the following six grounds of appeal —

- "1. *The learned Judge erred in fact and in law in making the final damages award in the case;*
 - a. in failing to make a final finding of the exact award to be made to each party to the suit;*
 - b. in failing to take note that the Plaintiff was required to and did finish the incomplete building at its own costs as set out in the quantity surveying report which report she has relied on to make a finding for the damages due to the Respondent;*
 - c. in failing to consider that if she found that the Fish Leather rent should be reduced because Appellant was using the premises for 3 years, then an equal deduction should have been made for the Respondent's fully fledged Carpentry Workshop running at the same time to reduce the award to the Respondent.*
 - d. In not considering that the Defence is scant and fails to address the issues raised in the Plaint most importantly Paragraph 9(c) of the Plaint where the Plaint is deemed to be admitted in that respect as there are no pleadings in rebuttal.*
2. *The learned Judge erred in fact and in law in terms of balancing the separate cases of the two litigants where the only substantial evidence came from the Plaintiff and his witnesses and no rebutting evidence from the Respondent except for the statements made in the Quantity surveyors*

report.

3. *The Learned Judge erred in fact and in law in placing too much weight on the Quantity surveyors report to make the award but failed similarly to take into account the evidence of the Appellant to show its general inconvenience, expense, future planning problems due to the Respondent not following the plans, decaying property while the case proceeded and extra repairs required to correct defects.*
4. *The learned Judge erred in fact and law in failing to note and take into account that the Respondent's pleadings did not disclose a full distinct defence to the Appellants claims and their whole case was based on mere denials.*
5. *The learned Judge erred in law in failing to take into account that the unspecific general denials of the Respondent were not sufficient to make out a defence to the Appellant's claims.*
6. *The learned Judge erred in fact and law in not paying enough or any attention to the specific claims of the Appellant in terms of his claims for special damages and costs when reaching her decision of how much to award the Appellant as damages and costs.*

[24] The Respondent has challenged the findings of the learned trial Judge on the following four grounds of appeal —

"1. That the Honourable Judge erred in law in not awarding the Respondent the sum of SR3,000,000/-, including the costs of labour, material and a further sum of SR3,000,000/-, as per the contract.

2. The Honourable Judge erred in law in failing to Order that the Respondent should be reinstated to the building, which it should occupy, as per the contract, for the agreed period of 10 years.

3. The Honourable Judge erred in law in failing to Order that the Respondent is entitled to and must receive a 45 % (percent) interest in the Appellant's company, as per the contract.

4. The Honourable Judge erred in law in failing to determine that the Appellant breached the Agreement, by failing to obtain a "change of use", from Planning Authority for the building premises, on behalf of the Respondent."

[25] I turn to the grounds of appeal.

Ground 1 (a) of the grounds of appeal

- [26] The contention in ground 1(a) of the grounds of appeal is to the effect that the learned trial Judge did not make any award in this case.
- [27] In his skeleton heads of arguments, the Appellant has combined by and large all the grounds of appeal together. Moreover, the Appellant has narrowed down the issues in his skeleton heads of argument which do not address the grounds of appeal but repeated them. Consequently, the skeleton heads of argument are unclear and not succinct and contain unnecessary elaboration. Such skeleton heads of argument run afoul rule 24 of the Seychelles Court of Appeal Rules, 2005, as amended.
- [28] The contention in ground 1(a) does not form part of the issues in the skeleton heads of argument. Clearly, the Appellant is not concerned with this ground of appeal, which stands dismissed.
- [29] We strongly urge Counsel for the Appellant to diligently formulate grounds of appeal and skeleton heads of argument.

Grounds 1(b) and 3 of the grounds of appeal

- [30] Grounds 1(b) and 3 of the grounds of appeal are misconceived.
- [31] As I understand it, grounds 1(b) and 3 concern the Appellant's contention that the learned trial Judge was wrong in not finding that the Appellant was entitled to the money required to make good the defects for the Respondent's workmanship as per the quantity surveying report, exhibit P1. Mr Nigel Stanley Valentin, PW-1, detailed demolition and rectification costs in exhibit P1, as SCR506,879.
- [32] Under the allegation of loss and damage, the Appellant has explicitly claimed special damage for "*displacement and inconvenience costs of: i. Cost of remedying defects in the building and the cost to complete the building to a satisfactory and licensable state;...*". The Appellant did not claim an amount for this head of claim. It is to be observed that the submissions offered on behalf of the Appellant had not quoted any law or authority in support of this head of claim. At the appeal, Counsel for the Appellant was unable to cite any provision of the Civil Code of Seychelles on which the Appellant had relied to claim special damage.

- [33] I have considered Article 1153² *alinéa* 3 of the Civil Code of Seychelles, which permits a claimant to claim special damage ("*préjudice spécial*"). Article 1153 *alinéa* 3 is to the effect that where the defendant has on account of his bad faith caused to the claimant a loss distinct and separate from the loss resulting from the delay in settling an amount due, an award in compensatory damages with interest may be made.
- [34] A detailed explanation of Article 1153 *alinéa* 4 in the French Civil Code, which is in like terms to the Seychellois Article 1153 *alinéa* 3, is given in *Juris Classeur Civil Art 1146 à 1155 Fasc 20* at note 38 —

"38. – Dérogations tenant à la nature du préjudice et au comportement du débiteur.

Ce n'est que dans l'hypothèse où est constaté un préjudice «indépendant de retard» que des dommages et intérêts supplémentaires sont envisageables. On parle alors de dommages et intérêt compensatoires, dont le montant dépend de l'étendue du préjudice souverainement apprécié par les tribunaux.

L'allocation de dommages et intérêts compensatoires sur la base de l'alinéa 4 de l'article 1153, est subordonnée à la réunion de deux conditions visées par le texte. D'une part, le créancier doit faire la preuve d'un «préjudice indépendant du retard». Autrement dit, le demandeur doit démontrer avoir subi un préjudice spécial, distinct de la seule privation de la somme d'argent à l'échéance (Cass. 1 re civ., 14 mars 2000: Juris-Data no 2000-001067.

Il peut être constitué par le fait d'avoir été obligé de faire des «frais et des démarches» (Cass. 1 re civ., 9 déc. 1970: Bull. civ.I, n o 325), le fait d'avoir été privé d'un fonds de roulement important (Cass. 1 re civ., 6 nov. 1963: Bull. Civ. I, n o 481), le fait d'avoir fait l'objet d'une saisie de ses biens (Cass. Req., 7 mai 1872: DP 1873, I, p.40).

D'autre part, le créancier doit faire la preuve de la «mauvaise foi» du débiteur. La conception jurisprudentielle de la mauvaise foi a évolué au fil du temps. Au lendemain de la loi du 1900, les tribunaux se contentaient d'une faute quelconque (Cass civ., 16 juin 1903: D. 19003, I, p. 407). Par la suite, la mauvaise foi a été définie comme le refus délibéré d'exécuter son obligation monétaire, en ayant

² "Article 1153

"With regard to the obligations which merely involve the payment of a certain sum, the damages arising from delayed performance shall only amount to the payment of interest fixed by law or by commercial practice; however, if the parties have their own rate of interest, that agreement shall be binding.

These damages shall be recoverable without any proof of loss by the creditor. They are due from the day of the demand, except in cases in which they become due by operation of the law.

However, the creditor who sustains special damage caused by a debtor in bad faith and not merely by reason of delay, may obtain damages in addition to those for delayed performance". Emphasis supplied

conscience du préjudice cause par cette attitude. Autrement dit, on exigeait du créancier, qu'il établisse l'intention de nuire de son débiteur (cass. Civ., 7 mai 1924, préc. – Cass. Com., 24 avt. 1969: Bull. Civ. IV, n o 143). A l'heure actuelle, il semble que la jurisprudence adopte une conception médiane en exigeant la démonstration d'une faute caractérisée du débiteur (lenteurs exagérées, résistance abusive, passivité...circonstance qui ne traduisent pas nécessairement une intention de nuire au débiteur). Par exemple, la mauvaise foi est caractérisée lorsque le débiteur oppose une résistance ou utilise des moyens purement dilatoires, notamment par l'abus de voies de recours (Cass. 1 re civ., 9 déc, 1970: JCP G 1971, II, 16920, note M.D.P.S). De même, est de mauvaise foi le débiteur qui «connaissait la situation exacte et avait volontairement différé le paiement» (Cass. 1 er civ., 13 avr. 1983: JCP G 1983, IV, p. 193)".

- [35] I have not come across any other provision of the Civil Code of Seychelles under damages arising from the failure to perform the obligation, which deals with special damage ("*préjudice spécial*").
- [36] After considering Article 1153 *alinéa* 3 of the Civil Code of Seychelles and the legal explanations above, I state that the Appellant's pleadings concerning special damage for defects for the Respondent's workmanship are misconceived. In the same vein, the amount of SCR200,000 claimed as special damage is misconceived. It may be that Counsel for the Appellant has claimed special damage on the pleadings in terms of provisions of English law.
- [37] This is enough to dispose of these two grounds of appeal. Grounds 1(b) and 3 stand dismissed.
- [38] [In parenthesis, I state that the learned trial Judge awarded SCR75,000 as special damage in all the "*circumstances of the case*". It is unclear which provision of the Civil Code of Seychelles she had relied on to make this finding. Clearly, the learned trial Judge's conclusion that the Appellant was entitled to special damage was wrong. I quash the award of SCR75,000 made by the learned trial Judge as special damage.

Ground 1 (c) of the grounds of appeal

- [39] Ground 1 (c) of the grounds of appeal is also misconceived.
- [40] This ground of appeal concerned the Appellant's claim on the pleadings for special damage for "*displacement and inconvenience costs of: ... ii Commercial rental costs for the last five years to be paid by the defendant, for their occupation of the premises and*

running their own business". The Appellant did not claim an amount for this head of claim. The learned trial Judge did not deal with it. The pleadings concerning special damage for rental costs are misconceived in any event.

[41] For the reasons stated above, this ground of appeal is flawed and stands dismissed.

Ground 1 (d) of the grounds of appeal

[42] Ground 1 (d), 4 and 5 of the grounds of appeal are misconceived.

[43] These grounds of appeal contended in the main that the learned trial Judge erred in not considering that the Respondent's pleadings were defective.

[44] Concerning ground 1(d), Counsel for the Appellant has tried to argue that the Respondent had on its pleadings expressly admitted special damage claimed in paragraph 9(c) of the plaint. I have already stated that the Appellant's claim for special damage was misconceived.

[45] I express no more about the Appellant's contentions concerning these grounds of appeal as the Appellant's plaint was clearly not a model of felicitous drafting. At the appeal, Counsel for the Appellant directly admitted that the Appellant's pleadings were not without their challenges.

[46] For all the reasons stated above, grounds 1(d), 4 and 5 of the grounds of appeal stand dismissed.

Ground 2 of the grounds of appeal

[47] After considering ground 2 of the grounds of appeal, I state that it is vague and cannot be entertained as it amounts to no ground of appeal under rule 18(3) and (7) of the Seychelles Court of Appeal Rules, 2005, as amended. Obviously, it does not fall under the savings. Thus, ground 2 of the grounds of appeal stands dismissed.

Ground 6 of the grounds of appeal

[48] Under ground 6 of the grounds of appeal, the Appellant complained that the learned trial Judge did not pay close attention to his specific claims for special damage and costs at the

time of making the award in this case. I have stated enough about how the Appellant's claim for special damage was misconceived.

[49] With respect to the Appellant's grievance concerning costs, I have to state that I am at a loss to understand it. It is not even clear whether or not the Appellant had addressed the issue of costs concerning this ground of appeal in the skeleton heads of argument offered on its behalf.

[50] For the reasons stated above, ground 6 of the grounds of appeal stands dismissed.

[51] I now turn to the cross-appeal.

Grounds 1 and 2 of the cross-appeal

[52] At the appeal, Counsel for the Respondent did not press grounds 1 and 2, which stand dismissed.

Grounds 3 and 4 of the cross-appeal

[53] Counsel for the Respondent dropped grounds 3 and 4 at the appeal as they contained matters which fell outside of the pleadings in this case. Both grounds stand dismissed.

Decision

[54] For the reasons stated above, the Appellant's appeal is dismissed in its entirety.

[55] The cross-appeal is also dismissed in its entirety.

[56] I quash the order of the learned trial Judge awarding the Appellant the sum of SCR75,000 as special damage.

[57] I uphold the order of the learned trial Judge awarding the Respondent/Counterclaimant the sum of SCR2,531,348 in damages.

[58] I make no order as to costs both with respect to the appeal and cross-appeal.

Robinson JA

I concur

Twomey JA

I concur

Dingake JA

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