IN THE COURT OF APPEAL OF SEYCHELLES

Reportable
[2022] Civil Appeal SCA 49/2020 SCCA 79 (16 December 2022)
(Appeal from CS 32/2017) SCSC 712

In the matter between:

MONIQUE HERMITTE **Appellant**
(rep. by Ms M. Marguerite)

and

ANTOINE ELLIOT LOW HONG **Respondent**
(rep. by Mr. C. Andre)

Neutral Citation:	*Hermitte v Low Hong* (Civil Appeal SCA 49/2020) [2022] SCCA79 (16th December 2022) (Appeal from CS 32/2017) SCSC 712)
Before:	Andre, Dr. Twomey-Woods, Dr. L. Tibatemwa-EkirikubinzaJJA
Summary:	Appeal against a decision of the Supreme Court – Breach of agreement
Heard:	6 December 2022
Delivered:	16 December 2022

ORDERS

The Court makes the following Orders:

(i) The appeal is dismissed; and

(ii) Costs are awarded to the Respondent.

JUDGMENT

ANDRE, JA

INTRODUCTION

[1] This is an appeal arising out of the notice of appeal filed on 13 November 2020 by Monique Hermitte (Appellant) against Antoine Elliot Low Hong (Respondent), being

dissatisfied with the decision of Her ladyship Laura Pillay J given at the Supreme Court on the 30 September 2020 in Civil Side No. 32 of 2017 (impugned judgment).

[2] The Appellant as per cited notice of appeal, appeals against the whole of the decision upon the grounds of appeal set out in paragraph 2 of the notice of appeal and to be considered in detail below. The Appellant further seeks the relief set out in paragraph 3 of its notice of appeal namely, the setting aside of the impugned judgment with costs; ordering that the appellant is reimbursed for her financial contributions to the business and her share in the process of works performed by the respondent with the materials and equipment of the business, and such further or other orders as this Honourable Court deems fit in the circumstances of the case.

BACKGROUND

[3] Mrs Hermitte, the Appellant in this Court and the Plaintiff in the Supreme Court has brought a case against Mr. Low Hong, the Respondent, for breach of an agreement. Mrs. Hermitte and Mr. Low Hong registered a business, VIS Blasting Drilling and Plumbing Contractor (hereafter the "business" / "VIS"). In the Supreme Court, Mrs. Hermitte claimed that she has contributed SCR607,000 towards the business by buying certain materials and equipment; and that Mr. Low Hong's contribution would be his skills. The loan was taken by the business to purchase a vehicle to be used by Mr. Low Hong. Mrs. Hermitte claimed that the parties agreed to share the profits of the business and that Mr. Low Hong breached the said agreement as he used the vehicle and equipment for his personal benefit and did not share the profits with Mrs. Hermitte. Mr. Low Hong filed a counterclaim alleging that Mrs. Hermitte has not paid the full amount for his services rendered in a different project.

[4] The Supreme Court delivered its Judgement on the 30 September 2020 in Civil Side No. 32/2017 wherein it held that there was an agreement between the parties but dismissed both the Plaint and the Counterclaim as neither had been proved Mrs. Hermitte is appealing the said decision.

GROUNDS OF APPEAL

[5] The Appellant filed 6 Grounds of Appeal which *in the verbatim* state as follows:

> ***Ground 1*** – The learned Trial Judge erred in law and on the facts in finding at paragraphs [20] and [21] that only three issues fell to be determined by the Court and that the case is based purely on the facts in that the learned Trial Judge failed to consider and determine the applicable legal issues of breach of contract and other facts in issue.
>
> ***Ground 2*** – The learned Trial Judge erred in law in failing to consider and determine all the legal and factual issues in that by this failure the Appellant's right to a fair hearing under article 19(7) of the Constitution was compromised.
>
> ***Ground 3*** – The learned Trial Judge erred in law and on the facts in dismissing the plaint at paragraph [52] after having found at paragraph [27] that there was ample evidence of an agreement between the parties to join up as partners in the business and concluded at paragraph [51] that Appellant and Respondent did set up the business in that the learned Trial Judge failed to consider and determine the other facts in issue.
>
> ***Ground 4*** – The learned Trial Judge erred in law and on the facts in failing to consider the Appellant's loss of financial contribution used to purchase the materials and equipment for the business where it was not disputed that the said materials and equipment remained in the possession of the Respondent and were never returned to the Appellant despite Respondent's claim that there were no works to be performed.
>
> ***Ground 5*** – The learned Trial Judge erred in law in her appreciation of the facts of the case and in her application of the burden and standard of proof in civil cases.
>
> ***Ground 6*** – The learned Trial Judge erred in law in that she failed to give due weight to the following relevant facts:

(i) the materials and equipment of the business were purchased from the initial contribution made by the Appellant;

(ii) the materials and equipment purchased remained in the possession of the Respondent;

(iii) Respondent never returned the materials and equipment to the Appellant despite his claim that he did not get work;

(iv) Respondent did undertake works under different projects after setting up the business;

(v) the pick-up truck was purchased from a loan made to the Appellant and Respondent trading under the business name and therefore belonged to both Appellant and Respondent;

(vi) personal use of pick-up truck purchased for the business was clearly established;

(vii) loan repayment by Respondent was not consistent; such that her factual assessment was erroneous.

[6] The Appellant seeks three reliefs as cited in paragraph [2] (supra).

SUBMISSIONS OF PARTIES

Appellant's Submission

[7] By way of filed skeleton heads of submissions of 29 November 2022, the appellant in a gist submits as follows.

[8] With regard to Ground 1, the Appellant states that essentially having found that there was an agreement between the parties the Trial Judge should have considered whether the agreement was breached and if found to be breached consider what losses were suffered. The Appellant further states that the Trial Judge failed to consider important facts, such as the initial contribution by the Appellant to the business. It is submitted that the Trial Judge failed to *"address the legal issue of breach of contract onto which the Appellant's plaint was grounded"*, which is a grave error. The Appellant states that lawfully entered into agreements *"shall not be revoked except by mutual consent or for which the law authorizes"* relying on Article 1134 of the Civil Code.

[9] The Skeleton Heads further address *"implicit duty to act in good faith"*; *"duty to cooperate"*; *"implied principle of fairness and duty of good faith"* relying on F. Terre, P. Simler & Y.Lequette Droit civil: Les obligations (10th ed., Dalloz 2009), at pp. 458-461; *Vijay v Ailee Recreations Ltd.* (1983) SLR 91. It is submitted that *"parties to a contract, particularly like the one at issue, owe to each other a collaboration that allows the contract to produce its full effect or risk not fulfilling their obligations under the contract"*. Appellant further states that, *"had the learned Trial Judge considered a breach of contract she would have found for the appellant and would naturally go on to assess damages"*.

[10] The Skeleton Heads of submissions thereafter consider the issue of damages relying on the decision in *Petit Care Hire V Mendelson* 1977 SLR 68 and *Dubois v Nalletamby* (1979) SLR 33, stating that the judge in that case, *"reiterates that damages for breach of contract include damages for loss sustained and for profit not gained if they were reasonably foreseen or had been in the contemplation of the parties when the contract was made"*. The Skeleton Heads also refer to the decision in the *University of Seychelles A. I of Medicine Inc LTD v Government of Seychelles* (CS97/2011) in which the court allowed parties to negotiate an agreement with regard to damages after finding that there were *"several evidentiary issues with respect to the proof of damages"*. The judge stated that parties are not obliged to come to an agreement, and if they didn't within 60 days, he would proceed with his judgment as to damages.

[11] The Appellant concludes that *"The learned Trial Judge chooses to constrain herself to the assessment of only the breach of the loan agreement and a narrow assessment of profit without considering other legal and fact in issue, an approach which the Appellant rejects"*.

[12] With regard to Ground 2, the Appellant states that the courts are bound to give effect to Article 19 of the Constitution, the right to a fair hearing, which includes an *"examination of all the legal and factual issues brought before the court"*. The Appellant submits that the Trial Judge failed to consider and determine all the legal issues while the Respondent solely benefited from the venture by using the vehicle and equipment.

[13] In relation to Ground 3, Skeleton Heads state:

> *"A partnership is a contract whereby two or more persons agree to make a joint contribution for the purpose of sharing any benefit that may result therefrom (Article 1832 of the Civil Code). The concept of profit is inherent in a commercial partnership. The Learned Trial Judge accepts this at paragraph 23 when she confirms that 'the nature of the business then governs the nature of the arrangements for profits.*
>
> *The joint venture is the basic subject matter in this case. The plaint is grounded in the breach of this joint venture. As a result, the plaintiff now appellant had prayed for damages for the breach (Barbe VHoureau (2003) SLR118)"*

[14] With regard to Ground 4, the Skeleton Heads refer to Article 1838 which states that *"every partner must contribute thereto either money or other property or his work. It is not in dispute that the plaintiff contributed money and that the defendant brought the skills"*.[1] The Appellant submits that based on the evidence the partnership benefited from the funds contributed by the Appellant. The Skeleton Heads refer to the decision in *Gonzage D'offay v. Alf Barbier* (1981) S.L.R. 100 stating that it is similar to the present case and that although there was no written agreement between the parties, the defendant was not able to explain activities on any basis other than one of a partnership.[2] The Appellant further refers to the decision in *Mondon v Rassool* (CS 230 of 2008) [2013] SCSC 33 (17 March 2013) where the judge explained that an agreement can be express or implied for the partners to make a joint contribution for the purpose of sharing benefits that may result therefrom. It is submitted that the court did not find that an agreement existed between the parties in that case.

[1] Citation is from Article 1833:
"A partnership must have a lawful object and shall be made in the common interest of the parties. Every partner must contribute thereto either money or other property or his work."
Article 1838 referred to in the Skeleton Arguments relates to universal partnerships:
"Article 1838
The universal partnership of profits consists of everything which the parties acquire through work, however obtained, during the continuance of the partnership; any movable property which each partner possesses at the time of the contract is also included; but the immovable property which each partner owns personally shall only be included to the extent of its enjoyment"
[2]

[15] In relation to Ground 5 it is submitted that upon overall assessment of the entire evidence on record it should have been found that the following facts and circumstances were established:

> *"i. Proof of an agreement made out ex-facie the plaint and by evidence produced with no counter evidence by the defendant.*
> *ii. The plaintiff's contribution to the business with no counter evidence by the Respondent*
> *iii. The contribution of the plaintiff had benefited the business in terms of the materials, equipment and Nissan double cab purchased.*
> *iv. The materials, equipment and transport were used on projects*
> *v. Except for SCR 25,000 the Appellant received no share of profits.*
> *vi. The appellant incurred loss of initial capital injected into the business and other losses such as airfares"*

[16] The Appellant further makes reference to Halsbury's laws of England (4th Ed), paragraph 19, and *Banane v Banane* (SCA29 of 2018) (2020) SCA40. It is stated that relevant facts have been left out of the assessment.

[17] With regard to Ground 6, Skeleton Heads state:

> *The learned Trial Judge erred in law in that she failed to give due weight to the following relevant facts:*
>
> *(i) The material and equipment of the business were purchased from the initial contribution made by the appellant. No assessment of this fact is made by the Learned Judge.*
>
> *(ii) The materials and equipment purchased remained in the possession of the Respondent. No assessment of this fact is made by the Learned Judge.*
>
> *(iii) Respondent never returned the materials and equipment to the appellant despite this claim that he did not get work. No assessment of this fact is made by the Learned Judge.*
>
> *(iv) Respondent did undertake works under different projects after setting up the business. It was established that the respondent carried business for PMC, & Neil Surman but the learned Trial Judge dismissed those facts based on the erroneous analysis that for these to be proven, the tools would have to be used when the contribution to the joint venture of the respondent was in terms of skills*
>
> *(v) The pickup truck was purchased from a loan made to the Appellant and Respondent trading under the business name and therefore belonged to both Appellant and Respondent; No assessment of this fact is made by the Learned Judge.*
>
> *(vi) Personal use of pick-up truck purchased for the business was clearly established; No assessment of this fact is made by the Learned Judge.*

(vii) Loan repayment by Respondent was not consistent; such that the factual assessment was erroneous. It was always the assertion of the Appellant that the Respondent failed to be consistent on the loan payments whereas the Learned Trial Judge's assessment was on the failure to pay loan.

The Learned Trial Judge identifies at paragraph 22, 27 and 45 that the defendant was not truthful but fails to give due weight to the Appellant's evidence. As such the Learned Trial Judge failed to reach a just and equitable solution in this matter.

[18] Finally, based on the above submissions, the Appellants pray to this Court that this appeal should be allowed as prayed for with costs.

Respondent's Skeleton Heads of Arguments

[19] By way of filed submissions of 22 November 2022, the respondent in a gist submits as follows.

[20] The Respondent states that the Appeal is out of time *"as 30 days would end on the 11 November 2020, the Appeal was indeed filed on the 12 November"*. The Skeleton Heads of Argument by the Respondent is brief:

*"**Ground 1***

2. It is clear that the learned trial Judge did not erred in her findings and that she gave proper and legally sound reasons as to why she came to the conclusion that she got to in her Judgement. (sic)
At paragraph 20 the issues detailed to be decided by the Court was indeed correct and proper in light with the plaint.

Ground 2

3. It is clear that there had been no violation of article 19(7) as the matter was heard and the Judge was right in coming to a conclusion.

Ground 3

4. The Judge was indeed correct to come to such conclusion as it was clear from evidence that there was no agreement as averred by the Plaintiff and that there was simple armament to assist.

Ground 4, 5 & 6

5. The Judge was right in her conclusion"

[21] The Respondent moves for the dismissal of the appeal with costs.

ANALYSIS OF THE GROUNDS OF APPEAL

[22] Prior to the analysis of the Grounds of Appeal, the issue of whether the appeal is out of time needs to be determined. Judgment was delivered 30th September 2020. Notice of Appeal is dated 12th November but filed on the 13th November. November 1st is a public holiday, which was a Sunday in 2020, therefore Monday 2nd November was not a working day. In computing the number of days the first as well as the last days are excluded as per Court of Appeal rules. Therefore, 30th day is the 12th November, 13th November being the filing day is excluded and appeal was filed within time.

Ground 1

[23] As submitted by the Appellant, the Trial Judge has indeed identified three issues to be considered by the Court in paragraph [20], and the issue of the breach of agreement/contract is not expressly included:

> *"[20] The issues for the Court to consider are as follows:*
>
> *(1) Did the parties enter into an agreement to join up as partners in a business?*
> *(2) Did the Defendant fail to pay the loan instalments?*
> *(3) Did the Defendant fail to pay the Plaintiff profits earned by the business?"*

[24] Paragraph 4 of the Appellant's Written Submissions (J2 of the Court of Appeal Bundle) identified 6 issues for the Court's consideration, one of which is *"(3) Has this agreement been breached and by whom?"*. The Plaint (B1-B2) also quite clearly alleged a breach of the agreement. Particulars of breach being: (i) use of material, equipment, and Nissan vehicle purchased for business for own benefit and profit; (ii) failure and refusal to credit business bank account with proceeds of the business and denying Plaintiff share of profit; (iii) failure and refusal to share profits of business from date of business operation to date.

[25] The Trial Judge has indeed concluded in the judgment that there was an agreement between the parties:

> *"[27] On the basis of the above I find that there is ample evidence that there was an agreement between the parties to join up as partners in the business of VIS Blasting Drilling and Plumbing Contractor."*

[26] While it is clear that the Trial Judge did not list the issue of breach of the contract expressly, it is also necessary to consider whether the issue was addressed. In my opinion, the Trial Judge did consider and address at least most, if not all, of the averments in the particulars of breach for the reasons analysed below. Having found that the evidence adduced was not sufficient to support the averments, the Plaint was dismissed. Essentially, the Trial Judge even though not expressly, did find that having not proved particulars of the breach, the Appellant failed to prove the breach of the agreement.

[27] Firstly, particulars of the breach (i) actually address two issues: use of materials and use of the vehicle for the Respondent's own benefit. These will be addressed separately. Particulars (ii) and (iii) in my view are almost, if not fully, identical stating that the Respondent did not share profits of the business with the Appellant.

<u>Use of equipment & profits</u>

[28] The Trial Judge's analysis of the use of the equipment and profits can be found in paragraph [38] of the Judgment onwards. In paragraph [39] the Trial Judge identifies that in order to ascertain whether the Respondent failed to pay the Appellant her share of profits, it is necessary to establish whether the business was making any profit.

[29] It was established that VIS did *"only one job on an old house at Les Cannelles from which he* [the Defendant] *gave the Plaintiff SCR 25, 000.00"*. The Trial Judge addressed evidence regarding Neil Surman's testimony that he paid the Defendant for use of the compressor in paragraphs [42]-[43]. It was held:

> *"The cheque stubs do not match the evidence of the witness in that the payments were made to the Defendant for plumbing works whereas the witness stated he paid the Defendant for use of the compressor per his evidence at page 2 of the proceedings of 8th November 2019 at 2pm".*

[30] It was further found that Defendant was only paid for labour and materials provided by Mr. Surman.

[31] The job for the Property Management Corporation was analysed in paragraph [44]. The Trial Judge came to a finding that there was no evidence that the Respondent was using the business equipment for the work that he was paid for. The Trial Judge stated:

> *"[44] . . . However,* ***there is no evidence that the Defendant was using any equipment or materials from the business for plumbing works****. I cannot subscribe to the view that the Defendant having agreed to enter into business with the Plaintiff to undertake drilling, blasting and plumbing works was excluded from undertaking works in his own name.* ***Had the Plaintiff shown that the Defendant was undertaking basting and drilling works using the compressor belonging to the business or was undertaking plumbing works using the equipment and materials of the business that would have been a different matter****. In as much as I accept the evidence of the Plaintiff that she injected money into the business for the purchase of the materials and compressor, and assisted with the purchase of the pickup, on the record though there is no evidence that the Defendant was using materials owned by the business for plumbing works and there is insufficient evidence that he was renting out the compressor****."***
>
> (emphasis added)

[32] Since there is no evidence of any agreement that the Respondent would only exclusively conduct plumbing business for the VIS business, I agree with the findings of the Trial Judge that the Respondent could have taken jobs on his own as long as he was not using business equipment. If it was shown that he was using business equipment then he could have been in breach of the agreement. The findings in paragraph [44] also acknowledge that the Trial Judge accepted the Appellant's evidence that she had injected money into the business.

[33] The Trial Judge concluded:

> *"[51] In conclusion, though I accept that the Plaintiff and the Defendant set up the business of VIS Blasting Drilling and Plumbing Contractor together, there is insufficient evidence that the Defendant failed to pay the loan instalments and/or pay the Plaintiff her share of the profits earned by the business."*

[34] The finding, therefore, dismisses the particulars of the breaches (ii) and (iii) which relate to profits. Therefore, while the Trial Judge does not clearly and expressly state in the Judgement that the agreement was not breached her findings establish that the Appellant

did not prove her particulars of a breach of (ii) and (iii). At the outset of the analysis, the Trial Judge stated that it was necessary to consider whether the business was actually making profits and found that only one job was done using the business equipment and the Respondent accounted for that profit.

[35] In relation to particulars of breach (i) – use of vehicle and equipment for own benefit, while the abovementioned analysis considered and determined the issue of the use of equipment, the use of vehicle is not expressly addressed.

Vehicle

[36] The Vehicle issue was determined in relation to loan repayments in paragraphs [28]-[37]. The vehicle was purchased by way of a loan of SCR 292,000.00 taken in the name of the business. The vehicle therefore should be owned by the business. Payment of Road Tax Receipt and H Savy Insurance Renewal Certificate (Exhibits P4 and P5) both are in the name of VIS Business name stating that the vehicle is commercially owned. As stated by the Appellant herself, the Respondent was crediting her account with loan repayments, save for the issue of an additional SCR 2,000. Further, paragraph 2 of the Plaintiff's Written Submissions (J1 of the Court of Appeal Bundle) states that the Respondent's contribution was also a mortgage of personal property to guarantee the loan. Therefore, as further admitted by the Appellant in the written submissions, the contribution of the Respondent was not just skills but also a monetary contribution towards repayment of the loan which was guaranteed by the mortgage of his personal property.

[37] With regard to the additional SCR 2,000, the reasons for the additional charge are explained in paragraphs [30]-[32] of the Judgment with the Trial Judge concluding her understanding of the evidence and bank arrangement, that "*As long as the VIS was crediting the Plaintiffs account with the loan repayment of SCR 7992/- the Plaintiff would not be out of pocket"*. In paragraph [33] the Trial Judge states:

> *"[33] The issue then is whether the Plaintiff's account was being credited with the loan repayment, which was totally dependent on the business earning money."*

[38] The Trial Judge concludes her determination by finding that there was insufficient evidence to establish that the Respondent failed to pay the loan instalments. Paragraph [36] of the Judgment further notes that the Respondent's evidence in cross-examination was that the loan was paid off, although not clear by whom.

[39] Nevertheless, paragraph [44] of the judgment itself states that *"Had the Plaintiff shown that the Defendant was undertaking basting and drilling works using the compressor belonging to the business or was undertaking plumbing works using the equipment and materials of the business that would have been a different matter"*. The vehicle, arguably, can also be considered as 'equipment' belonging to the business. However, the nature of the agreement with regard to the vehicle was not clear, considering that the Respondent was also paying off the loan. Therefore, the Appellant did not substantiate her arguments regarding the vehicle.

[40] Therefore, Ground 1 as it is worded, stating that the Trial Judge erred by failing to consider and determine a breach of contract, fails as even though the Trial Judge did not expressly say that there was or was not a breach of contract, the particulars of the breach as to use of equipment for own benefit and failure to account profits were addressed in the judgment and the finding was that the Appellant failed to prove these issues.

Ground 2

[41] The Appellant did not further substantiate the submissions with regard to Ground 2. Therefore, the ground does not succeed.

Ground 3-6

[42] Grounds 3-6 of the Appeal repeat certain matters already addressed and are in a way interlinked. They mention similar if not identical issues with certain differences in the arguments, the issues which have not yet been addressed relate to the averred failure of the Trial Judge to consider the monetary contribution injected into the business and alleged loss thereof. It further addresses the current whereabouts of the equipment. The Grounds reiterate that the Trial Judge failed to give due weight to relevant factors.

[43] Firstly, some of the submissions in the Skeleton Argument relate to the existence of the agreement, which is not the issue of the Appeal. The Trial Judge did find that an agreement existed.

[44] In relation to Ground 5 the Appellant lists in (i)-(vi) facts and circumstances that should have been found to be established and concludes that the relevant facts have been left out by the Trial Judge. Points raised under (i)-(iii) (existence of the agreement, Appellant's contribution to business; that contribution had benefited the business in terms of materials equipment, and car purchase) have been addressed in the judgment. Point (iv) *"The materials, equipment and transport were used on projects"* was not omitted by the Trial Judge, the Trial Judge held that it was not proven that materials were used during the work undertaken by the Respondent in his own capacity. Point (v) *"Except for SCR 25,000 the Appellant received no share of profits"* – the Trial Judge found that there were no other profits proved by the Appellant. Point (vi) *"The appellant incurred loss of initial capital injected into the business and other losses such as airfares"* – this point will be addressed below.

[45] Under Ground 6, the Appellant states that the Trial Judge erred in law in that she failed to give due weight to the relevant facts listed under (i)-(vii). Points (i)-(iii), (v):

> *"(i) The material and equipment of the business were purchased from the initial contribution made by the appellant. No assessment of this fact is made by the Learned Judge.*
>
> *(ii) The materials and equipment purchased remained in the possession of the Respondent. No assessment of this fact is made by the Learned Judge.*
>
> *(iii) Respondent never returned the materials and equipment to the appellant despite this claim that he did not get work. No assessment of this fact is made by the Learned Judge.*
>
> . . .
>
> *(v) The pickup truck was purchased from a loan made to the Appellant and Respondent trading under the business name and therefore belonged to both Appellant and Respondent; No assessment of this fact is made by the Learned Judge."*

[46] Initial contribution, ownership of the assets, and in whose possession the equipment is will be addressed below.

[47] Points (iv) state:

> *"(iv) Respondent did undertake works under different projects after setting up the business. It was established that the respondent carried business for PMC, & Neil Surman but the learned Trial Judge dismissed those facts based on the erroneous analysis that for these to be proven, the tools would have to be used when the contribution to the joint venture of the respondent was in terms of skills"*

[48] The Appellant did not substantiate why the analysis was erroneous. As pointed earlier, I agree with the Trial Judge's analysis with regard to this issue.

[49] Point (vi):

> *"(vi) Personal use of pick-up truck purchased for the business was clearly established; No assessment of this fact is made by the Learned Judge."*

[50] The issue with regard to the vehicle has been addressed in this judgment in relation to Ground 1 analysis.

[51] Point (vii):

> *(vii) Loan repayment by Respondent was not consistent; such that the factual assessment was erroneous. It was always the assertion of the Appellant that the Respondent failed to be consistent on the loan payments whereas the Learned Trial Judge's assessment was on the failure to pay loan.*

[52] It is not entirely clear how this submission is relevant to the Appeal. Paragraph 9 of the Plaint states that *"although the Defendant credits Plaintiff's personal bank account with the monthly repayment sum, Plaintiff has to cater for additional funds in the sum of SCR2000/- in her personal bank account monthly for the repayment of the said loan"*. The issue of SCR2000 was already addressed above. The Appellant averred that the Respondent was often late with the payment; however, it is also not known whether the Respondent was even aware of the Appellant's additional charges due to her other personal loan. The Appellant is also not claiming the amount of additional charge from the Respondent. Relevance, therefore, is not clear.

[53] As noted in the analysis in relation to Ground 1, the Trial Judge did acknowledge, the contributions of the Appellant to the business, albeit also noting the *"discrepancies*

galore in the evidence of the Plaintiff and the case as a whole" as not all the invoices refer to the business.

[54] As it appears from the evidence, the assets should be owned by the business, not the Appellant or Respondent personally. The Appellant however is asking the Court for a personal remedy. While the Appellant alleged that the equipment was sold by the Respondent, no further evidence were provided as to the whereabouts of the assets. Moreover, the Plaint was based on a breach of contract without addressing or pleading for the return of the assets. Therefore, this Court is not going to determine the issues not pleaded.

[55] Certain issues raised by the Appellant in relation to Grounds 3-6 has either already been addressed by the Trial Judge, and I agree with her analysis; or the Appellant has not substantiated the issues with proof. Grounds 3-6 therefore do not succeed.

CONCLUSION

[56] While the Trial Judge did not expressly identify a breach of contract under issues to be considered, in her Judgement particulars of breach stated in the Plaint was considered and determined. The determination was that the Appellant did not prove the particulars of the breach. The Trial Judge determined that the Appellant did not prove that the Respondent used the equipment while doing other jobs in his personal capacity, not for VIS. The Appellant did not prove that the Respondent did not share the profits of VIS there were no profits of VIS apart from the one job for which the Respondent has accounted. The issue of the use of the vehicle not for the VIS business purposes was not specifically addressed.

[57] With regard to the monetary contributions by the Appellant, as it appears from the evidence the assets bought should be owned by the business, in which the Appellant is a partner, but not owned by the Appellant personally.

DECISION

[58] Having found no merit to each of the grounds of appeal as raised by the Appellant, the appeal is dismissed and the reliefs sought cannot be granted for the reasons given.

[59] It follows thus, that the judgment of the lower court is upheld in its entirety.

ORDER

[60] As a result, this Court orders as follows:

(i) The appeal is dismissed; and

(ii) Costs are awarded to the Respondent.

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S. Andre, JA

I concur

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Dr. L. Tibatemwa-Ekirikubinza,

TWOMEY-WOODS JA

[61] I have read my learned sister's decision with which I agree entirely. I wish to add the following remarks.

[62] A reading of the Plaint discloses the fact that no agreement was pleaded. Whilst each party's intention was averred, the terms of the agreement were never disclosed. In the circumstances, it is impossible for the court to deduce whether there was a breach of any of the terms of the agreement.

[63] At the hearing of the appeal I took exception to the Respondent's s heads of argument which have been set out in my learned sister's decision above. The heads of argument as drafted breach Rule 24 of the Seychelles Court of Appeal Rules. Such arguments or what may be termed non-arguments in the present case display a complete lack of respect not only for court but also for the party Counsel represents especially as this is a court of last resort. It is totally unacceptable for heads of argument to simply state that the court was correct in its decision. It is for this reason that I remonstrated with Counsel and stated that his heads of argument were rejected. Let this be a lesson for future appeals.

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Dr. M. Twomey-Woods JA

Signed, dated, and delivered at Ile du Port on 16 December 2022.