IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CA19/2016

Appeal fromMagistrates CourtDecision243/2014

[2017] SCSC

FELIX AMELIE

Appellant

versus

MARC MARGUERITTE

Respondent

Heard:

Counsel: Mr. Elvis Chettyfor appellant

Ms. Poolfor respondent

Delivered: 24 October 2017

JUDGMENT

Vidot J

[1] The Appellant appeals a judgement of Learned Magistrate M. Ng'hwani delivered on 16th July 2015. The original suit pertains to an oral building agreement. The Appellant, then Plaintiff was claiming the sum of SR25,000/- being outstanding balance of works performed on the house of the Respondent/Defendant. The Appellant had pleaded that the consideration for works done was agreed at SR31,000/-. He averred that he was paid SR6000/- only and he was claiming the balance of the contract sum.

[2] The Respondent had denied the claim and averred that works were not completed and he had to hire another contractor to complete them and that they were defective and of poor workmanship. He alleged that apart from the SR6000/- that the Appellant acknowledged receipt thereof, he had paid an additional SR8,000/- as an advance, making a total of SR14,000.

[3] The Learned Magistrate had found in favour of the Respondent and dismissed the Plaint.

[4] The Memorandum of Appeal lists the following grounds;

(i) The Learned Magistrate erred when she failed to thoroughly consider the evidence;

(ii) The learned Magistrate erred in law and on the evidence, in holding that the Respondent has proved his case; and

(iii) The Learned Magistrate erred when she thoroughly failed to consider all the evidence.

[5] At this stage I wish to remind Counsels that as per Rule 12 of the Subsidiary Legislation; The Appeal Rules of the Courts Act, which states that the memorandum of appeal shall contain a concise statement in numbered paragraphs of the point or points on which the judgment is alleged to be erroneous without any narrative or argument and a concise prayer of the relief.

[6] I note that unfortunately in this case the memorandum appeared too vague and not as concise as prescribed by Rule 12. Furthermore, there is no prayer of the relief sought.

[7] I further note with concern that the Defence raised a Plea in limine litis that the Plaint was prescribed and that plea was not addressed in submission of counsels at first instance and nor was it addressed in the judgment. That being the case, and though pleadings clearly suggest that the case was indeed prescribed, this Court cannot make a determination on that issue, especially since there was no appeal on that point. That indeed is unfortunate.

[8] In the submission in the Magistrate Court, Counsel for the Respondent/Defendant invoked the provision of Article 1341 of the Civil Code of Seychelles. That Article deals with the admissibility of oral evidence before Court on a matter which exceeds SR5000/-, Though such evidence may be admissible in commercial transaction as provided under the Commercial Code, in the present it could not have unless Court had ruled to allow it. However, following from the proceedings, I note that no objection was taken at the time such evidence was being adduced. As held in **Michaud v Ciunfrini SCA 26/2015 (24th August 2007),** if a party does not object to oral evidence when it is given, it is given that the evidence is presumed admissible.

[9] Though the Appellant raised 3 grounds of appeal in the memorandum, which grounds are interlinked, in his written submission, Counsel for the Appellant failed to address the grounds individually but rather a "melange' of all of them together. I can only assume that this was so because as afore stated the grounds are interlinked.

[10] Ground 1 of the Memorandum alleges that the Learned Magistrate erred in that she failed to consider all the evidence. The Appellant failed to identify which evidence was not taken into account. The Learned Magistrate citing **Zatte v Joubert [1993] SLR 132**, to the effect that he who asserts must prove, found that the Appellant/Plaintiff failed to prove his case. Though that remains a general principle, the law provides that at times the evidential burden shifts. The Respondent counters the Appellant's submission by holding that the latter produced no documentary proof of the contract. It is correct that no written agreement was exhibited, but the existence of an agreement is not in dispute. The judgment finds that this was so. What the Learned Magistrate found is that the Appellant did not prove the value of the work completed and what amount was paid. The latter part was the issue to be determined. She also concluded that the Appellant failed to produce documentary exhibits nor witnesses to corroborate his testimony. Definitely the Learned Magistrate considered the evidence adduced in the case, but whether a competent assessment of the evidence was made is a different matter. In the circumstances this ground of appeal fails.

[11] The 2nd and 3rd grounds of appeal shall be dealt with together. They state that the Learned Magistrate erred in law and on evidence in holding that the Respondent has proved his case and that the Learned Magistrate erred when she failed to thoroughly consider the evidence. It is disappointing to note that the filed submission by Counsel for the Appellant is so scanty that it is not clear if the issues which he is alleging were not sufficiently considered. Reading from the judgment, the Learned Magistrate stated correctly that the onus is on he who asserts to prove. However, as above stated the evidential burden does sometimes shifts. First, there is no dispute that SR6000/- was paid for construction of concrete bean. There is evidence that the Appellant started erecting the roof. Daniel Antoine Benoit had stated that when he *"started to cover the house, there was wood which was put, we have to remove"*. This partly corroborates the evidence of the Appellant. Therefore, there was the issue of the advance that was allegedly paid. The Appellant averred he did not receive payment. Once he satisfies court that work was performed, the burden was on the Respondent to show proof of payment. He failed and therefore the Appellant should be entitled to that SR8,000/- deposit.

[12] The Respondent/ Defendant had claimed that the work was defective. The Respondent claimed that the concrete beam did not have iron rod reinforcement. His testimony was supported by that of Daniel Antoine Benoit in that at least the part of the beam he had to cut there was no presence of iron rods. The Respondent testified that part of the beam fell down and damaged the car of the carpenter. It had to be fixed. That evidence was not traversed by the Appellant. The Appellant did not satisfy the Magistrate that he was owed SR25,000/-. I see no reason on this point to reverse the decision of the Learned Magistrate. Furthermore, the work was not completed and there were defects.

[13] The Learned Magistrate in her judgment stated that she "*perused the evidence on record adduced by the parties.*" I take this to mean <u>all</u> evidence. The Appellant did not identify the particular pieces of evidence which he feels were not considered. I have reviewed the evidence and though I would have welcome a more comprehensive analysis of pertinent parts of the evidence, I cannot fault the Learned Magistrate. Therefore these grounds succeeds partially to the extent that I find that the SR8,000/- was not paid, particularly

since it is evident that the Appellant commenced the work. The Respondent is to pay that sum to the Appellant.

Signed, dated and delivered at Ile du Port on 24 October 2017

M Vidot
Judge of the Supreme Court