

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CS No. 07 of 2016

[2018] SCSC 732

OLIVIER JOSEPH CEDRIC LEVI

1st Plaintiff

ROSELICE DIANA LEVI

2nd Plaintiff

Versus

RICKY CHRISTOPHER CHARLES

Defendant

Heard: 16th, 29th January 2018.

Counsel: Mr. F. Elizabeth for the Plaintiffs
Mr. N. Gabriel for Defendant

Delivered: 1st day of August 2018

JUDGMENT

ANDRE-J

[1] This Judgment arises out of a Plaint of the 27th January 2016 filed by Olivier Joseph Cedric Levi (“1st Plaintiff”) and Roselice Diana Levi (“2nd Plaintiff”) (cumulatively

referred to as “Plaintiffs”) in this Judgment against Ricky Christopher Charles (“Defendant”).

- [2] The hearing took place on the afore-mentioned dates and after hearing all Learned Counsels as above-referred, filed written submissions on behalf of their respective parties and of which contents have been duly considered.
- [3] For the purpose of this Judgement, the following are the relevant factual and procedural background to the pleadings.
- [4] The Plaintiffs have filed the Complaint against the Defendant of the above-mentioned date, claiming the sum of Five Hundred and Fifty Thousand, Two Hundred Rupees (SR550, 200/-), for a breach of a lease agreement signed between them on the 11th February 2015 and as amended on the 19th February 2015. The Plaintiffs aver that prior to the signing of the lease agreement, they were sent images showing only the exterior of the dwelling house subject matter of the agreement and they were informed by the Defendant that the house would be ready upon their arrival.
- [5] The Plaintiffs further aver that the Defendant had informed them that, “*the premises is a three bedroom house, with its own compound, big spacious kitchen, shower and all comforts*”, and advised them that in order to secure the said premises they would have to make payment in form of one month’s rent in advance, together with five months’ rent as deposit.
- [6] Plaintiffs further aver that the express terms of the lease agreement in question were that the Defendant be responsible for the maintenance and repair of the structure of the dwelling house, the Defendant be responsible for major breakdown of electrical appliances and water and sanitary system arising from normal wear and tear, the Defendant be responsible for keeping the grounds tidy and in good and aesthetic condition.
- [7] It is averred that in breach of the Lease Agreement, the Defendant has failed, refused or neglected to ensure that the rented premises was in a habitable condition and in a completed state upon the arrival of the Plaintiffs and their children in the Seychelles and that the rented premises were incomplete; there were no doors, the flooring had not been

finished, there was no electricity or water, the septic tank outside was open and filled with toxic waste and as a result, the Plaintiffs, together with their three children, an infant child of only six months and two twelve year olds, were forced to resort to hotel accommodation, for a period of one week before they could find alternative housing accommodations with their friends.

[8] The Plaintiffs aver that they have tried many ways to communicate and seek for a reimbursement of the money paid to the Defendant, however he has failed or refused or neglected to respond.

[9] As a direct result, the Plaintiffs allege sufferings, loss and damage for which the Defendant is liable to compensate them for in the form of a deposit (five months' rent) paid in advance in the sum of Thirty Two Thousand, Five Hundred (SR 32,500/-); one months' rent in the sum of Six Thousand, Five Hundred Rupees (SR 6,500/-); one week hotel charges in the sum of Eleven Thousand Two Hundred Rupees (SR 11,200/-); moral damages in the sum of Two hundred Thousand Rupees (SR 200,000/-) and punitive and Exemplary damages in the sum of Three Hundred Thousand Rupees (SR 300,000/-). Hence moving for Judgment in the total sum of Five Hundred and Fifty Thousand, Two Hundred Rupees (SCR 550,200/-)with interest and cost.

[10] In answer to a counterclaim as filed by the Defendant (as illustrated below), the Plaintiffs aver that the counterclaim is denied and that that they could not enter the leased premises due to the fault of the Defendant in not completing the house and to put it fit and IN habitable condition to allow the Plaintiffs to take possession and occupy the same and hence imputing breach on the Defendant as per the Plaint. The Plaintiffs further dispute any alleged loss and sufferings by the Defendant in the sum as claimed and move for the dismissal of the counterclaim.

[11] The Defendant on his part admits the existence of the lease agreement but denies furnishing only the photographs of the exterior of the house and not the interior. It is averred in response to the Plaint that the Defendant did advise the Plaintiffs of the incomplete status of the house but nevertheless they insisted in coming to stay in it when they travel to the Seychelles in December 2014.

- [12] The Defendant further avers that the Plaintiffs having signed the lease agreement were under the obligation to pay the Defendant one month's rent in advance and the five months' rental deposit.
- [13] The Defendant avers further that the Defendant had never reneged on his responsibility for maintenance and repair major breakdown of electrical appliances, water and sanitary system and keeping the grounds tidy and in good and aesthetic condition.
- [14] The Defendant further raises a counterclaim in that albeit signing the lease agreement, the Plaintiffs failed to enter the leased premises hence the breach of the lease agreement and as a result claiming from the Plaintiffs loss and damages suffered on his behalf in the form of loss of revenue for the period of July 2015 to February 2016 in the sum of Forty Six Thousand, Five Hundred Rupees (S.R. 46,500/-), moral damages for stress and anxiety at Twenty Five Thousand Rupees (S.R. 25,000/-), punitive and exemplary damages at Twenty Five Thousand Rupees (S.R. 25,000/-) totalling to Ninety Six Thousand Five Hundred Rupees (S.R. 96,500/-).
- [15] The first Plaintiff and the Defendant testified in person at the hearing.
- [16] The Plaintiff testified in a gist that his wife the second Plaintiff had been in contact with the Defendant and that he did not know the Defendant himself. He further testified that the lease agreement was signed between their lawyer Mr. Jean Marc Lablache and the Defendant (*Exhibit P2*).
- [17] The 1st Plaintiff further testified that he saw the pictures of the house online and found it to be nice and it satisfied his taste. However, he failed to ask his lawyer to inspect the house prior to signing the agreement and paid the deposit.
- [18] That when themselves and their children arrived in Seychelles at the end of June 2015, the family was very enthusiastic. The exterior of the house was perfect, but the interior

was horrifying (*Exhibit P6*).

- [19] The 1st Plaintiff testified the he was promised a three bedroom house with a big lobby and a functioning bathroom and shower and a living room. In conclusion the state of the house according to the Plaintiff was so terrible that even animals would refuse to live there. The first Plaintiff testified additionally that he and his family decided not to stay in the house and tried to call the Defendant but they could not reach him. The family then went to the Coral Strand Hotel; whose Manager was a friend of theirs; Mr Denis Veboukhorov, who allowed them to stay at the hotel at a special price.
- [20] The first Plaintiff testified that they went to the police station at Anse Etoile to try to get in contact with the Defendant and later on stated that on the 27th July 2015 he sent a without prejudice letter to the Defendant, that he had paid for the hotel fees which he is also claiming and that the time he spent in Seychelles was not very joyful and everything was a big mess.
- [21] The 1st Plaintiff as indicated earlier denied the counterclaim in terms of the above averments and moved for its dismissal.
- [22] On his part, the Defendant testified that the Plaintiffs were meant to travel to Seychelles in July 2015 and not in June 2015 and had they stuck with their initial schedule he would have had sufficient time to clean up the place and make it habitable. That he had never been in contact with the 1st Plaintiff and that it was the 2nd Plaintiff who called him in regards to the lease agreement. Further the deposit made was done voluntarily as per the agreement and was not forced on the Plaintiffs.
- [23] In cross examination the Defendant testified that the lawyer had visited the place and had not made any remarks in regards to the conditions and state of the house.
- [24] The Defendant further testified in terms of his counterclaim (*supra*), that when the Plaintiffs refused to stay in the house as agreed he had loss revenue because he would then have been able to rent it out to someone else. He testified that the interior of the house was complete but simply needed a clean-up. He states that the carpenter brought in beds for the Plaintiffs and did not make any comments about the house. The Defendant testified that his claim for moral damages was justified, in that he had been stressed by the decision of the Plaintiffs not to lease the house as per the lease agreement.

- [25] I will now move on to address the legal standards and its analysis based on the relevant evidence as illustrated above.
- [26] The issues to be determined by this court are namely as follows, *firstly, whether there was a legally binding contract between the Plaintiff and the Defendant?, secondly, if the answer is in the affirmative, as to what were the expressed and implied terms of the contract?, thirdly, if the Defendant breach the contract?, fourthly, as to whether the Plaintiffs are entitled to remedy as per damages claimed and fifthly, as to the quantum of damages.*
- [27] Article 1134 of the Civil Code of Seychelles (Cap 33) (*“the Code”*) provides that:- *“Agreements lawfully concluded shall have the force of law for those who have entered into them. They shall not be revoked except by mutual consent or for causes which the law authorises. They shall be performed in good faith.”*
- [28] Article 1135 of the Code further provides that, *“Agreements shall be binding not only in respect of what is expressed therein but also in respect of all the consequence which fairness, practice or the law imply into the obligation in accordance with its nature.”*
- [29] Article 1147 additionally provides that, *“The debtor shall be ordered to pay damages, if any, either by reason of his failure to perform the obligation or by reason of his delay in the performance, provided that he is unable to prove that his failure to perform is due to a cause which cannot be imputed to him and that in this respect he was not in bad faith.”*
- [30] Article 1148 also provides that, *“1. Damages shall not be due when, as a result of an act of God or an inevitable accident, the debtor was prevented from giving or doing what he has only partly become impossible by an act of God or by an inevitable accident and if the Defendant is also at fault, the liability of the Defendant shall be reduced in proportion to his share of the responsibility.*
- 2. If the literal performance of a contract is possible but, owing to a complete change of circumstance which could not have been anticipated when the agreement was concluded and which is outside the control of the parties, it no longer fulfils the common design of the parties, the contract shall be rescinded. However, the person who stands to lose from the rescission may apply to the Court for the appointment of an arbitrator who shall be at liberty to modify the terms of the contract. If the parties agree to nominate an arbitrator, it shall not be necessary for the Court to make the appointment. This paragraph shall not apply to any contracts for the sale of specific goods which perish, whether or not the risk passed to the buyer before the date of perishing, or to any charter party except a time charter party or a charter party by way of demise, or to any contract for the carriage of goods which, according to commercial practice, is normally covered by insurance.”*
- [31] Finally, for the purpose and context of this Judgment, Article 1149 of the Code provides that, *“the damages which are due to the creditor cover in general the loss that he has sustained and the profit of which he has been deprived, except as provided hereafter.*

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

2. The damages payable under paragraphs 1 and 2 of this article, and as provided in the following articles, shall apply as appropriate to the breach of contract and the activity of the victim.

3. In the case of delict, the award of damages may take the form of a lump sum or a periodic payment. In other latter case, the Court may order that the rate of the payments should be pegged to some recognized index, such as the cost of living index or other index appropriate to the activity of the victim.”

[32] In the case of (**Souffe .V. Cote D’or Lodge Hotel Limited (CC 24/12)**) (then) Chief Justice Mr Egonde Ntende, remarked that:-

“The Defendant has failed to prove that his failure to perform the agreement was due to the actions of a third party. In that regard I can come to no other conclusion other than that he is liable to pay damages for its failure to perform its part of the contract which would have allowed the Plaintiff to commence performance of the contract agreed between two parties.”

[33] Similarly, in the case of (**Ebrahim Suleman and others .V. Marie Therese Joubert and others (CA 27/10)**), Chief Justice Twomey stated as follows:-

“In such circumstance applying evidentiary rules, we need to find that the Respondents discharged both their evidentiary or burden of proof as is required by law. The maxim ‘he who avers must prove’ obtains and prove he must on a balance of probabilities. In *Re B* [2008] UKHL 35, Lord Hoffman using a mathematical analogy explain the burden of proof stated: “**If a legal rule requires a fact to be proved (a fact in issue), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates on a binary system in which that only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bear the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened.**””

[34] In the case of (**John Denis versus Ronniel Ryland, Commissioner of Police and The Attorney General CS 135/12 (2016)**) the Chief Justice, Mathilda Twomey had this to say in respect of moral damages:-

“Issue 3: Are damages payable to the Plaintiff and what is the quantum of damages to be awarded? The Plaintiff has claimed moral damages in the sum of One Hundred

*Thousand Rupees (SR 100, 000) for pain and suffering, moral damages in the sum of One Hundred Thousand Rupees (SR 100,000) for humiliation, distress, mental anguish and trauma; moral damages of One Hundred Thousand Rupees (SR 100,000) for inconvenience, embarrassment and anxiety and One Hundred Thousand Rupees (SR100,000) for loss of liberty for 24 hours. **It must be noted on the outset that damages in delictual cases are compulsory and not punitive.** The Court has received neither submissions nor authorities from Counsel in terms of the quantum of damages. The Plaintiff has not claimed any damages for physical injury which would have been payable for the injury to his eyes, wrist and the rest of his body including a continuing medical condition such as the weakness he claims to still be experiencing in his wrist. This Court can only make an award for damages claimed. I find that the Plaintiff did suffer moral damages. Article 1149 (2) provides that, “Damages shall also be recoverable for any injury to or loss of rights or personality. These include rights which cannot be measured in money such as pain and suffering and aesthetic loss and the loss of any amenities of life.” I am left in the same dilemma of assessing moral damages without any statutory yardstick. A survey of recent cases, all decide during 2014 and 2015 show a wide divergence in moral damages awarded. It appears that each case is judged on its own merits in the absence of any guidance or evidence from the Plaintiff, the award this Court makes in the present case can only be arbitrary.”*

- [35] The Defendant has submitted that the Court must distinguish between whether the agreement entered into by the parties is a lease or an agreement to lease in accordance with Article 1718 (2) and 1718 (1) of the Civil Code. The Plaintiffs submit that such a distinction in the present case is only an academic discussion and has no consequence on the outcome of the case in terms of the damages claimed. Whether the agreement was a lease agreement or an agreement to lease, the fact remains that the Defendant was in breach of the agreement and he is liable to pay damages to the Plaintiffs as claimed or upon an assessment by the Court. The Plaintiffs submit that the Defendant has failed to prove his counter-claim and as such it should be dismissed with costs.
- [36] The Defendant claim that moral damages are exaggerated for it is over and above the amount that he had averred in the agreement for lease. The Defendant further testified that if he had been informed in time of Plaintiffs’ arrival in Seychelles, he would have taken the necessary steps to clean up the premises and make it habitable before the arrival of the tenants. The alleged breach cannot be placed totally on the Defendant and he cannot be made liable in law to refund the amount deposited and the sums being claimed.
- [37] Now, in this case noting the evidence of the 1st Plaintiff on behalf of the Plaintiffs (as above illustrated), in the light of the Defendant’s it is abundantly clear that the Defendant in this case acted in bad faith throughout the transaction and failed to come to Court with clean hands and never intended to perform his obligations under the contract as required by the law. He refused to communicate to the Plaintiffs and that shows how irresponsible he was towards them, even after they had already paid him.
- [38] (*Exhibit P6*) is proof of the inhabitable state of the leased premises upon the arrival of the Plaintiffs and their children in Seychelles. Further what shocks the Court is that the

Defendant failed to see any defects with the leased premises in the light of clear evidence in terms of the photographs as exhibited.

- [39] I find thus in terms of the Plaint that the Defendant did breach the lease agreement by non fulfillment of his obligations in that he failed to deliver to the Plaintiffs the leased premises completed in full, safe and habitable upon leasing out to the Plaintiffs and hence claim granted as per the award illustrated below at *[paragraph 45]*.
- [40] With direct reference to the counterclaim of the Defendant, having found that the Defendant acted in bad faith and breaching the agreement itself as above analyzed, Defendant cannot claim breach of lease agreement by the Plaintiffs for he unilaterally changed the condition of the leased agreement to the detriment of the Plaintiffs as above-referred.
- [41] It follows, thus that the counterclaim is dismissed accordingly with costs to the Plaintiffs.
- [42] With regards to the award of damages, as indicated in the cited case law, it is established practice that assessment of damages are to be compensatory and not punitive and that moral damages are intangible and neither material nor corporal and hence inconvenience to be weighed by the Court on a case to case basis.
- [43] Further, moral damages as claimed are recoverable under Article 1149 of the *Code (supra)* even if it is for breach of contract and that in line with the Ruling in the case of ***(Kopel versus Attorney General (1995) SLR 315)***, wherein it was made clear that, “*even if moral damages may not as a rule be awarded for breach of contract, in certain circumstances, the Court may do so.*”
- [44] Analyzing the evidence of the Plaintiffs, it is my considered view that the amounts claimed by the Plaintiffs however for loss and damages appear to be on the high side and I find that a more reasonable and appropriate sum should be awarded by the Court given the circumstances of the case.
- [45] I thus proceed to award the Plaintiffs awards as follows:-
- (1) Firstly, the sum of Thirty Two Thousand Five Hundred (S.R. 32,500/-) as deposit (five months’ rent equivalent) paid in advance to the Defendant;
 - (ii) Secondly, one month’s rent in the sum of Six Thousand Five Hundred (S.R. 6500/-); one week hotel charges in the sum of Eleven Thousand Two Hundred Rupees (S.R. 11,200/-);
 - (iii) Thirdly, moral damages in the sum of Twenty Five Thousand Rupees (S.R. 25,000/-); and
 - (iv) Fourthly, punitive and exemplary damages in the sum of Ten Thousand Rupees (S.R. 10,000/-).

All the awards with interests and costs.

Signed, dated and delivered at Ile Du Port on this 1st day of August 2018

S. ANDRE
Judge of the Supreme Court