IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CA 15/2016

Appeal from Praslin Magistrates Court Decision Civil Side 03/2012

[2018] SCSC 922

THEOPHANE STRAVENS
Appellant

versus

TONY LESPERANCE
Respondent

Heard: 12th September 2018

Counsel: Mr. Shah together with Ms. Ibrahim for appellant

Mrs. Amesbury for respondent

Delivered: 16th October 2018

JUDGMENT

Nunkoo J

[1] This appeal considers whether a valid contract was concluded between two parties.

Factual background

The appellant, Mr Theophane Stravens was a building contractor. He and the respondent Mr Tony Lesperance knew each other for quite a while. The respondent was in a common law relationship with the appellant's cousin, Ms Lucina Stravens for many years. In 2008, Ms Stravens began a home building project at Cap Samy. and the appellant did some paid

construction work on the house. During this period, the appellant and respondent verbally agreed that the appellant would use some building materials that belonged to the appellant, and that the respondent would return these. The materials were supposed to be used in the construction of the appellant's own home, but his own home project had been halted. Although the quantity is uncertain, the materials included bags of cement, iron rods, welded mesh and cable trunking. None of the parties kept record of the materials that were lent or returned. These, and all other building materials, were all kept in storage, and the appellant could access the storage facility to take building material. The respondent returned some of the material to the appellant, but not all. Pursuant to this, the appellant demanded back the materials that had not been returned, and later addressed a letter of demand. He attached a list of items that were allegedly owed to him. At this stage, the relationship between the three had soured, and the appellant had also stopped the construction work at the respondent's house. When the appellant did not get the materials back, he instituted a claim against the respondent in the magistrate's court.

[2] **The proceedings in the magistrates' court**

The appellant issued a plaint against the respondent in 2012, requesting a sum of R41,023. He claimed that this was the market value of the outstanding material. The respondent denied that he owed the appellant. They each led evidence at the trial, and the appellant called a few witnesses in support of his claim.

[3] The appellant's evidence was as follows. During late 2007, the respondent approached him about a house that they would start to build the next year. He started work on the house but needed some materials that the respondent did not have. Since he had these, he used his own. These included steel rods, welded mesh, 132 bags of cement, plywood, wood, trunkings and coping nails. The respondent only returned some of the materials, saying that the rest were not on the market. The respondent never returned these materials, despite his requests. Under cross examination, the respondent testified that he had not kept a list of items that he had lent to the respondent, and what was returned. He also agreed that he took some of the appellant's materials from the storage that he had access to. Several of the witnesses that he called corroborated that he had worked for the respondent and had lent

the respondent some materials. They also testified that the appellant took some materials from the storage facility, and that the respondent had returned some of these materials.

[4] The respondent agreed that there had been an oral agreement to borrow some material from the appellant, which would be returned when the work was completed. He also agreed that he returned some of the materials, but that this was not documented. He testified further that he discovered that the appellant was taking cements from the storage facility without his or Ms Straven's consent. He also testified that the appellant reneged on the agreement by stopping work on the house prematurely. Under cross examination, he conceded that he did not keep any record of what was lent or returned but denied that the list that the appellant prepared was correct.

[5] The magistrate's findings

The magistrate found that there was no contract between the parties since they did not intend to bind themselves. Consent, in his view, was lacking. The court also found that the appellant did not keep record of what was lent and what was returned, and so had failed to prove what quantity was still outstanding. The court concluded that the appellant had failed to prove that the was a contract, what the terms were, and that there was a breach. Accordingly, he dismissed the plaint.

[6] **The present appeal**

The appellant was disgruntled by the court's determination and instituted the present appeal, stating that the magistrate's findings were erroneous. He submitted before this court that the finding by the magistrate's court that there was no intention to enter into a legal contract was flawed. In his view, the reliance on the closeness of the personal relationship between him and the respondent for this finding was misplaced. The fact that they had a close relationship was why there was no written contract, but this did not mean that there was a lack of intention to be bound. His view was that the intention could be derived from the parties' subsequent conduct, in that the respondent returned some of the materials. This, he submits, clearly shows an intention on the respondent's part to be bound. In relation to the second finding, namely that there was no contract and no breach, he submitted that the

respondent's own evidence corroborated the existence of a verbal agreement to return the materials. He submitted that the onus had shifted to the appellant to show that he had extinguished the obligation. He also submitted that the magistrate's court erroneously disregarded the schedules that he had submitted, as these were not disputed by the respondent.

[7] On his part, the respondent wanted the magistrate court's judgment upheld. He submitted that the intention between them had not been to create legal consequences, as this was a 'domestic' relationship. He also submitted that the magistrates' court was correct to disregard the annexure of materials, as this had no evidentiary value, because it had not been signed or acknowledged by the respondent.

[8] Legal analysis

As stated above, the crisp issue is whether a valid contract was concluded between two parties. It is common cause that there was no written agreement. Thus, the principles relating to the proof of the legal validity of oral agreements must be considered in establishing whether a valid contract was concluded. There was no objection to the support of the claim by means of oral evidence. It can be accepted that the respondent tacitly waived the applicability of Art 1341 of the Civil Code of Seychelles, which precludes the admissibility of proof by oral evidence where the value is above 5000 rupees. (*Coopoosamy v Duboil* (2012) SLR 219 para 10). Even if the respondent did object, it has been established in case law that there is an exception to the rule that oral evidence would not be admissible. One such exception is where it is impossible to obtain written proof because there is a moral impossibility because of the relationship between parties. In *Coopasamy*, the Court of Appeal said that the exception would apply where were close ties because of a family relationship (lien de famille), friendship or trust. The court would have a wide discretion to determine whether there was such a moral responsibility and would have to consider each case on its own facts. (*Coopoosamy v Duboil* para 13.) The evidence led by the appellant relating the proof of the contract was therefore admissible. It was sufficient for the appellant to rely on oral evidence to prove that a contract existed. The question that now must be determined is whether such a contract did exist.

[9] The requirements for a contract, as set out in the Civil Code, include the capacity to enter into a contract, a definite object, that it should not be against the law or public policy and that there should be consent of the party who binds himself. (See Art 1108 of the Code). The main element of contention in this appeal seems to be whether there was an intention to create a contract, with the ordinary legal consequences. As opposed to what the respondent avers, namely, that what was intended was an agreement between family members, with only moral consequences. It is settled that the intention of the parties is key in determining the legal effect of an agreement. See *Bernard Georges and another v Guinness Overseas Limited* SCA 02/2011 at 13. Where the intention is not clear, the question becomes one of interpretation in the strict sense, and interpretation is a matter of fact. (See Bary Nicholas 'The French Law of Contract' (2nd ed) 1992 at 47.) What the court would look at, is the subjective state of mind of the parties, but the court can also infer what the intention was from subsequent conduct. (See Lesperance v Vidot SCA 25 of 2007.)

[10] In the present case, the magistrates' court found that there was no intention to bind. He based this on the existence of the close familial link. The appellant and the respondent's common law partner were related. Thus, there could not have been any intention to have legal consequences flow from the agreement. This court must decide whether this was the correct finding to make, on the evidence presented at the court. And it is this court's view that this finding was incorrect. The evidence of both the appellant and respondent was that the appellant's materials would be used but would be returned at a later stage. Whilst it is true that they did not stipulate what consequences would flow if all the materials were not returned, this does not mean that the consequences would not flow by operation of law.

[11] Subjectively, both parties understood that the materials had to be returned. This is evident from the respondent's subsequent actions. He returned some of the materials. And the evidence by the appellant that the respondent said that he could not return the materials because none were on the market was not challenged or rebutted by the respondent. The respondent instead testified that he did not return some of the materials because they discovered that the appellant had stolen some of the materials. But the respondent did not issue a counterclaim in respect of these alleged materials, nor did he raise a defence that

these should be set off against what the appellant said he was owed. Therefore, the magistrate's court was incorrect in its finding that there was no intention to create a binding contract.

[12] In effect, it appears that the appropriate characterisation of the kind of agreement entered between the parties is a loan for consumption, as envisaged in Art 1892 of the Civil Code. This is when one of the parties delivers to the other a certain quantity of things which are consumed by use on condition that the latter shall return to him as much of the same kind and quality. In terms of Art 1903, if he finds it impossible to do so, he shall be bound to pay their value.

[13] To turn to the second aspect, namely the appellant's claim that the annexures were erroneously disregarded by the magistrates' court. The court found that the annexures were not record kept contemporaneously during the period. Thus, it was not possible for the appellant to accurately prove that the value of the outstanding material was what he alleged.

[14] Article 1315 of the Civil Code provides that a person who demands the performance of an obligation shall be bound to prove it. It is trite that he would have to do so on a balance of probabilities. Conversely, a person who claims to have been released shall be bound to prove the payment or the performance which has extinguished his obligation. This implies that while the onus initially is on the appellant to prove what he was owed, when the respondent put up the defence that his duties had been extinguished, the onus shifted on him to prove this.

[15] It was common cause that the appellant did not keep any contemporaneous record, which was acknowledged by the respondent. It was also common cause that the annexures were prepared only in preparation of the trial. This is exactly what one would have expected where an agreement has not been reduced to writing, and where the agreement was made in a context such as this – namely, the close familial bond. In that regard, not much value can be placed on the document itself, but it can be considered in conjunction with the oral evidence. In this instance, the oral evidence of both the appellant and the respondent was that only some, but not all the materials were returned. The respondent's own version was that he did not return all the material to the appellant.

[16] The appellant thus discharged the onus to prove that he was still owed and chose to set out in the annexures what he believed he was owed. In the absence of invoices and receipts, it is normally difficult for the court to establish how this amount was arrived at. But, the trial court had accepted the evidence that some of the material had not been returned. In the event, since no adverse credibility findings could be made against either parties in relation to their evidence that some materials were not returned, and in the absence of any rebuttal by the respondent about the quantity of the outstanding material, the trial court should have accepted the appellant's annexures.

[17] The appeal is allowed. The Respondent is hereby ordered to pay the sum of SCR 41023.00 to the Appellant.

[18] With costs.

Signed, dated and delivered at Ile du Port on **16th October 2018**.

S Nunkoo
Judge of the Supreme Court