

**IN THE SUPREME COURT OF SEYCHELLES**

**Civil Side: CC25/2015**

[2018] SCSC 999

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**BRIAN QUILINDO TRADING AS  
EMS BUILDING CONTRACTORS**  
Plaintiff

Versus

**FRIDA JUPITER**  
Defendant

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Heard:

Counsel: Miss Christen for plaintiff

Mr Hoareau for defendant

Delivered: 17 October 2018

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**Judgment**

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**Robinson J**

**The Background**

[1] Paragraph 1 of the amended plaint averred that the "*plaintiff at all material times was trading under the name EMS Building Contractors which is engaged in the business of building construction and renovation in Seychelles.*". The plaintiff did not have a written

agreement with the defendant to "*renovate and extend a residential home*". The monetary value of the agreement is over 5000/- rupees.

### **The proceedings**

- [2] This court considers it appropriate to repeat the facts of this suit and the brief rulings delivered during the course of proceedings.
- [3] *The evidence of the plaintiff.* EMS is registered under the Registration of Business Names Act 1972 P1. A licence was issued to Brian Quilindo, trading under the business name *EMS Létourdie*<sup>1</sup>, by the Seychelles Licensing Authority, authorising him to provide services as a building contractor P2. The plaintiff, in the course of his testimony, sought to adduce oral evidence of an agreement between himself and the defendant to do construction works for her.
- [4] Objection was taken to such evidence going on record, unless there is a writing embodying that agreement under article 1341 of the Civil Code of Seychelles Act (hereinafter referred to as the "*Civil Code*").
- [5] In the main, the position of the plaintiff is that this is a commercial matter under article 109-2 of the Commercial Code; and that, consequently, article 1341 of the Civil Code does not apply (*Eric Bossy v Rodolfo Radaelli* 1982 SLR 438). The last provision of article 1341 of the Civil Code provides, "... *The above is without prejudice to the rules prescribed in the laws relating to commerce.*". Article 109 of the Commercial Code provides —

#### "Article 109

1. A sale may be proved:

By an authentic document,

By a document under private signature,

By the sale note or the account note of a money dealer or broker,  
duly signed by the parties,

By an invoice which has been accepted,

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<sup>1</sup> Manuscript writing – P1

By the correspondence,

By the accounting books of the parties,

**By the evidence of witnesses admissible at the discretion of the Court.**

2. The rules of proof contained in the first paragraph of this article shall be equally applicable to all commercial matters."

Emphasis is mine

Counsel further contended that even if this court were to hold that this is not a commercial matter; and that, therefore, article 109 of the Commercial Code does not apply to it, article 1341 of the Civil Code read with article 1347 of it should apply. Article 1347 provides, "*[t]he aforementioned rules shall not apply if there is writing providing initial proof. The term describes every writing which emanates from a person against whom the claim is made, or from a person whom he represents, and which renders the facts alleged likely.*"

- [6] Counsel for the defendant relying on *Currimjee Jeewonjee & Co. v. Sayed Hossen* 1923 MR 245<sup>2</sup> and *M. Ramdin v. T. De DYLVA & Anor* 1928 MR 137 contended that the alleged oral agreement into which the plaintiff and the defendant entered is a "mixed contract" in view of the fact that the plaintiff is a trader and the defendant is a non-trader. In support of his submission that the plaintiff is a trader and the defendant is a non-trader, he referred this court to the plaint, which alleged, "2. *The plaintiff, [a licensed building contractor P2], was engaged by the defendant in April 2013 whereby the plaintiff would renovate and extend a residential home. This entailed demolishing existing building works carried out by a third party, then renovating certain parts of the house and adding an extension to the said house.*" In this respect, he contended on the authority of **Currimjee Jeewonjee & Co. supra** that oral evidence is not admissible against the non-trader, in a verbal contract between a trader and a non-trader. He also explained and exemplified his position by referring this court to **M. Ramdin supra**. In that case it was not disputed that a contract between a trader and a non-trader for the cutting and loading of canes was a "mixed contract", that is one in which parole evidence may, in the discretion of the court be

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<sup>2</sup> The decision of the Mauritian Courts are not of course binding, but they are of persuasive authority.

admitted against the trader, but not against the non-trader. The court in **M. Ramdin** *supra* held "*that in the special circumstances of the case, the Court would not be justified in allowing parole evidence of the non-trader to prove that he had paid the amount he owed under the Contract*".

- [7] In reply to the defendant's Counsel's submissions, the plaintiff's Counsel contended in essence that the jurisprudence of the Seychelles courts "*does not differentiate between a [mixed contract] and or a commercial matter*". In the view of Counsel this suit is of a commercial nature under the Supreme Court (Commercial List) Rules, 2012, (hereinafter referred to as the "*Rules*"). In the light of her submissions, she urged this court to exercise its discretion, under article 109-1 of the Commercial Code, to allow oral evidence.
- [8] This court, after having heard both Counsel, ruled that oral evidence was not admissible against the defendant, who is a non-trader, in an oral contract between a trader and a non-trader with the stipulation that it will further explain the basis for its decision at the time of judgment.
- [9] Following the ruling of this court, the testimony of the plaintiff was adjourned. The plaintiff's Counsel called Mr. Ziggy Adam to produce certain documents in terms of article 1347 of the Civil Code.
- [10] *The evidence of Mr. Adam.* Mr. Adam, a legal officer of the Fair Trading Commission, stated that the defendant lodged a complaint at the Fair Trading Commission on 24 April 2014, as against the plaintiff regarding "*performance of service*".
- [11] Objection was taken to Mr. Adam adducing evidence in relation to a "*complaint form*" dated 29 April 2014, which formed part of a second bundle of documents to be relied on by the plaintiff at the hearing of this suit. That bundle of documents was filed in the registry of the Supreme Court on 10 July 2017, four days before the hearing of this suit. Objection was taken on the ground that such documents not otherwise disclosed in accordance with rule 5 (3) (a) of the Rules will prejudice the defendant. The defendant's Counsel pointed out that issue was joined in November 2016. It is pertinent to note that both Counsel are

agreed that the documents will go to the core of the defendant's defence. Rule 5 (so far as relevant) provides —

"5 (1) The Court shall hold a preliminary hearing to determine the issues between the parties and ascertain whether the matter may be submitted to mediation after all pleadings have been closed.

(2) The parties shall attend the preliminary hearing in person or with their counsel if they have instructed them in the matter.

(3)(a) At least forty-eight hours prior to the date fixed for the preliminary hearing, a party shall file in the registry of the Supreme Court and serve on the other party all documents to be relied on at the hearing of the matter;

(b) Subject to paragraph (c), a party shall not be allowed to rely on any documents not disclosed in accordance with paragraph (a);

(c) The court may allow a party to rely on documents not otherwise disclosed in accordance with paragraph (a) if such disclosure will not prejudice the other party;

...

(5) The parties shall abide by the time limits set by the Court, failing which the Court may —

(a) refuse adjournments;

(b) dismiss the action or enter judgment;

(c) award costs."

This court was unable to accept or understand the plaintiff's Counsel contention that the Fair Trading Commission had refused to disclose the relevant documents to her timeously. If that had been the case then one would have expected the plaintiff's Counsel to have challenged the position of the Fair Trading Commission. There was no such challenge.

[12] Having heard both Counsel, this court, relying on Rule 5 of the Rules, did not allow the plaintiff to rely on a document, which formed part of a second bundle of documents, not otherwise disclosed in accordance with rule 5 of the Rules on the ground that such disclosure will prejudice the defendant. In my judgment it is significant that the plaintiff does not even list any of the documents contained in the second bundle of documents in

accordance with section 74<sup>3</sup> of the Seychelles Code of Civil Procedure. This ruling was subject to the stipulation that this court will further explain the basis for its decision at the time of judgment.

- [13] Subsequently, Mr. Adam resumed his testimony. He stated that he personally wrote a final letter to the defendant on 20 August 2014. Objection was taken to that letter being tendered in evidence on the basis of article 1341 of the Civil Code. In reply to the objection the plaintiff's Counsel suggested that article 1347 of the Civil Code applies. Without going into the merits of the plaintiff's and defendant's contentions, this court ruled that article 1347 of the Civil Code does not apply because the writing emanated from the Fair Trading Commission. In the light of the above, this court refused to adjourn this suit. Mr. Adam was not cross-examined.

*Oral application to examine the defendant on her personal answers*

- [14] The plaintiff then made oral application to examine the defendant, who was not present in court, on her personal answers, which application was refused by this court on the basis of section 164 of the Seychelles Code of Civil Code, which provides, "*If a party to the cause or matter is present in court at the hearing of the case, he may be examined on his personal answers with the permission of the Judge, without any previous application.*".
- [15] Following this ruling, the evidence of the plaintiff resumed, but in the light of the rulings of this court, examination-in-chief could not proceed. The plaintiff was not cross-examined.
- [16] *The evidence of Miss Cecile Bastille.* Miss Bastille, a quantity surveyor, valued the works done by the plaintiff. Objection was taken to such evidence going on record on the basis of article 1341 of the Civil Code. Following the rulings of this court in relation to the said issue, the testimony of Miss Bastille could not proceed. Miss Bastille was not cross-examined.

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<sup>3</sup> Section 74 of the Seychelles Code of Civil Procedure provides, "*If the plaintiff sues upon a document other than a document transcribed in the Mortgage Office of Seychelles, he shall annex a copy thereof to his plaint. If he rely on any other documents (whether in his possession or power or not) as evidence in support of his claim, he shall annex a list thereof to his plaint and shall state where the same may be seen a reasonable time before the hearing.*"

[17] Following the testimony of Miss Bastille, the plaintiff closed its case. The defendant did not call any evidence.

### The Analysis

#### *Objection to oral evidence*

[18] This court ruled that the plaintiff is a trader, and the defendant is a non-trader; and that, therefore, oral evidence is not admissible against the non-trader, under the last provision of article 1341 of the Civil Code read with article 109 of the Commercial Code. This court refers to Cohendy and Darras Code de Commerce, art. 109, at note 75, which reads —

"Lorsqu'un contrat est commercial pour l'une des parties et civil pour l'autre, la preuve peut être faite par tous les moyens, conformément à notre article, contre la partie pour laquelle l'acte est commercial : mais elle ne peut être faite que dans les conditions du droit commun contre la partie qui a fait acte civil—Sic, Larombière, sur l'art. 1341 n. 40 ; Demolombe, t.30, n. 104 ; Aubry et Rau, t. 8 sec. 763 bis, p. 326 notes 6 et 7 ; Bravard et Demangeat, t. 2 p. 461 : Lyon-Caen et Renaud, t. 3 n. 87.—Contra, Massé, t.4 n. 2543 et s., d'après lequel la partie pour qui l'acte est commercial pourrait tout au moins prouver sa libération par tous les moyens."

(See **Currimjee Jeewonjee & Co.** *supra*).

[19] In the case of **Eric Bossy** *supra* Sauzier J quoted paragraph 432 of the Mise à Jour 1965 of Encyclopédie Dalloz. Droit Commercial Vo. Actes de Commerce and the cases reported in Gaz. Pal 1947.2.84; D 1958 Somm. 26 and J.C.P 1956. 11. 9375.

"432. La Cour de cassation a de nouveau jugé qu'un bail d'immeuble consenti par un propriétaire non commerçant à un commerçant en vue de l'exploitation de son commerce, **prend, à l'égard de ce commerçant, le caractère d'un acte de commerce dont la preuve peut être rapportée par le bailleur, conformément aux dispositions de code de commerce...**"

[20] It is clear to this court that the jurisprudence of the Seychelles courts applies the principle of jurisprudence of civil law<sup>4</sup> in relation to the question in issue, contrary to the suggestion of the plaintiff's Counsel that our jurisprudence "*does not differentiate between a [mixed contract] and or a commercial matter*"

[21] Had this court held that the defendant was a trader, this court doubt whether it would have exercised its discretion in favour of the plaintiff and have allowed oral evidence to establish the alleged agreement because the commercial nature of the transaction is of such a character that it would reasonably be expected to be committed to writing. Paragraph 2 of the plaint alleged that the works "*entailed demolishing existing building works carried out by a third party, then renovating certain parts of the house and adding an extension to the said [residential] house*" and paragraph 5 alleged that "*an evaluation of the work was carried out and found to amount to SR908,337.10...*". See article 109-2 of the Commercial Code and *Ah king v Sullaiman* 1950 MR 36 where the court held that under article 109 of the Code de Commerce oral evidence is not admissible as of right but may be allowed at the discretion of the Court. In the Mauritian Cases [Court of Civil Appeal] of *Island Management Limited & Or v H. Couacaud & Ors* and *M.G. Rivalland & Or v H. Couacaud & Ors* 2014 SCJ 396 (two appeals), Chief Justice K.P. Matadeen delivering the judgment of the court stated —

"Furthermore, even on the assumption that the impugned agreement of 30 December, 2008 was an "*acte de commerce*", the learned Judge still had a discretion whether to allow or refuse oral evidence to prove the agreement under article 109 of the Code de Commerce – **Sambo v de Chasteauneuf Ltd [1978 MR 75]**. And as was held in **Lee Luen Mang v Lam Yue Hong [1955 MR 376]**, "*no definite rule can be laid down as to what circumstances can justify the court to exercise its discretion*". The Court, however, pointed out that "*cases where parties are normally expected to reduce to writing their transactions must be distinguished from those where there is a likelihood that the haste with which traders are bound to*

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<sup>4</sup> Article 5 of the Civil Code provides "5(1) The text of the Civil Code of Seychelles as in this Act contained shall be deemed for all purposes to be an original text, and shall not be construed or interpreted as a translated text. (2) Nothing in this Act shall invalidate any principle of jurisprudence of civil law or inhibit the application thereof in Seychelles except to the extent that it is inconsistent with the Civil Code of Seychelles."



*conclude in a short lapse of time numerous commercial operations makes it impossible to commit to writing all or any of them and where the operation of the rules of article 1341 of the Civil Code would cause great inconvenience."*

#### *Disclosure of documents*

[22] The amended complaint listed only a quantity survey report and a letter dated 5 September 2014. It is on the basis of these documents that the defendant has prepared her defence. Preliminary hearing was held on 1 October 2015, both plaintiff and his Counsel Mr. Pardiwalla, who represented him then, were absent.

[23] According to the plaintiff's Counsel, the plaintiff now seeks to rely on the following other documents —

- "House plans 4 pages";
- "internal closure memo the complaint dated 9 August 2014 – 2 pages";
- "official statement by Frida Jupiter – dated 8 May 2014 – 3 pages";
- "complaint form signed by Frida Jupiter – dated 29 April 2014 – 8 pages";
- "site visit report dated 8 May 2014"
- "meeting with complainant & respondent dated 12 June 2014"; and
- "19 photos of site".

[24] The plaintiff and the defendant are agreed that the documents will go to the core of the defendant's defence. This court was of the opinion that such disclosure effected at the eleventh hour will prejudice the defendant and did not give leave to the plaintiff to produce in evidence the documents in respect of which such omission had been made.

#### **The Decision**

[25] In the light of the above, there being no written evidence of the conditions of the agreement or initial proof thereof, this court dismisses the plaintiff's case with costs.

Signed, dated and delivered at Ile du Port on 17 October 2018



F Robinson  
**Sitting as a Judge of the Supreme Court**