SUPREME COURT OF SEYCHELLES

Reportable
[2021] SCSC 105
CS 151/2021

In the matter between:

HELENE LESPERANCE — **1st Plaintiff**
(rep. by Emmanuella Parmentier)

RONELLE LESPERANCE — **2nd Plaintiff**
(rep. by Emmanuella Parmentier)

RON LESPERANCE — **3rd Plaintiff**
(rep. by Emmanuella Parmentier)

RONDA LESPERANCE — **4th Plaintiff**
(rep. by Emmanuella Parmentier)

and

MARIA ELIZABETH — **Defendant**
(rep. by Frank Elizabeth)

Neutral Citation: *Lesperance & Ors v Elizabeth* (CS 151/2018) [2021] SCSC 105 (8th February 2022).
Before: Pillay J
Summary: Breach of contract; Article 818 of the Civil Code; Section 128 of the Seychelles Code of Civil Procedure
Heard: 13th September 2019, 27th September 2019, 1st October 2019
Delivered: 8th February 2022

ORDER

[1] In the circumstances I enter judgment in favour of the Plaintiffs as follows:

(1) Unpaid rent from 25th June 2015 to March 2016 in the sum of SCR 350, 000.00
(2) Surveyor's fees in the sum of SCR 7, 500.00
(3) Unpaid Utility Bills in the total sum of SCR 3, 621.00
(4) SCR 588, 166 to make good the damage caused to the Plaintiff's property

[2] All with interest from the date of judgment plus costs.

JUDGMENT

PILLAY J

[1] The Plaintiffs prays for a judgment in their favour ordering the Defendant to pay the Plaintiff the sum of SCR 1, 896, 537.00 and continuing with interest at the commercial rate for delayed performance.

[2] The Plaintiff claims as follows:

1. *By virtue of a promise of lease (the "Agreement") made on the 27th May 2015, between the Plaintiffs and the Defendant, the Plaintiffs let to the Defendant, Parcel LD214 and the house situated thereon belonging to the Plaintiffs situate at Anse Reunion, La Digue, (hereinafter the "premises") for a period of ten years, commencing from 1st April 2015 to the 1st April 2025, for the rent of SR35, 000/- per month on terms and conditions set out in the said Agreement.*

2. *It was further agreed by the parties in the said Agreement, amongst other things, that during the term of the tenancy:-*

   (i) the Defendant could carry out works on the premises for it to be used as a tourism establishment provided that;
   - *(a) the works be diligently done and the works regular;*
   - *(b) the works were carried out and completed using workmanship of the highest quality and standard and materials of quality and standard;*
   - *(c) the works were to be completed within three months of the date of the Agreement (1st April 2015);*
   - *(d) no structural works to the building or works that would affect the structure if the building would be done; and*

(e) *that the Defendant would be liable for rebuilding and repairing any defects in the building upon request by the Plaintiffs.*

(ii) *the Defendant was to pay a monthly rent of SCR 35, 000 commencing from the 1st April 2015 in respect to the premises;*

(iii) *in the event of any material breach of the Agreement, the Agreement shall be rescinded by the operation of the law, and the Plaintiffs would be entitled to take possession of the premises, and the Defendant would be liable to pay the rent until the delivery of the premises; and*

(iv) *non-payment by the Defendant of at least two (2) months' rent due, would be a material breach.*

3. *The Plaintiffs further avers that the Defendant in breach of the Agreement, on the 8th February 2018 wrote a letter to the 1st Plaintiff informing her that the Promise of Lease was being cancelled and terminated with immediate effect, and vacated the premises.*

4. *Upon vacating the premises, at the beginning of February 2018, the Defendant has to date only paid SCR 70, 000 toward the rent of the premises.*

5. *In breach of the Agreement, the Defendant has also failed to complete the renovation and improvement to the premises as agreed upon, and structural works to the building on the premises was conducted in direct breach of the Agreement.*

6. *The Plaintiffs aver that the building on the premises is now inhabitable and in such bad disrepair since the Defendant vacated the premises, that they have not been able to inhabit the house and have had to rent another house to live in.*

7. *Despite numerous request to the Defendant to settle the outstanding rent, the Defendant has refused and/or neglected and/or failed to settle the outstanding arrears of rent.*

8. *On the basis of the matters aforesaid, the Plaintiff has suffered loss and damage, which the Defendant is liable to make good to the Plaintiff as follows:*

Particulars of Loss and Damage

(i)	*Unpaid rent*	*SR 1, 164, 000/-*
(ii)	*Damages to the property*	*SR 588, 166/-*
(ii)	*Cost of quantity surveyor (Nigel Roucou)*	*SR 7, 500/-*
(iii)	*Unpaid Utility Bills*	*SR 3, 621/-*
(iv)	*Moral damages*	*SR 100, 000/-*
(v)	*Rent incurred by Plaintiffs for 7 months (February – October 2018) due to inability to occupy their home*	*SR 49, 000/-*
Total		*SR 1, 896, 537.00*

9. The Plaintiff avers that despite numerous requests by the Plaintiffs to the Defendant to settle the claim, she has failed and/or refused and/or neglected to do so and as a result of the failure the Plaintiffs are entitled to interest at the commercial rate of ten (10%) as damages from the the 8th February 2018 up ti the date of payment of the judgment debt and interest in full. (sic)

[3] In her defence the Defendant raised four pleas in limine as follows:

(1) The Plaintiffs have no locus standi to bring this action in law.

(2) The promise of lease is against public policy and invalid in law.

(3) The Plaintiffs did not have legal capacity to enter into the promise of lease and it is therefore invalid in law.

(4) The Plaint is frivolous and vexatious and ought to be struck out in law.

[4] The Defendant also filed a counter claim in the sum of SCR241, 000; being SCR 126, 000.00 for rent paid to the Plaintiffs, SCR 100, 000.00 sum invested in the building for

maintenance, repairs, renovation and improvement, and SCR 15, 000.00 sum paid to architect/draughtsman.

[5] By way of motion heard on 25th February 2020 the Plaintiff sought leave to file it defence to the counter-claim which was objected to and subsequently refused in a ruling by this Court dated 24th April 2020.

Plaintiff evidence

[6] The Plaintiff testified that herself and her deceased husband bought the property LD214 when she was 19 years old and lived on the property from then until she leased it to the Defendant. She stated that at the time the house was built no planning permission was required. She was in a very big financial crisis when the Defendant approached her and asked to rent her house. Her husband had passed then and she was appointed executor of his estate on 25th September 2015. Before that on 27th May 2015 she along with her three children, Ronelle Begitta Lesperance, Ron Eddy Lesperance and Ronda Joan Lesperance, signed a promise to lease LD214 with the Defendant. On 30th March 2015 she had handed over the property to the Defendant. The Defendant had informed her that she wanted to turn the property into a tourism establishment and that she would contact the Plaintiff when it was time to go to do the necessary procedures with licensing and planning. It was her testimony that the Defendant was aware of all the details about her home. Her house was demolished to be rebuilt but nothing has been done todate. The Defendant pulled down walls and put up walls without seeking her permission.

[7] From April the Defendant started paying the rent by SCR 5, 000, SCR 15, 000 and SCR 2, 000. The payments were made cash and started at the beginning of May 2015. Up to 25th June 2015 the Defendant had paid SCR 70, 000 in rent. When she approached the Defendant about the unpaid rent the Defendant informed her she was waiting for a loan. The Defendant vacated the premises around 2016, during the first three months of 2016.

[8] Nigel Roucou a quantity surveyor testified that he prepared a report for Joanise Lesperance on 16th August 2018 who paid him SCR 7, 500 to compile the report. It was his testimony that the unfinished work and the repairs that needed to be done came to a sum of SCR 588,

166. It was further his testimony that it was obvious that works had started on the building as well as remodelling that had not been completed.

[9] Mr. Roucou explained that the work was not done diligently as it was incomplete. According to him he couldn't say that the work is of the highest quality either as it wasn't complete. It was his evidence that in view of the age of the house all the walls would be load bearing in which case the works would be structural works.

Defence evidence

[10] Frank Ally deponed that he was the attorney for the Plaintiff. He prepared a document for the Plaintiff to consider and show to the other party. He confirmed that the Plaintiff was appointed the executor of the estate of her husband on 25th September 2015. According to Mr Ally the property is "registered under the Mortgage and Registration Act and if a person can show to a third party the apparent authority" he may lease.

[11] The Defendant deponed that she was not supposed to get a promise of lease but a lease. She was waiting until the month of April and making part payments. It was her evidence that the first Plaintiff gave her permission to start interior works on the property. She made part payments because she was not sure how things were going. She contacted Planning Authority to apply for a change of use and was informed that the house had been built without planning permission. She advised the first Plaintiff to redo the house plans and submit to planning so that she could then submit for a change of use. She waited but the first Plaintiff did not submit the plans but only called for the rent payments every month.

[12] The parties were given time to file submissions however only the Learned counsel representing the Plaintiff filed submissions in the time allotted. Christmas night Learned counsel for the Defendant emailed his submissions. Time was given to the Plaintiff's counsel to file any additional submissions if she wishes however none was filed.

[13] Learned counsel for the Defendant submitted that the Court dismissed the Plaintiff's application for leave to file defence to the Defendant's counter-claim. It was his submission that as a consequence, the Defendant's counter-claim remains undefended and the Court has no choice but to enter judgment on the counter-claim pursuant to section 128 of the

Seychelles Civil Procedure Code. He relied on the case of **Govinden and Anor v Pointe and Others (315of 2003) [2006] SCSC 53 (04 July 2006)** as authority.

[14] In terms of the pleas in limine, Learned counsel for the Defendant submitted that the Plaintiffs have no locus standi to bring the action as in accordance with Article 1029 of the Civil Code the action can only be brought by the Executrix of the estate of the first Plaintiff's late husband as he was the registered owner at the time the parties entered into the agreement and at the time of the alleged breach. It was his submission that in the alternative the Plaintiffs could have brought the action through a fiduciary in law if they subsequently became co-owners of the property per Article 818 of the Civil Code.

[15] Learned counsel for the Defendant further submitted that the claim should be dismissed as being against public policy in that at the time the parties entered into the agreement the first Plaintiff did not have legal capacity to enter into the agreement. It was his submission that the agreement was void ab initio as a result.

[16] Learned counsel submitted that the Plaint was frivolous and vexatious and ought to be struck out. Relying on the definition given by the Court of Appeal in the case of **Elizabeth v the President of the Court of Appeal** argued that the Plaintiffs' action is frivolous and vexatious and that the Defendant is labouring to defend the Plaintiffs' action.

[17] It was Learned counsel's submission that the Plaintiffs' action is a non-starter in law as they have failed to overcome the legal hurdles and should be dismissed.

[18] Learned counsel for the Plaintiff relies on Article 1134 of the Civil Code. Learned counsel submitted that the counter claimant has failed to prove her case in its totality on the basis of **Seychelles Savings Bank v Onezime and Another (342) of 2008) [2010] SCSC 121 (09 December 2010)** in that the Court is required to assess the evidence adduced by the Plaintiff or as in this case the counter-Plaintiff, and should not automatically accept all the uncontroverted evidence of the counter-claimant.

[19] For the sake of expediency I propose to deal with the pleas on public policy, locus standi and capacity together.

Public Policy, Locus standi to sue and Capacity to enter into a contract

[20] The Defendant's position is that the promise to lease is against public policy for two reasons. Firstly, because at the time the parties entered into the agreement the first Plaintiff did not have legal capacity to enter into the agreement. Secondly, the Plaintiffs did not have the requisite planning permission to build the house in the first place.

[21] Learned counsel for the Defendant relies on the case of **NSJ Construction (Pty) Ltd and Anor v F.B choppy (Pty) LTD (SCA16/2019** to support his first argument. He referred to the findings of Vidot J that "...NSJ did not possess a "Building Contractor' licence as required by Licences Act. They possessed at the time of the agreement a class 4 licence that only permits carrying out of maintenance works. That was a misrepresentation of NSJ...the Court cannot condone such disregard for the law...In operating without a licence NSJ was acting against public policy."

[22] I am at a loss to understand how the above passage bears relevance to Learned counsel's argument.

[23] The Court of Appeal in dismissing NSJ appeal made clear the distinctions between the cases **of Monthy v Buron (SCA 06/2013) [2015] SCCA 15 (17 April 2015)** and **DF Project Properties (Pty) Ltd v Fregate Island Pvt Limited (SCA 56/2018 and SCA 63/2018 Appeal from CC 29/2014) [2021] SCCA 28 (21 July 2021)** to the facts they were dealing with in the case of **NSJ**. In **NSJ** the Respondent was not aware that the Appellant had no licence whereas in the other two cases that the Appellant sought to rely on, both parties were aware of the illegal conduct.

[24] If indeed one is to accept Learned counsel for the Defendant's argument that because the Plaintiffs had no planning permission to build the house as a result the Promise to Lease is against public policy, contrary to what occurred in the case above whereby the Seychelles Licensing Officer testified to the fact that NSJ had no building licence, in the case at hand, other than the Defendant's testimony that there was no planning permission for the house which resulted in her not being able to get a change of use there is no evidence from a Planning Officer to testify to that fact.

[25] Learned counsel for the Defendant further argued that the Defendant could not perform her obligations under the contract as failure to obtain planning permission was fatal to the contract. He submitted that the case should therefore suffer the same fate as those of **Monthy v Buron** and **DF Project Properties** above.

[26] The Plaintiff testified that at the time that the house was built no planning permission was needed and the Defendant was aware of this fact. She testified that the Defendant spoke to her about the planning authority and licences that was required for a tourism establishment, adding that the Defendant informed her that when she would be ready to start those procedures she would inform the Plaintiff who would then accompany her to those respective offices.

[27] The Defendant testified that she was told that the Plaintiff had to simply submit an architectural plan for approval so she, the Defendant, could proceed with her own application for change of use. In my view the Defendant is attempting to raise the defence of *exception d'inexecution.* According to the case of **Hoareau vs A2B (Pty) Ltd (SCA 34 of 2012) [2014] SCCA 13 (11 April 2014)**

> *there is a plea of exception d'inexecution that is available to a party which may be invoked so that the breach of the other party becomes a ground for treating the contract as terminated. But for a plea of exception d'inéxecution or non adimpleti contractus (unperformed contract) to succeed, the party who invokes it should show that the breach of the party was grave. It is not available for every kind of breach. In general in such cases the courts try to strike a balance between the competing obligations of parties bearing in mind the essential obligation in the agreement.*
>
> ***[15]*** *In **Jumeau v Sinon 1977 SLR 78,** Sauzier J. laid down the conditions under which a plaintiff could claim exceptio non adimpleti contractus:*
> *"(a) that it is raised in good faith and not as mere dilatory measure; and*
> *(b) that the alleged breaches by the lessor of his obligations under the lease do not bear on secondary or subordinate matters of no real importance but are sufficiently grave." see also: **Synthetic Marble Products Ltd v Allied Builders Ltd [1998 SCJ 184].***

[28] I find that the this was raised as an afterthought as a means of getting out of fulfilling her obligations under the contract hence not in good faith.

[29] For the above reasons, the defence arguments on the issue of planning permission is rejected.

[30] Moving on to of his argument that the first Plaintiff had no legal capacity to enter into the contract, article 1108 the Seychelles Civil Code provides that:

> *"Four conditions are essential for the validity of an agreement-*
> *The consent of the party who binds himself,*
> *His capacity to enter into a contract*
> *A definite object which forms the subject matter of the undertaking,*
> *That is should not be against the law or against public policy."*

[31] In the case of **Monthy v Buron (SCA 06/2013) [2015] SCCA 15 (17 April 2015** the Court Appeal concluded that their *"understanding of public policy as expressed in the Code is of one denoting a principle of what is for the public good or in the public interest. In this sense we agree with Chloros that public policy is not a static concept."*

[32] Exhibit D1 shows that the property was owned jointly by the first Plaintiff and her deceased husband. Following his death the property devolved onto the first Plaintiff along with the second, third and fourth Plaintiffs. The Plaintiffs being co-owners Article 818 of the Civil Code is relevant and reads as follows:

> *If the property subject to co-ownership is immovable, the right of the co-owners shall be held on their behalf by a fiduciary through whom only they may act.*

[33] In the case of **Legras and Ors v Legras CA 6/86** Sauzier JA explains clearly the application of Article 818 of the Civil Code. He concluded that "Article 818 of the Civil Code only affects the exercise of the right of co-ownership in so far as it relates to or involves the immovable property itself, individual co-owners remain vested with their real right of co-ownership in the property…, such real right of co-ownership, representing the share of the co-owner in the immovable property, may be transferred or transmitted to a co-owner or to a third party without the intervention of the fiduciary."

[34] He suggested that "the transfer of the right of co-ownership does not amount to the exercise of that right. The exercise of a right is the "employment" or "making use" of a right. For

example mortgaging or leasing the right or collecting the fruits of the common property and selling them. The transfer or transmission of the right is not an exercise of the right in that sense, it just amounts to the passing of that right to someone else."

[35] Clearly in seeking to lease the property to the Defendant the Plaintiffs were exercising their right in the property. Hence required the exercise of that right through a fiduciary.

[36] However, I note paragraph (C) of the Promise to Lease:

> *The Promisors are taking steps to transmit the Property to them and whereupon they will appoint Joanise Helene Jeamina LESPERANCE (born MATOMBE) (hereinafter "Joanise") as the Fiduciary of the Property to administer the Property;*

[37] I also note paragraph 4 of the Promise to Lease which provides that

> *On completion of the works or upon the appointment of Joanise as the Fiduciary of the Property, whichever occurs last, the Promisors or Joanise, as applicable, shall lease the Property to the Promisee for a term of 10 years on terms and conditions set out in the proposed Lease Agreement that is attached herewith provided always that in the event that the Promisors leases the Property to the Promisee prior to Joanise's appointment as the Fiduciary of the Property, upon her appointment Joanise shall execute a new Lease Agreement for the remaining term.*

[38] In the case of **Durup v Adam & Anor (CS 346/1997) [1998] SCSC 10 (30 July 1998)** the second defendant was appointed by the Court as the fiduciary of the co-ownership of the parcel of land, long after the construction of the house. Counsel for the defendants questioned the validity of the consent of a single co-owner for the said construction similar to the want of capacity of one co-owner to transfer any interest in land without the services of a fiduciary. The Court found that:

> *Once the Court has admitted that the plaintiff possessed the implied positive consent of the defendants to her construction, and to their acquiescence with such act, [the Court] accept[s] that the defendants are estopped from benefitting by their failure to comply with the law, of acting through a fiduciary and denying such consent. The reasoning of Sauzier J in the case of* Etheve v Morel *(1977) SLR 252 by analogy supports the above contention of the counsel for the plaintiff.*

[39] In the case of **Etheve v Morel (1977) SLR 252** the plaintiffs pleaded that the defendants could not act on behalf of the co-owners without the appointment of a fiduciary. Sauzier J found that it was necessary for a fiduciary to be appointed before defendants could lodge a notice of objection to a survey being done as it was only through a fiduciary that they could act as from January 1, 1976.

[40] He however went on to find that

> *"the plaintiff was aware that the land of the heirs Morel was held in co-ownership. It was up to the plaintiff to make enquiries regarding the capacity in which Mrs Medea Morel had lodged the objection to the disputed beacons and to raise the point then that the objection was invalid because no fiduciary had been appointed to the heirs Morel. The plaintiff is now precluded from taking the point as it would be unjust and inequitable for him to avail himself of that legal flaw after the arbitration proceedings have been concluded.*
>
> *The Supreme Court of Seychelles is by virtue if section 5 of the Court Act (Cap. 43) a Court of Equity and is invested with powers, authority, and jurisdiction to administer justice and to do all acts for the due execution of such equitable jurisdiction in all cases where no sufficient legal remedy is provided by the law of Seychelles. It is by virtue of such powers that I hold that the plaintiff is estopped from taking the point at this stage that the defendants could not act in the arbitration proceedings on behalf of the co-owners without the appointment of a fiduciary.*
>
> *The following passage from the judgement of Lord Denning M.R in the case of Moorgate Mercantile (1975) 3 All E.R. 314 at page 323 on the question of estoppel by conduct is relevant:*
>
> > *Estoppel is not a rule of evidence. It is not a cause of action. It is principle of justice and equity. When a man, by his words or conduct, has led another to believe in a particular state of affairs, he will not be allowed to go back on it when it would be unjust or inequitable for him to do so.*

[41] Similarly, at all material times, the status of the Plaintiffs was made clear to the Defendant per paragraph (c) and 4 of the Promise to Lease. The Defendant was fully aware of the status of the Plaintiffs when she signed the promise to lease and took possession of the property. In the circumstances she is estopped from pleading that the Plaintiffs had no

capacity to enter into the contract and were acting contrary to Article 818 of the Civil Code of Seychelles.

[42] Furthermore, I note that all the Plaintiffs, who were co-owners, all agreed to the Promise of Lease on the terms it was agreed to. In any event though it is unclear when the first Plaintiff was appointed as fiduciary she had in fact been appointed as the fiduciary at the time of filing of the matter, hence had capacity to sue, see **Prunias v Darou (CS 9/1992) [1997] SCSC 12 (01 July 1997).**

[43] I am further fortified in my view by the amendments to Article 818 of the Civil Code which now reads as follows:

> *(1) Where a property is co-owned, a fiduciary may be appointed.*
> *(2) A fiduciary shall be appointed either by the agreement of all co-owners, or by the Court on the application of any co-owner or of an interested party.*

[44] Additionally I take note of the following articles of the Civil Code of Seychelles

Article 1134 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.*

Article 1135 provides that:

> *Agreements shall be binding not only in respect of what is expressed therein but also in respect of all the consequences which fairness, practice or the law imply into the obligation in accordance with its nature.*

[45] In the case of **Monthy v Government of Seychelles (SCA 37/2019 Appeal from CS 136/2018) [2019] SCSC 511) [2021] SCCA 73 (17 December 2021)**, Twomey JA noted that

> *The Code ... does not provide for a definition of either good or bad faith. The concept is certainly moral or ethical and its meaning after transposition into law*

generally implies honesty and integrity in one's legal obligations. A dictionary meaning of good faith is that "good faith may require an honest belief or purpose, faithful performance of duties, observance of fair dealing standards, or an absence of fraudulent intent."

She went on to note that;

French jurisprudence interpreting the concept of good faith in contractual law has inferred duties of loyalty and cooperation between the parties in the execution of contracts. As summarised by Terré:

"La jurisprudence ne déduit d'ailleurs de cette reference à la bonne foi que des consequences limitées, y découvrant un devoir de loyauté qui pèse sur chacun des contractants et qui permet, de manière en quelque sorte negative, de sanctionner la mauvaise foi, la mauvaise volonté de ceux-ci dans l'exécution des contrats, ainsi q'un devoir de coopération entre les contractants..." ***[5]***

In other words, case law deduces from this reference to good faith only limited consequences, discovering in it a duty of loyalty which weighs on each of the contracting parties and which allows, in a somewhat negative manner, the sanction of bad faith, the unwillingness of parties in the execution of contracts, as well as a duty of cooperation between the parties to a contract." (translation mine)

These concepts of loyalty and cooperation have been incorporated into our jurisprudence with the court specifying in the case of d'Offay v Stevens,[6] a case which also concerned a breach of a lease agreement, that borrowing from principles of French jurisprudence, our Article 1134-3 implies a duty of cooperation between the parties to a contract.[7]

Closely linked to the concept of good faith is the principle of fairness extolled by Article 1135. It provides:

> *"Agreements shall be binding not only in respect of what is expressed therein but also in respect of all the consequences which fairness, practice or the law imply into the obligation In accordance with its nature. (Emphasis added)*

She then concluded that;

Agreements therefore, and specifically leases which are the subject matter of the present case, have to be executed fairly, judiciously and with good faith to balance any potential inequalities in the contract.

[46] On the above I find favour in the submission of the Learned counsel for the Plaintiff that the Court should look at the good faith of the parties. In entering into the Promise to Lease with full knowledge of the capacity of the Plaintiffs; in starting demolition works and structural works on the house without first seeking input from Planning Authority only to then turn round and state that she could not perform her part of the contract because the first Plaintiff had no planning permission I find was plain and simply wrong.

[47] Moreover, I note that the Defendant was not a newbie to the tourism business. She was managing the Villa Authentique tourism establishment and had been in the business of managing tourism establishments since 2013 prior to taking possession of the Plaintiffs' premises to start a new tourism establishment.

Frivolous and vexatious

[48] In terms of the plea that the Plaint is frivolous and vexatious and ought to be struck out in law, the phrase "frivolous and vexatious" was defined in the case of **Lotus Holding Company Ltd v Seychelles International Business Authority (121 of 2010) [2010] SCSC 19 (29 July 2010)** in the following manner;

What is a vexatious proceeding? The answer may be provided in Civil Procedure, 2010 Volume 1, at page 71,

'..... two or more sets of proceedings in respect of the same subject matter which amount to harassment of the defendant in order to make him fight the same battle more than once with the attendant multiplication of costs, time and stress. In this context it is immaterial whether the proceedings are brought concurrently or serially.'

[49] In **Elizabeth v President of the Court of Appeal, (2010) 382** 'frivolous and vexatious' is defined, as follows:

"Turning to the question of whether a mater is 'frivolous or vexatious' we note that the two words are not defined in the Seychelles Code of Civil Procedure. In fact, we have not been able to come across a legislative interpretation of the words

though the words are used in legislation in many jurisdictions. We shall start by looking at their dictionary definition. According to the Oxford Dictionary and Thesaurus (at page 600) frivolous is defined as 'adj. 1 paltry, trifling, trumpery. 2 lacking seriousness; given to trifling; silly.' We take it that this word in relation to a claim or petition means that the claim or petition has no reasonable chances of success.

Vexatious is defined at page 1750 of the Oxford Dictionary (supra) as 'adj. 1 such as to cause vexation. 2 Law not having sufficient grounds for action and seeking only to annoy the defendant.' Vexatious therefore relates to the effect on a defendant. It is vexatious if an adverse party is made t defend something that would not succeed.

[50] On a consideration of the facts on record I do not find that the Plaintiffs were being frivolous or vexatious. Simply because the Defendant labours to defend a matter, which I find was not the case as the Defendant came up with a lengthy Defence as well as a counter-claim, it does not automatically follow that the matter is frivolous and vexatious.

[51] For the above reasons the pleas in limine raised by the Defendant are dismissed.

The Merits

[52] According to the Defendant she was not supposed to get a Promise to Lease but a lease. Though she stated that she asked the first Plaintiff about the validity of the Promise to Lease and that she never spoke to the children she never denied signing the Promise to Lease.

[53] In fact, in the Defence the Defendant admitted paragraph 1 of the Plaint other than to state that it was against public policy.

[54] In spite of the Defendant's testimony and Learned counsel for the Defendant putting to the Plaintiffs that there was no planning permission for the house in question resulting in the Defendant being unable to effect the necessary repairs, there was no concrete evidence to that effect. The Plaintiff testified that at the time there was no need for planning permission and that the Defendant had told her she would be informed when it was time to start procedures such as planning approval and licences which never happened.

[55] In any event per clause 6 of the Promise to Lease:

In the event that this Agreement is rescinded and the works have not been completed, the Promisee shall either reinstate the building and the Property in the state and condition that it was on delivery thereof to the Promisee or complete the works as designed, all at the Promisee's cost and expense, failing which the Promisee shall be liable to the Promisor in damages and to pay the full cost and expense of the reinstatement or to complete the works.

[56] Nigel Roucou a quantity surveyor testified that it would cost SCR 588, 166 to make good the damage caused to the Plaintiffs' property. In his view the condition of the building looked like "a construction site that had been left for a couple of weeks or months". It was his testimony that when he visited the site the house was not habitable. It was further his testimony that as a result of its age all the walls in the house were load bearing walls so the renovations are technically structural.

[57] I have no reason to doubt his valuation and his valuation is the only one on record. In the circumstances I accept his valuation that it would cost SCR 588, 166 to make good the damage caused to the Plaintiffs' property.

[58] In terms of the rent owing, the Defendant testified that her sister, Yvette, paid rent to the first Plaintiff but she was not given a receipt which was the reason why she could not produce a receipt. The sister, Yvette, however, did not come in to explain how that came about or attempt to show that she withdrew money on specific dates and was on La Digue or whichever place the money was paid. For lack of proof that payment for rent was made or the amounts paid I decline to accept the testimony of the Defendant that there was payment of rent to the amount she stated.

[59] The Defendant defaulted on payment of the rent from June 2015 so in effect in accordance with the promise to lease, the Agreement lapsed two months from then. In examination in chief, the first Plaintiff deponed that the Defendant vacated the property during the first three months of 2016. There is no evidence that the Defendant refused to hand over possession. Furthermore, and in fact, the Defendant testified that she has seen people residing at the property since her leaving the property.

[60] Clause 8 of the Promise to Lease (PE2) provides as follows:

In the event of any material breach of this Agreement, this Agreement shall rescind by operation of law or ipso facto and the Promisors shall be entitled to take possession of the Property, failing delivery thereof by the Promisee to the Promisors, the Promisee shall be liable to pay the Promisors the rent until delivery thereof.

[61] When the Defendant left the property at the beginning of 2016 the Plaintiffs were entitled to take over possession of the property. On that basis I find that the Defendant is liable to the Plaintiff for the unpaid rent from 25th June 2015 to March 2016 in the total sum of SCR 350, 000.00

[62] Mr. Roucou confirmed that he was paid his invoice for the report he produced in the sum of SCR 7, 500.00 so that sum is awarded to the Plaintiffs.

[63] In terms of moral damages the first Plaintiff explained the financial crisis she was in that led her to enter into the agreement with the Defendant. She testified about her illness as a result of an accident she had while riding her bike with all the problems she had on her mind. She explained that she is diabetic and hypertensive.

[64] In the case of **Kopel v Attorney General [1955] SLR 315** and **Pillay v Lesperance & Or [1991] SLR 88** the Court found that though "in principle moral damages ought not to be awarded in a case of breach of contract, yet in certain circumstances the Court ought to do so".

[65] In the case of **Nathalie Weller v/s Sarah Walsh Civil Appeal No. 3 of 2015** the Court of Appeal expanded on **Kopel** explaining that "to recover moral damages in an action for breach of contract the following conditions have to be met. (i) There must be an injury, whether physical, mental or psychological, sustained by the claimant. A mere allegation of "disappointment, anxiety", are insufficient. (ii) There must be evidence that the respondent acted in bad faith, fraudulently, recklessly, out of malice or in wanton disregard of his contractual obligation. (iii) The wrongful act or omission of the respondent should be the proximate cause of the injury sustained by the claimant."

[66] In the matter at hand I decline to make any awards under the head of moral damages as in my view none of the above conditions have been satisfied.

[67] In terms of the counter-claim the Defendant claims the sum of SCR241, 000 out of which SCR 126, 000 is for sums paid to the Plaintiff as rent, SCR 100, 000 invested on the building for maintenance, repairs and renovation and SCR 15, 000 paid to the architect.

[68] Following an objection by counsel for the Plaintiff on the production of receipts, counsel for the Defendant and counter claimant indicated that he did not need to prove his counter claim as there was no defence to the counter claim. In his submissions counsel for the Defendant raised the issue of section 128 of the Seychelles Code of Civil Procedure and submitted that judgment should be entered in default on the Plaintiff's failure to file the defence to the counter claim. He referred the Court to the case of **Govinden and Another v Pointe and Others (315 of 2003) [2006] SCSC 53 (04 July 2006**.

[69] Indeed, in the above-mentioned case, the Plaintiff sought judgment in accordance with section 128 of the Seychelles Code of Civil Procedure in the absence of a defence being filed. True it is that the Plaintiff omitted to file a defence to the counter claim. In the case of **Burka v Ventigadoo (08 of 2009) [2009] SCSC 5 (15 November 2009)** CJ N'tende found that:

> *under Section 128 of the Code of Civil Procedure a court is provided with two alternate courses of action. It could enter judgment for the plaintiff or it could provide the defendant with more time within which to file a defence.*

[70] I agree with the finding in **Burka** above. However, in this matter there was no application for judgment to be entered in default when the ruling was delivered to the effect that the Plaintiff could not file a defence to the counter claim. Though there is no statement of defence to the counter-claim filed in the present matter, this Court cannot ignore the fact that the Defendant in her testimony in defence of the Plaint could not offer any documentary support for the statements she made. Furthermore, this Court has accepted the evidence of the Plaintiff that only SCR 70, 000.00 was paid in rent. With that in mind it would be wrong for this Court to then grant judgment in favour of the Defendant on a counter-claim for SCR 126, 000.00 in rent paid without further proof.

[71] In addition, though Mr. Roucou's report remained an Item and cannot be relied on by this Court, he made clear in his evidence that the premises was a construction site "that has been left for couple of weeks or months…(sic)". With what Mr. Roucou described as "work that has started in partition and re-modelling of a building but it hasn't been completed." the counter-claimants claim for maintenance, repairs, renovation and improvement made to the premises cannot succeed.

[72] In the circumstances the counter-claim is dismissed.

[73] In conclusion I enter judgment in favour of the Plaintiff as follows:

(1) Unpaid rent from 25th June 2015 to March 2016 in the sum of SCR 350, 000.00

(2) Surveyor's fees in the sum of SCR 7, 500.00

(3) Unpaid Utility Bills in the total sum of SCR 3, 621.00

(4) SCR 588, 166 to make good the damage caused to the Plaintiff's property

[74] All with interest from the date of judgment plus costs.

Signed, dated and delivered at Ile du Port on … 8th February 2022.

Pillay J