SUPREME COURT OF SEYCHELLES

Reportable
[2022] SCSC …
Civil Appeal 15/2020
(Appeal from RB 13/2020)

In the matter between:

EDEN HOLISTIC SPA (PROPRIETARY) LIMITED **Appellant**
(rep. by Serge Rouillon)

and

WOODLANDS HOLDINGS LIMITED **Respondent**
(rep. by Frank Elizabeth)

Neutral Citation:	*Eden Holistic Spa (Pty) Limited v Woodlands Holdings Limited* (CA 15/2020) 2022 SCSC… (24 March 2022).
Before:	Dodin J.
Summary:	Appeal from Rent Board - Control of Rent and Tenancy Agreement Act
Heard:	Written submissions
Delivered:	24 March 2022

ORDER

JUDGMENT

DODIN J.

[1] The Appellant being dissatisfied with the judgment of the Rent Board delivered on 11th September, 2020, appeals to the Supreme Court against the judgment of the Rent Board in case RB13 raising the following grounds:

1. *The Rent Board erred in law and fact in taking into consideration and making an award against the Appellant on a belated claim for a sum*

representing an insufficient deposit payment when the item had never been pleaded or raised until the trial;

2. *The Rent Board erred in making a judgment against the Appellant for payment of the belated claim which included an alleged insufficient deposit payment when the Appellant had no chance or advance warning to prepare of the claim until the hearing of the case.*

3. *The Rent Board erred in fact in failing to note the letters of the Appellant concluding all matters in terms of the contractual tenancy of the parties produced as exhibits where the issue of deposit is not challenged by the Respondent in any correspondence or pleadings.*

4. *The Rent Board erred in fact in failing to note the discrepancy of the sums claimed as arrears of rent which when added to an insufficient deposit amount does not add up to the amount claimed as arrears or for damage in the application for eviction.*

5. *The Rent Board erred in law generally in failing to look discerningly at all pleadings and evidence of the parties and the lack of certainty in dealing with two corporate entities and the figures produced by the Landlord before the Rent Board to justify its claim.*

6. *The Rent Board erred in using final rent payments to offset an alleged insufficient deposit payment for a lease which was valid and running; mentioned in the lease agreement and there were no claims for the said deposit shortage proved to the Court except for a receipt which justifies both parties' stories in the absence of proof; which proof the Appellant was given no chance to produce.*

[2] The Appellant moved the Court to:

a. Allow the Appeal and reverse the decision of Rent Board and find that the Appellant has no obligation to pay Respondent any sum;

b. make any other order as maybe fit and just in the circumstances;

c. award the costs of the Appeal in favour of the Appellant.

[3] Learned counsel for the Appellant made the following submissions in support of the appeal:

1. *In respect of grounds 1 to 4 of appeal; The original claim for a sum of R33,000/- arrears of rent plus service charge of R1500/-. This was amended in the proceedings to include damage to furniture and a total amount of arrears due R46,000/-. The figures do not match the amounts claimed before or after the insufficient deposit deduction amount. Bringing in the deposit issue confuses and nullifies the arrears claimed because the figures don't add up. The amount claimed could match 2 months' rent R23,000/- but shows no bearing on any deposit deduction therefore the deposit issue like the property damage are all afterthoughts and greed on the part of the landlord.*

   The Appellant's claim that since the insufficient deposit was not pleaded and claimed with the arrears claimed then it could not be taken into consideration in the final award and therefore it is argued that the final award of the rent board was ultra petita and therefore not legal.

   In Diana Jean v Debora Banane SCA 19 of 2015 the Court of Appeal said; "What is ultra petita? It is an expression in Latin meaning "beyond that was sought".

2. *In respect of grounds 2 and 3 of the appeal; following from paragraph 1 above there were exchanges between the parties where the lease agreement came to an end including a full breakdown of the dues outstanding given by the Appellant to the Respondent in a full break down letter which was never challenged.*

No pleadings or documents were produced and there was no claim or dispute on the Tenants story that the deposit balance was taken from a previous lease deposit. In none of the documents produced is there any dispute or discussion that the tenant had a R45,000 deposit with the landlord and there was no counter offer or response to the tenants request to offset R45,000/- deposit against arrears of rent.

3. *In respect of ground 5 of the Appeal the rent board failed to look at the company records of both parties which would have revealed the discrepancies of the of the figures claimed by the Respondent which main burden was on the Respondent as the entity bringing the claim, it should have had better records of its claims including a formal claim for an insufficient deposit being outstanding on their books.*

4. *In respect of ground of 6 of the Appeal following the previous grounds about records and insufficient deposit the issue of insufficient deposit was only brought up by the Respondent at the hearing giving the Appellant no chance to produce contradicting evidence except her oral explanations that the deposit from the previous rental of another house was used to set off against the new letting when one lease ended and the new on started. This makes perfect hence the complete absence of any mention of the insufficient deposit claim in any pleadings or amended pleadings of the Respondent.*

In this case the insufficient deposit issue raised during the trial not pleaded and with insufficient notice to the Appellant to make a fair response meant the final order to use the insufficient deposit to set off against alleged unpaid rents was ultra petita and for that reason the rent board order should be set aside.

In the case of Sara Jupiter v June Tregarthen CS93/2015 the former Chief Justice Twomey explained the basis of proper pleadings when making a request before any adjudicating body said;

"similarly in Tree Sword v Pulciani and ors [2016] SCCA 19, the Court of Appeal explored the application of these procedural rules in Seychelles which find their origin from England and stated:

[16] Rule 13 of Order 18 of the Supreme Court Rules of England applicable at the time of Seychelles' independence in 1976 provide that every pleading must contain necessary particulars of any claim. In explaining the function of the rule the following note is made:

'The function of the particulars is to carry into operation the overriding principle that the litigation between the parties, and particularly the trial, should be conducted fairly, openly and without surprises and incidentally to reduce costs... This function has been stated in various ways as follows:

(a) to inform the other side of the nature of the case they have to meet as distinguished from the mode in which the case is to be proved (per Lindley L. J. in Duke v Wisden (1897)77 L.T. 67, 68;... Aga Khan v Times Publishing Co. 91924) 1 KB 675, 679).

(b) to prevent the other side from being taken by surprise at the trial (per cotton LJ in Spedding v Fitzpatrick (1888) 38 Ch. d. 410...).

(c) to enable the other side to know what evidence they ought to be prepared with and to prepare for trial per Cotton LJ. ibid,)…. (See Supreme Court Practice (Sweet and Maxwell 1991)18/12/12, 299).

[17] These authorities are supported in Seychelles. In Gallante v Hoareau (1988) SLR 122, G. G. D de Silva J stated:

"The function of pleadings is to give fair notice of the case which has to be met and to define the issues upon which the court will have to

adjudicate in order to determine the matters in dispute between the parties."

In addition to these clearly enunciated principles of pleadings, there is also jurisprudence constante in Seychelles that a Court will not formulate a case for parties and that their pleadings must disclose all the facts, which they intend to bring in evidence at trial. Tirant v Banane (supra) is authority that all facts to be relied on at trial have to be pleaded so that both parties and the Court are made fully aware of all issues between the parties. It was followed in Sophola v Desaubin SCA 13 of 1987; Confait v Mathurin SCA 39 of 1994; Equator Hotel v Minister of Employment and Social Affairs SCA 8 of 1997; Verlacque v Government of Seychelles SCA 8 of 2000; Barbe v Hoareau SCA 5 of 2001 ; Gill v Gill SCA 4 of 2004.

In Vandange Plant Hire Ltd v Camille 2015 SCCA 17, the Court of Appeal reiterated that:

"in terms of procedure and pleadings, the rule bears no repetition that parties are bound by their pleadings and that they may not ask nor can the Court grant any relief which goes beyond the four corners of the Plaint and the pleadings. Nor may it consider any issue any more than grant a remedy flowing from that issue when that issue was not joined by the parties in the first place". [Sic]

[4] Learned counsel for the Respondent made the following submission:

1. *In grounds 1 to 4 of the notice of appeal the appellant has raised the issue of ultra petita. The respondent submits that the appellant is not permitted to raise new points on appeal which was not raised in the court below. The ultra petita issue was not raised in the court below nor adjudicated upon. With respect, it cannot be raised here for the first time as a notice of appeal is supposed to point out where the presiding judge*

erred either in law or in fact or both. It is trite law that the appellate court will not interfere with the judgment of a lower court unless the appellant is able to show the court that the lower court committed an error of law or fact or both to justify a reversal of the judgment of the lower court.

2. *In Malawi, the Court, in the case of Kumalakwaanthu t/a Accurate Tiles and Building Centre v Manica Malawi Ltd (Civil Appeal No. 57 of 2014) (2015) MWSC, had to deal among other issues with whether the Court of Appeal could deal with an issue not raised on appeal. The majority found that despite being empowered to deal with the issue under the rules, the correct approach was one of restraint, particularly when the issues are not raised by the parties.*

3. *In the case of Mullarkey & Anor v Broad England And Wales Court Of Appeal (Civil Division) (Jan 21, 2009) the court held that:-*

"The authority cited by Counsel in relation to the question whether a concession should be allowed to be withdrawn is Pittalis v. Grant [1989] 1 QB 605, in particular a passage in the judgment of Nourse LJ at page 611, as follows:

"The stance which an appellate Court should take towards a point not raised at the trial is in general well settled: Macdougall v. Knight (1889) 14 App. Cas. 194 and The Tasmania (1890) 15 App. Cas. 223. It is perhaps best stated in Ex parte Firth, In re Cowburn (1882) 19 Ch.D. 419, 429, per Sir George Jessel M.R.:

"the rule is that, if a point was not taken before the tribunal which hears the evidence, and evidence could have been adduced which by any possibility would prevent the point from succeeding, it cannot be taken

afterwards. You are bound to take the point in the first instance, so as to enable the other party to give evidence."

Even if the point is a pure point of law, the appellate Court retains a discretion to exclude it. But where we can be confident, first, that the other party has had opportunity enough to meet it, secondly, that he has not acted to his detriment on the faith of the earlier omission to raise it and, thirdly, that he can be adequately protected in costs, our usual practice is to allow a pure point of law not raised below to be taken in this Court. Otherwise, in the name of doing justice to the other party, we might, through visiting the sins of the adviser on the client, do an injustice to the party who seeks to raise it." (see para 30 of the judgment)

3. *The court went on to consider the point and had this to say in respect of the case of Pittalis v. Grant:*

"The issue in Pittalis v. Grant was whether a flat was "premises" within the meaning of the Rent Act 1977, where there had been a lease of a flat and shop together and the lessee had then sublet the flat separately from the shop. On a claim for possession of the flat, the issue was whether those who continued in occupation of the flat after the expiration of their actual tenancy had the benefit of the Rent Act. In the County Court it was conceded that they did but on appeal that concession was sought to be withdrawn, and was allowed to be withdrawn, and it was held that the occupants did not have the protection of the Act. The case is perhaps a somewhat unhappy precedent since, in Wellcome Trust Limited v Hamad [1990] QB 638, a later Court of Appeal held that the decision in Pittalis had been reached per incuriam and was wrong. What is clear is that the very issue was before the Court, that all possible evidence (as to the nature of the premises and the history of the lettings) had been adduced

and that all that was to be withdrawn was a concession or admission as to the right answer to the question of law." (para 31 of Judgment)

4. *And at paragraph 32 of its judgment the court further elaborated on the principle that a party cannot raise a point for the first time on appeal which was not raised in the court below. It commented on the case of Jones v. MBNA International (unreported)as follows:-*

"A more recent case concerned with a similar point is Jones v. MBNA International, unreported, decided by the Court of Appeal on 30 June 2000. That was an employment case where in the county court the Claimant had put his case, ultimately, on an allegation that the employer was in breach of an implied term that it would not, without reasonable and proper cause, conduct itself in a manner calculated to destroy or seriously damage the relationship of confidence and trust between employer and employee but accepted that he could only succeed if he could show that the employer had acted in bad faith in the relevant conduct. He lost after a trial before a Recorder lasting for several days. On appeal he sought to change his ground so as to argue that the employer had been in breach of the same implied term but without alleging bad faith and rather alleging that the employer's investigation of the facts had been conducted unreasonably. The new ground of appeal point required findings of fact which it was said would be consistent with or Court would flow from findings made by the trial judge. Not surprisingly, the Court of Appeal refused to allow this to be taken. What matters is not so much the decision of the court, as the terms in which the judges spoke as a matter of principle. Lord Justice Peter Gibson gave the first judgment and said this at paragraph 38:

"38. It is not in dispute that to withdraw a concession or take a point not argued in the lower court requires the leave of this court. In general, the court expects each party to advance his whole case at the trial. In the

interests of fairness to the other party this court should be slow to allow new points, which were available to be taken at the trial but were not taken, to be advanced for the first time in this Court. That consideration is the weightier if further evidence might have been adduced at the trial, had the point been taken then, or if the decision on the point requires an evaluation of all the evidence and could be affected by the impression which the trial judge receives from seeing and hearing the witnesses. Indeed it is hard to see how, if those circumstances obtained, this court, having regard to the overriding objective of dealing with cases justly, could allow that new point to be taken."

5. *Finally, the court concluded at paragraph 52 of the judgment that:-*

"Civil trials are conducted on the basis that the court decides the factual and legal issues which the parties bring before the court. Normally, each party should bring before the court the whole relevant case that he wishes in advance. He may choose to confine his claim or defence to some only of the theoretical ways in which the case might be put. If he does so, the court will decide the issues which are raised and normally will not decide issues which are not raised. Normally a party cannot raise in subsequent proceedings claims or issues which could and should have been raised in the first proceedings. Equally, a party cannot, in my judgment, normally seek to appeal a trial judge's decision on the basis that a claim, which could have been brought before the trial judge, but was not, would have succeeded if it had been so brought. The justice of this as a general principle is, in my view, obvious. It is not merely a matter of efficiency, expediency and cost, but of substantial justice. Parties to litigation are entitled to know where they stand. The parties are entitled, and the court requires, to know what the issues are. Upon this depends a variety of decisions, including, by the parties, what evidence to call, how much effort and money it is appropriate to invest in the case, and generally how to

conduct the case; and, by the court, what case management and administrative decisions and directions to make and give, and the substantive decisions in the case itself. Litigation should be resolved once and for all, and it is not, generally speaking, just if a party who successfully contested a case advanced on one basis should be expected to face on appeal, not a challenge to the original decision, but a new case advanced on a different basis. There may be exceptional cases in which the court would not apply the general principle which I have expressed. But in my view this is not such a case."

6. *In respect of grounds 2 and 3 of the appeal, the respondent submits that if the appellant had a claim of SCR45,000.00 deposit in respect of another lease, it was incumbent on the appellant to file a counter-claim and make this a live issue before the court. Section 80 of the Seychelles Code of Civil Procedure provides as follows:-*

"80 (1) Subject to subsection (2), where a defendant in any action wishes to make any claim or seek any remedy or relief against a plaintiff in respect of anything arising out of the subject matter of the action, he may, instead of raising a separate action make the claim or seek the remedy or relief by way of a counter claim in the action; and where he does so the counterclaim shall be added to his defence to the action.

(2) If, on the application of any party against whom a counterclaim is made, it appears to the court that it is in the interests of justice that the subject matter of the counterclaim be dealt with as a separate action, the Court may

(a) *order that the counterclaim be struck out;*

(b) *order that it be tried separately; or*

(c) *make such order as it considers appropriate."*

7. *The respondent submits that since the appellant did not file a counterclaim, claiming the deposit that was allegedly due to the appellant from the respondent, the issue was never a fact in issue which the court could have adjudicated upon as it was not raised in the appellant's pleadings or proven by the appellant. Although admittedly, the appellant did testify about the deposit, the presiding Magistrates ruled that there was no supporting evidence produced by the appellant in court to prove payment of the deposit and that the same was therefore not due from the respondent to the appellant.*

8. *Ground 5 is vague and the respondent does not understand what the appellant means. It is not for the court to look at the books of the two companies, it is for the parties to prove their respective cases. Like Justice Dingake stated in the case of Vijay Construction (Pty) Ltd v/s Eastern European Engineering Limited SCA28/2020*

"In summation it seems to me that the general trend from the above authorities seem to be that save in exceptional circumstances, a role of a judge is akin to that of an impartial umpire in a game, who is very careful not to be seen to be unduly aiding another side at the expense of the other. It is our solemn duty to keep the ring and not to enter the fight of the parties." (see paragraph 24 of the judgment)

9. In the in the United States, the matter arose in the United States v Sineneng-Smith (590 U.S. (2020) the court observed that:-

"In our adversarial system of adjudication, we follow the principle of party presentation. As this Court stated in Greenlaw v United States, 554 U.S. 237 (2008), "in both civil and criminal cases…we rely on the parties to frame the issues for the decision and assign to Courts the role of neutral arbiter of matters the parties present… In criminal cases, departures from party presentation principle have usually occurred "to protect a pro se

litigant's rights. … But as a general rule, our system "is designed around the premise that parties represented by competent counsel know what is best for them, and are responsible for advancing facts and argument entitling them to relief." (page 3-4)"

The court went on to state:-

"Courts are essentially passive instruments of government" and … they "do not, or should not, sally forth each day looking for wrongs to right. [They] wait for cases to come to [them], and when [cases arise, Courts] normally decide only questions presented by the parties." (page 4)

10. *In respect of ground 6, the respondent submits that it is very difficult to understand what the appellant is actually arguing here. The respondent filed a claim before the Rent Board for eviction of the appellant and payment of arrears of rent. The issue of deposit and set off was raised by the appellant not the respondent. If the pleadings are wanting, it is indeed the pleadings of the appellant who never file a counter-claim or set off. The appellant seems to be arguing against its own case about defective pleadings. With respect, the respondent cannot be expected to meet this very confusing and unclear submission on ground 6 of the appeal.*

11. *The respondent submits that the appeal is vague, frivolous and vexatious and ought to be dismissed with costs. It is clearly an exercise in futility and without merits whatsoever. The respondent therefore submits that this Honourable Court should dismiss the appellant's appeal with costs.* [Sic]

[5] The reason I have reproduced the grounds of appeal and the submissions of learned counsel in their entirety is a reflection of the difficulty in comprehending the various demands of the Appellant in the grounds of appeal and the accompanying submission when the only issues that fell to be determined by the Rent Board were:

i. Whether there were arrears of rent; and

ii. Whether the rent deposit was fully paid.

The Rent Board rightly concluded that it had no jurisdiction to entertain contractual issues or issues giving rise to claim for damages in view of its restricted jurisdiction. The jurisdiction of the Rent Board is limited by the provisions of sections 3, 4 and 10 of the Control of Rent and Tenancy Agreements Act which confines it to fixing rents and ejectment issues in respect of a house or part of a house let as a separate dwelling.

[6] Grounds 1, 2, 3, 4 and 6 are concerned with the issue of deposit. The determination as to whether the initial rent deposit was made in full depended essentially on the facts testified to by the witnesses before the Rent Board. Nahil Elmasry testified on behalf of the Applicant, now Respondent whilst Sabine Hama testified on behalf of the Respondent, now Appellant. It is obvious that the Rent Board did not give much credit to either witnesses' testimony. However, on balance of probabilities, The Rent Board found in favour of the Respondent but for a lower sum than was claimed. The Rent Board found that in according to the rental agreement a total of Seychelles Rupees 552,000 had to have been paid over the 6 months rental period. The records showed the total payment made or received was Seychelles Rupees 507,800. This left a balance of Seychelles Rupees 44,200. Since there was a deposit of Seychelles Rupees 30,000 made by the Respondent, the remaining amount due was Seychelles Rupees 14,200.

[7] An appeal is not an opportunity for an appellate court to review findings of facts of the trial court or tribunal unless the lower court or tribunal's finding is so unreasonable, perverse or outrageous that no reasonable court or tribunal could have reached. In the case of *McGraddie v McGraddie [2013] UKSC 58; [2013] 1 WLR 2477* the Court of Appeal stated;

> "*It was a long settled principle, stated and restated in domestic and wider common law jurisprudence, that an appellate court should not interfere with the trial judge's conclusions on primary facts unless satisfied that he was plainly wrong.*"

[8] In the case of *Ronny Georges Fred v Sound and Vision CA 25/2016 (delivered on 22 November 2017)* this Court stated;

> *"The Appellate Court although it can review the facts, unless it is satisfied that the conclusion of the Tribunal from the facts is perverse and patently unreasonable, should not substitute its own opinion on the facts only because the Appellate Court could have come to a different conclusion".*

The Rent Board was well placed to hear the evidence and assess the demeanour of the witnesses and come to the conclusion it did. After all, it was for the parties to prove their respective cases to the satisfaction of the law on burden of proof and hence convince the Rent Board of its case.

[9] It is trite law that the parties must prove their case at the trial court and cannot plead evidence that was not brought at the hearing on appeal. This has given rise to arguments of ultra petita by both learned counsel. That concept was recently addressed by this Court in the case of *Adonis v Port-Louis & others CS243/2021* ruling delivered on 18th March 2022:

> *"Ne eat iudex ultra petita partium aut breviter ne ultra petita": "The judge should not go beyond the parties' requests or summarily prevent further requests." Legal maxim translation from Latin brocard compiled in Ecclesiastical Rules by Burchard of Worms /Bishop of Worms, Germany. Of course with the gradual disappearance of Latin as a popular language the shorten idiom of ne ultra petita or non ultra petita or ultra petita represents the whole concept."*

[10] The principle of *non ultra petita*, entails that a court may not decide or award more than it has been asked to. Of course, a party may object at the hearing of a matter that a party is asking or leading evidence for matters not pleaded. However, a party can also argue on appeal that the Court took into consideration in its judgment matters not contained in the pleadings. Section 4 of the Control of Rent and Tenancy Agreements Act gives jurisdiction to the Rent Board to adjudicate the issue of rent by fixing, increasing or

reducing it. It is implied in the powers and jurisdiction that the Board can also determine outstanding rent and deposits of rent as necessary for it to fix the rent payable. Such specifics of arrears need not be pleaded but proved by evidence.

[11] Whilst I do not see any reason why the Appellant cannot raise it as a ground of appeal, the Appellant has not made out a case that:

> *"since the insufficient deposit was not pleaded and claimed with the arrears claimed then it could not be taken into consideration in the final award and therefore … the final award of the rent board was ultra petita and therefore not legal"*.

Grounds 1, 2, 3, 4 and 6 of appeal are ill-founded and are dismissed accordingly.

[12] In respect of ground 5, that ground of appeal does not seem concerned with the facts or the law governing the issue that was tried by the Rent Board but rather aimed at the competence and diligences of the Rent Board. That is not acceptable. All adjudicating authorities are presumed to have the competencies to attend to and address matters it is expected to adjudicate on. In so doing it is presumed that it does look discerningly at all pleadings and evidence. To contend otherwise is to challenge the competency of the adjudicating authority. Such challenge cannot be a ground of appeal. Whether it is deliberate or inadvertent, it is discourteous to the adjudicating authority and unnecessary. In respect of the issue of rent at hand, this ground has no bearing nor merit and is dismissed accordingly.

[13] This appeal is therefore dismissed in its entirety.

[14] I award costs to the Respondent.

Signed, dated and delivered at Ile du Port on 24 March 2022.

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Dodin J.