

SUPREME COURT OF SEYCHELLES

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Reportable  
[2022] SCSC 295  
CS 15/2020

In the matter between:

**MOUNTAIN VIEW INVESTMENT**

**Plaintiff**

**(PTY) LTD herein represented by its Director**

**Dr Ashraf Elmasry who is in turn represented**

**By Nabil Elmasry**

*(rep. by Frank Elizabeth)*

and

**JENNY POMEROY**

**Defendant**

*(rep. by Alexandra Benoiton)*

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**Neutral Citation:** *Mountain View Investment (Pty) Ltd v Pomeroy* (CS 15/2020) [2022] SCSC 295 (30<sup>th</sup> March 2022).

**Before:** Pillay J

**Summary:** Breach of contract

**Heard:** 19<sup>th</sup> October 2021 and 28<sup>th</sup> October 2021

**Delivered:** 30<sup>th</sup> March 2022

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**ORDER**

The Plaintiff is dismissed with costs to the Defendant.

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**JUDGMENT**

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**PILLAY J:**

[1] The Plaintiff sues the Defendant for breach of a transfer agreement and seeks damages in the sum of SCR 500, 000.00 as well as an order evicting the Indian workers illegally occupying the premises and order the Defendant to hand over vacant possession of the property to the Plaintiff.

[2] The Plaintiff avers as follows:

2. *The Plaintiff avers that on the 6<sup>th</sup> December 2006, it purchased parcel No. PR4611 from the Defendant for the sum of SCR 1, 800, 000.00.*
3. *The Plaintiff avers that the transfer of land was subject to the following conditions:-*
  - i). *The Defendant will keep the house in good tenantable condition and “en bon pere de famille”.*
  - ii) *The Defendant was obliged to allow the Plaintiff to inspect the properties when agreed with the Defendant when required.*
  - iii) *The Defendant will pay for the annually renewed insurance of the property and keep it insured at all times.*
3. *The Defendant’s sister will occupy the house for 25 years thereafter.*
4. *In breach of the conditions of the transfer, the Defendant has failed to, refused or neglected to comply with any and all of the said conditions.*
5. *The Plaintiff avers that the Defendant has added new buildings and structures to the property without obtaining prior written approval from the Plaintiff and planning permits for such construction.*
6. *Further the Defendant’s sister does not live in the house and instead the Defendant has allowed her son to house Indian construction workers in the said house.*
7. *By reason of the matters aforesaid, the Plaintiff has suffered loss and damage for which the Defendant is liable to make to the Plaintiff.*

[3] The issues identified by the Plaintiff for consideration by the Court is as follows:

- a) *Was there a contract between the Plaintiff and the Defendant in law?*
- b) *If yes, what are the terms of the contract?*
- c) *Did the Defendant breach the terms of the contract?*
- d) *If yes, what are the legal remedies available to the Plaintiff?*

[4] The Defendant admitted to the purchase dated 6<sup>th</sup> December 2006 but denied the other averments in the Plaint adding further that:

- 3. *...The conditions of the transfer was as follows:*
  - a. *The Defendant would reserve a right of use and habitation in respect of the two houses and it's immediate precinct for a period of 30 years free of charge;*
  - b. *The Defendant shall be responsible for the upkeep and maintenance of the houses and keep them insured with a reputable company;*
  - c. *The Defendant may neither assign nor hire out his right to another; and*
  - d. *The right granted may also be terminated (a) by abuse on the part of the Defendant wither by committing waste or by allowing the house to fall into disrepair or (b) by non-use for a period of 5 years.*
- 6. *...in the event that there are any conditions that have not been complied with, they are not material breaches to the agreement and therefore would not warrant termination of the agreement.*
- 7. *...the structures are referred to, are temporary structures in furtherance of the obligation to keep the premises in a state of good upkeep and maintenance.*
- 8. *...the Defendant has never resided in the house and even during the purchase it was her employees living in the house which resulted in the agreement for her use. The current persons residing in the house are doing under the Defendant's right of use.*

[5] Neither side filed submissions.

[6] The Defendant was called on her personal answers. She confirmed that the transfer of land parcel PR4611 dated 6<sup>th</sup> December 2006 was signed by her. She accepted that she was paid SCR 1, 800, 000.00 for the property. She also accepted that the transfer was subject to several conditions. She denied that she agreed for her sister to stay in the property for 25

years and stated that her sister had been in Italy for years and only came back 2 years ago. She denied housing Indian workers from Vijay Construction in the property and stated that always her workers from La Reserve which she used to own lived in the property.

[7] The Plaintiff's representative Mr. Elmasry testified that he is a director of the Plaintiff company. He was granted power of attorney on 20<sup>th</sup> August 2015. It was his evidence that he visited the property in question 8 months prior to his attendance in court to give evidence. The buildings were "very much deteriorated from the outside". The condition was very bad. He saw some Indian workers residing on the property. It was his testimony that he never agreed with the Defendant for the property to be used to house Indian workers. He requested counsel to write to the Defendant which was done by letter dated 30<sup>th</sup> November 2019 requesting the eviction of the Indian workers and to hand over vacant possession of the property. He further commissioned a report from Alf Esparon, a civil engineer. He testified that the Defendant was in breach of the conditions in that she was to use it personally and not for workers; actual insurance which he had not seen; to keep the property in good order and not to do work without their permission where she had added new building on the property.

[8] The witness further testified that the Plaintiff had never given written approval for construction. It was his belief that his brother had agreed for the Defendant's sister to live on the property. He now wished to occupy the property and to be awarded damages in the sum claimed.

[9] In cross examination Mr. Elmasry accepted that at the time of the transfer of the property he was not a director of the company. He was not present at the meeting or during any conversations prior to the sale of the property. He was unaware of any conversations between the Defendant and his brother but is aware of only of documentation. He was unaware of any other agreements between the parties other than the transfer document.

[10] Alf Esparon a civil and structural engineering consultant deponed that he conducted a site inspection on a property on Praslin with title number PR4611, on 13<sup>th</sup> November 2019. He went on to draw up a report on 19<sup>th</sup> November 2019 which he produced and was marked PE3. The report shows that the houses on the property were built about 40 years ago. The

ancillary storage was built about 8 years ago and out bathroom more recently. On house 1 he noted that there were signs of dampness and moisture penetration throughout the external masonry walls which were due to accumulation of storm/surface water during rainy periods. He further noted that there was a non-structural crack between the verandah and living room wall which was a result of the detachment of the verandah from the main house considering that the verandah seems to have been erected at a later stage.

- [11] On house 2 he found minor shear cracks over the lintel of the back kitchen door which have consolidated and is no longer an issue. He also found a crack of 2mm wide between the exterior wall of the house and the exterior laundry which he found not to be structural and was merely a detachment crack as the block works were not bonded into each other; the exterior laundry shed having been erected as an extension to the house.
- [12] He recommended a concrete apron be laid around the first house. He noted that both houses needed extensive “refurbishment works such as painting, repairing or replacement of certain fixtures and fittings, etc...” His conclusion was that the “structural integrity of the existing houses is rendered sound and safe for occupancy.”
- [13] The Defendant testified on oath that she never lived in either of the two houses which is in issue before the Court. Neither did her sisters. In 2006 her hotel workers lived in the house. When she sold the land to the Plaintiff it was on the agreement that she could stay there for 30 years. It was never her intention to live in either of the two houses. While her house was being renovated she rented a house from Mr. Nabil Elmasry. She stated that this was around the time of the tsunami.
- [14] With the evidence in mind then, what are the issues before the Court? I would agree with the issues identified by the Learned counsel for the Plaintiff;

- (1) *Was there an agreement between the Plaintiff and Defendant?*
- (2) *What were the terms of the agreement?*
- (3) *Was the Defendant in breach of those terms?*
- (4) *If so, what damages is the Plaintiff entitled to?*

[15] This matter is one based purely on the facts as a result of which the credibility of the witnesses is very much at the forefront. Moreover the burden is on the Plaintiff to prove the entirety of its case on a balance of probabilities.

[16] In the case of **Carolus and Others v Scully and Others ( SCA 39/2019) [2022] SCCA 1 (28 January 2022) (Arising in CS 09/2013) SCSC 422) [2022] SCCA 1 (28 January 2022)** Tibatemwa JA explained the standard of proof in civil cases and the manner in which the credibility of witnesses are assessed:

*The balance of probabilities is the requisite standard of proof by which a trier of fact must determine the existence of contested facts. Saying something is proven on a balance of probabilities means that it is more likely than not to have occurred. It means that the probability that some event happens is more than 50%.*

*Demeanor evidence has since time immemorial been recognized in law as an important basis for determining the credibility of witnesses in fact finding. Demeanor evidence refers to the non-verbal cues given by a witness while testifying, including voice tone, facial expressions, body language, and other cues such as the manner of testifying, and the attitude of a witness while testifying. Indeed it is a generally accepted principle in court hearings that the demeanour of a witness is of value in shedding light on the credibility of a witness.*

[17] In the case of **Onassis v Vergottis [1968] 2 Lloyd's Rep 403** Lord Pearce at 431 discussed the intricacies of assessing credibility of witnesses:

*“Credibility” involves wider problems than mere “demeanour” which is mostly concerned with whether the witness appears to be telling the truth as he now believes it to be. Credibility covers the following problems. First, is the witness a truthful or untruthful person? Secondly, is he, though a truthful person, telling something less than the truth on this issue, or, though an untruthful person, telling the truth on this issue? Thirdly, though he is a truthful person telling the truth as he sees it, did he register the intentions of the conversation correctly and, if so, has his memory correctly retained them? Also, has his recollection been subsequently altered by unconscious bias or wishful thinking or by overmuch discussion of it with others? Witnesses, especially those who are emotional, who think that they are morally in the right, tend very easily and unconsciously to conjure up a legal right that did not exist. It is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active.*

*For that reason a witness, however honest, rarely persuades a Judge that his present recollection is preferable to that which was taken down in writing immediately after the accident occurred. Therefore, contemporary documents are always of the utmost importance. And lastly, although the honest witness believes he heard or saw this or that, is it so improbable that on balance more likely that he was mistaken? On this point it is essential that the balance of probability is put correctly into the scales in weighing the credibility of a witness. And motive is one aspect of probability. All these problems compendiously are entailed when a Judge assesses the credibility of a witness; they are all part of one judicial process. And in the process, contemporary documents and admitted or incontrovertible facts and probabilities must play their proper part.*

[18] It is clear on the above that in order to properly assess the probabilities this Court must consider not only the credibility of the witnesses based on their demeanour, but also available documents or independent testimony providing corroboration of their evidence, contradictions in their own evidence as well as their motives.

[19] With that in mind I will address the issues raised.

**Was there an agreement between the Plaintiff and Defendant? What were the terms of the agreement?**

[20] It is not in doubt on the pleadings and evidence that there was an agreement between the parties. In her Defence, the Defendant admitted that on 6<sup>th</sup> December 2006 the Plaintiff purchased parcel PR4611 from her for a sum of SCR 1, 800,000. The real matter in issue is the terms of the agreement.

[21] The Defendant disputed the conditions that the Plaintiff claimed was included in the transfer agreement. The Plaintiff's representative could not read out the conditions in the transfer when asked by his counsel to do so as he had no glasses. He later testified that the conditions were:

*“one condition is to use privately not for workers. Second condition was the actual insurance for the property which we have not seen. Third condition of the property is to be kept in good order and the last condition is some work was done on the property without our permission.”*

[22] He agreed in cross examination that the entire agreement was contained in the transfer document. The transfer document was not produced and remained an item. However the conditions found in the transfer document were referred to at length and put to the Defendant in her personal answers by the Learned counsel for the Plaintiff as follows:

*i) "it is reserved for the transfer for you a right of use and habitation in respect of two houses and its immediate precinct for a period of 30 years free of charge.*

*ii) "the transferor shall be responsible for the upkeep and maintenance of the houses and shall keep them insured with a reputable company."*

*iii) "the transferor may neither assign nor hire out his right to another."*

*iv) "the right granted may also be terminated a) by abuse on the part of the transferor either by committing waste or allowing the houses to fall into disrepair or by nonuse for a period of 5 years"*

These conditions are the same as that pleaded by the Defendant and were in fact read out to the Defendant by Learned counsel for the Plaintiff from the transfer document.

[23] On that basis I find that there is an agreement between the parties, contained in the transfer for parcel PR4611 effected on 6th December 2006 with the following terms:

*i) it is reserved for the transferor a right of use and habitation in respect of two houses and its immediate precinct for a period of 30 years free of charge.*

*ii) the transferor shall be responsible for the upkeep and maintenance of the houses and shall keep them insured with a reputable company.*

*iii) the transferor may neither assign nor hire out his right to another.*

*iv) the right granted may also be terminated a) by abuse on the part of the transferor either by committing waste or allowing the houses to fall into disrepair or by nonuse for a period of 5 years.*



**Was the Defendant in breach of those terms?**

[24] The Plaintiff's case is that the Defendant is in breach of all the conditions of the agreement, in that she has; added new buildings and structures without obtaining the prior written permission of the Plaintiff as well as instead of housing her sister in the house she has allowed her son to house Indian construction workers in the said house.

[25] The Plaintiff's position is that the right of use and habitation was given for the Defendant personally and her sister. The Plaintiff's representative, Mr. Elmasry, testified that as far as he was concerned there was an agreement that the Defendant's sister would stay in the house for 25 years. He then went on to say that he was informed that the Defendant's sister or someone from her family was supposed to live in the house. It was his testimony that his brother informed him that a member of the family was living in the house.

[26] When asked in re-examination if the Defendant had ever occupied either house of the property, his answer was "she must have at one stage".

[27] Furthermore the Plaintiff's representative testified that he "[did] not know" who was supposed to live in the other house. If indeed the Defendant was to use the two houses "privately" for herself or her family, it is surprising that Mr. Elmasry did not know then who would live in the other house being so adamant that the sister was to live in one house.

[28] In terms of the Defendant's evidence, in cross examination the following exchange took place:

*Q: Now why would you therefore madam if it was not your intention to occupy these two houses sign a transfer of land the first condition of which is for you personally to stay on the property?*

*A: Ask them why?*

*Q: I am asking you madam you are in the box.*

*A: I am in the box yes I agree. I did [not] want to sell the property as you ask me and I would not move from a chateau to go to a smaller house. I have a big house and why should have moved from my big house to a smaller house which my family live with me. It is only a two bedroom house.*

The Defendant went on to explain that:

*...I sold them the mountain side of the land and the two houses where it is I said I would not sell it and reserved it for my staff that is when Mr. Elmasry say to me it's okay you can keep it for 30 years your staff can stay in it.*

At this juncture I note that in referring to Mr. Elmasry at certain points in her evidence, and specifically when she talks about the discussion on the conditions to be inserted in the transfer, in my view she meant to refer to Dr. Elmasry as Mr. Elmasry accepted on oath that it was his brother, Dr. Elmasry, who entered into the agreement with the Defendant and not him.

[29] The Defendant's logic cannot be faulted. She already had a bigger house, which was renovated around 2005-2006 (when the tsunami hit), round the same time this transaction was taking place, during which time she rented another house from Mr. Elmasry instead of staying in either of the two houses in question. Why then would she agree to a right of use for a simple bungalow which she deponed housed her hotel staff? It is noted that by her appearance and deportment the Defendant is a well-heeled woman. That being said, I am keenly aware that appearances can be deceiving, however there was nothing put to the Defendant to show that she had suffered such a loss of fortune, during the period in question, as to have to downsize to a smaller house on the scale of the property in question from her "chateau" as she put it.

[30] The Defendant made a good point in terms of the allegations of the Plaintiff, in answer to the following question:

*Q: ...in the agreement it does not say that your staff has a right to use it, it says you have a right to use it.*

*A: In the agreement they did not put my staff because they say my sister they did not even put me.*

[31] The conditions that were put to the Defendant made no mention of the Defendant's sister contrary to the pleadings. However Mr. Elmasry was adamant that the agreement was for the Defendant to use the property privately and the Defendant's sister to stay in the house.

[32] Interestingly when asked in cross examination if he knew why 30 years had been agreed as the amount of time for the Defendant's use of the property he stated that "if I was signing

the agreement I would not allow that.” According to him he came to know about the agreement when he became a director 8 years ago.

- [33] In her personal answers the Defendant was questioned about there being a valid insurance policy paid up on the house. The Defendant stated that there was in fact an insurance policy to the value of SCR 1 million in place. She repeated the same assertion in her evidence. Learned counsel for the Plaintiff went as far as stating that Mr. Paul Stravens, whom the Defendant testified is her insurance broker, would be called to testify in the matter to confirm if the two properties are insured. However Mr. Stravens was not called. Nor was there any evidence from any of the insurance companies to show that there was no valid insurance policy in place for the two houses.
- [34] Mr. Alf Esparon a civil and structural engineering consultant testified that he visited the property and inspected the two houses in question. Other than the crack which he found not to be a structural defect as well as signs of damp on the first house, Mr. Esparon found no other defects. On the second house he did not find “significant structural defects” either. It is noted that he gave no dates for the extensions he said had been done which had resulted in the cracks that he found. However he testified that in his opinion the houses were 40 years. This was in line with his report wherein he noted as follows “as explained on site by Mrs. Jenny Pomeroy, both houses were built approximately 40 years ago...”
- [35] Mr. Esparon recommended a concrete apron being installed in order to stop rainwater accumulating around the first house as well as painting and refurbishing of both houses.
- [36] Can it be said that his recommendation of “extensive refurbishment works such as painting, repairing or replacement of certain fixtures and fittings” amount to a breach of condition 4 in that the Defendant has “*allow[ed] the house to fall into disrepair?*”
- [37] Collins English Dictionary defines disrepair as “the condition of being worn out or in poor working order; a condition requiring repairs.” To repair in turns means “to restore (something damaged or broken) to good condition or working order.” To refurbish is defined as to “make clean neat, clean, or complete, as by renovating, re-equipping, or restoring.”

[38] Article 605 (5) of the Civil Code which deals with the obligations of the usufructuary defines structural repairs as

(a) *“repairs to things such as walls, foundations, floors, beams, columns, roofs, dykes, griynes, weirs, levees, retaining walls or fences which are necessary to maintain the integrity of the whole structure.”*

(b) *Repairs which are not structural repairs are maintenance repairs.*

[39] To my mind the right of use and habitation could only be terminated in circumstances where the Defendant allowed the houses to come to such a state whereby the repairs were no longer maintenance repairs but structural repairs, repairs that were over and above normal wear and tear. It is clear from Mr. Esparon’s report that this criteria was not met as the repairs he stated needed to be done amounted to maintenance repairs in addition to the “structural integrity of the [two] existing houses [being] rendered sound and safe for occupancy.”

[40] Furthermore the photographs in his report clearly show that the houses are not in a state of disrepair but rather simply needing some maintenance. This is in stark contrast to the evidence of Mr. Elmasry in chief wherein he stated that the general condition of the outside of the houses “was very much deteriorated from outside only the paint and it need a lot of work. The condition is very bad actually.”

[41] I found the Defendant’s distress to be sincere and real. She was present when the agreement was signed and she explained the reasoning behind the conditions listed in the transfer. She was logical and clear in her answers. I have no hesitation in concluding that she is a credible witness and accept her evidence.

[42] In contrast Mr. Elmasry was not concerned with getting his facts right, he struck me as simply wanting the Court to give the Plaintiff vacant possession of the property because he was not in agreement with his brother granting the Defendant use of the property for 30 years. Mr Elmasry struck me as not being too bothered with the facts that led up to the agreement. As evidenced by his acceptance in cross examination that to his knowledge the transfer document is the entire agreement between the parties and further in answer to

counsel's query whether there was an additional agreement providing for a condition that the Defendant was required to allow the Plaintiff's representative to inspect the properties as and when agreed, his answer was - it must have been. He was simply not in agreement with the conditions that his brother bound the Plaintiff with the Defendant and wanted to cancel the agreement.

- [43] With regard to the sum of SCR 500, 000.00 which he claims for loss of enjoyment of use, when asked in cross examination how he came to that number he stated that the this was "roughly" based "on two houses needs repair..." He went on to add that the figure also included repairs which could be more.
- [44] Other than his testimony there was not an iota of evidence quantifying the losses for which he claimed. In any event I am at a loss to understand how the Plaintiff could be entitled to loss of use and enjoyment of a property for the 8 months to a year it would allegedly take the Plaintiff to repair the houses which it willingly agreed to the Defendant using for 30 years due to end in 2036.
- [45] With that said I find that the Plaintiff evidence has not met the required standard hence failed to prove its case.
- [46] In the circumstances I find in favour of the Defendant and dismiss the Plaintiff. I enter judgment accordingly.
- [47] Costs awarded to the Defendant.

Signed, dated and delivered at Ile du Port on .....<sup>30<sup>th</sup></sup> March 2022



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Pillay J