

IN THE SEYCHELLES COURT OF APPEAL

Reportable

[2021] SCCA 73 (17 December 2021)
SCA 37/2019
Appeal from CS 136/2018) [2019]
SCSC 511

In the matter between

DORRINE MONTHY
(*rep. by Olivier Chang Leng*)

Appellant

And

GOVERNMENT OF SEYCHELLES
(*rep. by Luthina Monthy*)

Respondent

Neutral Citation: *Monthy v Government of Seychelles* ([2021] SCCA 73 (17 December 2021)
SCA 37/2019 (Arising in CS 136/2018) SCSC 511

Before: Twomey, JA, Robinson JA and Tibatemwa- Ekirikubinza JA

Summary: Rescission of 60-year lease – bad faith – fairness - damages

Heard: 3 December 2021

Delivered: 17 December 2021

ORDER

The appeal is allowed. The Respondent is ordered to pay the appellant the sum of to SR3, 323,855.45 together with interests and costs.

JUDGMENT

TWOMEY JA

Introduction

[1] In November 2016, the Respondent, the Government of Seychelles (the Government) granted the Appellant, Dorrine Monthy (Ms. Monthy) a sixty-year lease in respect of Title V9215 for the operation of a day-care centre. There was an existing residential building on the said property and Ms. Monthy applied to the Town and Country Planning Authority

(the Planning Authority) on 28 March 2017 for a change of use of the building to convert it into the day-care centre.

- [2] In between these events, the Government wrote to Ms. Monthy on 25 February 2017 as follows:

“We regret to inform you that we are terminating the agreement as the property is required by the Seychelles People Defence Forces) for military purposes. We are prepared to assess and pay you compensation that may arise from any improvement works you have carried out on the property.” (emphasis mine)

- [3] It would appear that the purported termination of the lease was largely ignored by Ms. Monthy and her Counsel wrote to the Government on 2 March 2017 informing it that the ground for the termination of the lease was invalid and unlawful as it was not one of the permitted grounds in the lease for cancellation or termination.

- [4] On 9 March 2017, the Ministry of Education approved Ms. Monthy’s proposed employee, Ms. Gernetzsky, as operator of the day-care centre. Armed with this approval, on 28 March 2017, Ms. Monthy applied for a change of use of the building from a residential unit to day-care centre.

- [5] On 10 April 2017, the Planning Authority issued a stop notice with regard to the alleged unauthorised construction of vehicular access to the property with a notice that Ms. Monthy file a retrospective application with respect to the same with the Planning Authority.

- [6] On 25 April 2017, the Planning Authority refused permission for the change of use of the residential building on the grounds that the lease had been cancelled by the Government.

- [7] On 30 May 2017, Ms. Monthy by way of an application for judicial review challenged the decision of the Planning Authority.

- [8] On 17 November 2017, the Supreme Court quashed the Planning Authority's decision on the grounds that it had overreached its function by failing to simply consider the application for change of use and had instead substituted itself for the Government in the purported cancellation.

[9] The Planning Authority subsequently considered the Appellant’s application for change of use of the premises into a day-care centre and granted its approval on 24 November 2017.

The present case

[10] The Government, by way of Plaintiff, on 27 December 2017 averred that Ms. Monthy had breached express terms of the lease by failing to submit plans of her proposed development to obtain approval of the Planning Authority and had carried out works without such approval. It further averred that in view of these unauthorised works it notified Ms. Monthy on 12 April 2017 that it had terminated the said lease.

[11] In her statement of defence, Ms. Monthy denied the breaches and averred that she had submitted plans for the proposed development. She further averred that the purported termination of the lease was invalid and illegal and a contravention of the terms of the lease. She also filed a counterclaim in which she claimed damages incurred for costs arising for alterations to the property, salaries paid to staff, loss of earnings and moral damages.

[12] On 25 June 2019, the learned trial judge found in favour of the Government, declared Ms. Monthy in illegal occupation of the premises, ordered her to vacate the property and dismissed her counterclaim in its entirety.

The grounds of appeal

[13] Dissatisfied with this decision, Ms. Monthy has appealed to this court on the following grounds:

“1. The learned trial judge erred in fact when he failed to take into account or even consider the evidence of bad faith on the part of the Respondent in attempting to unilaterally determine and terminate the appellant’s lease prior to the notice of termination.

2. The learned trial judge erred in fact when he stated at paragraph 16 of his judgment that the sole issue to be decided was whether the opening of the stone masonry was and the access drive was a breach of the lease between the parties, failing to consider the other issues raised by the Appellant at the trial.

3. The learned trial judge erred in fact in paragraphs 15, 22 and 23 of his judgment, when he dismissed the evidence of Mr Gioven Yocette, as “an absolute absurdity and an insult to the intelligence”

when Mr Yocette's evidence had probative value that should have been properly considered and analysed.

4. The learned trial judge erred at paragraphs 25-27 of his judgment when he failed to properly and satisfactorily analyse and consider the cases of Phillips v Vista Do Mar Limited (1973) SLR 394 and Paul Chow v Heirs Josselin Bossy [2006] SCCA 19 relied upon by the Appellant, choosing instead to focus on the decision in Jumeau v Anacoura (1978) SLR 180 narrowly without due consideration to any of the principles raised in the above-mentioned cases or the Appellant's submissions on the same.

5. The learned trial judge erred in coming to the conclusion at paragraph 27 of his judgment that the Appellant had "ample time" to file a retrospective application, failing to consider that the stop notice was issued on the 10th April 2017, and the notice of termination was issued on the 12 April 2017, meaning that the Appellant had 2 days to remedy the default, which was not "ample time".

6. The learned trial judge erred in law when he failed to consider the submissions of the Appellant that the Respondent had in essence, subrogated or assigned its right relating to the need for planning approval under the lease to the Planning Authority, and as a result, the Respondent acted prematurely and contrary to this subrogation/assignment when it terminated the lease after the Planning Authority had provided the Appellant with recourse to remedying the access driveway by way of retrospective application.

7. The learned trial judge erred in fact and in law by dismissing the Appellant's counterclaim without providing sufficient explanation for doing so or any analysis of the evidence brought in support thereof.

8. The learned trial judge erred in fact and law by failing generally to delve into many of the evidentiary aspects or arguments raised by the Appellant, choosing instead, to focus on a strict and narrow interpretation of the Lease without due consideration to all the circumstances.

[14] I intend to deal with these grounds in what I consider a logical approach to the issues of law raised.

Ground 4 – rescission of contracts

[15] Mr. Chang Leng, Counsel for the Appellant has challenged the court *a quo*'s order for the rescission of the lease. He has submitted that although the learned trial judge alluded to the cases of *Phillips v Vista do Mar*¹ and *Chow v Heirs Bossy*,² he failed to engage with the principles established by these authorities in respect of the rescission of the contract. Mrs. Luthina Monthy, Counsel for the Government, contends that the learned trial judge was correct in distinguishing the present case from *Phillips* and *Chow* and relying instead on the authority of *Jumeau v Anacoura & Anor*³ to allow the rescission of the contract as the lease provided for it expressly.

[16] It is important at this juncture to bring to light the actual provisions of the law: Article 1184 (1) of the Civil Code provides in relevant part:

“Rescission must be obtained through proceedings but the defendant may be granted time according to the circumstances.”

Rescission shall only be effected by operation of law if the parties have inserted a term in the contract providing for rescission. It shall operate only in favour of the party willing to perform.”

[17] It must be noted that the provisions above are restricted to transactions between private persons. Article 109 (3) limits the application of Article 1184 by stipulating that:

“When a breach of a commercial contract occurs, the party innocent of the breach shall be entitled to treat the contract as discharged by operation of law.”

The rules of article 1184 of the Civil Code, insofar as they require that when a breach of contract occurs discharge thereof shall be obtained through proceedings, shall not apply to commercial transactions.”

¹ (1973) SLR 394

² (2006) SCAR 57

³ (1978) SLR 180

[18] Further *Phillips* decided in 1973 has been overtaken by the Civil Code of 1975, specifically the provisions of Article 1184 (1) above relating to contracts where clauses for rescission are inserted. In the circumstances, although I would agree with Mr Chang Leng that *Chow* qualifies the case of *Jumeau* to the extent that even when rescission is provided for in a contract it only takes place by operation of law after the party in breach has been notified of the breach and given time to remedy the same, the authority does not apply to the present circumstances given the provisions of Article 109 (3) of the Commercial Code.

[19] Although *Chow*, is of no assistance in the present case, it cannot be gainsaid that in all cases of rescission of contracts the imperatives of Article 1134 of the Civil code relating to good faith are to the effect that parties must be given reasonable notice to remedy breaches. This is further examined in the grounds discussed below. To that extent, this ground of appeal succeeds.

Grounds 1, 2, 5, 6 and 8 -The issue of bad faith and fairness

[20] These grounds of appeal and the submissions of Mr. Chang Leng on the same although raising several issues are permeated with the issue of bad faith on the part of the Government in terminating the lease. Mr. Chang Leng submits that the learned trial judge did not consider that bad faith could be inferred from the behaviour and actions of the Government for the termination of the lease on 12 April 2017.

[21] He submits that the Government's actions, namely: the first notice of termination stating that the premises were needed for military purposes; the then Minister for Habitat, Infrastructure and Land Transport, Charles Bastienne apologetically informing Ms. Monthy that the lease would have to be terminated; the confirmation by President Danny Faure when he had a meeting with her that the lease would have to be terminated because of awkward questions being asked by the Leader of the Opposition in the Assembly; the change of use for the residential building being refused surprisingly when the whole purpose of the lease was for the operation of a day-care centre; and the minor issue of the opening of a stone masonry wall for access to the premises being used to cancel the lease – in Counsel's submission prove that the lease was not cancelled purely because Ms. Monthy did not seek planning approval for the access drive, but instead shows the bad faith on the part of the Government which merited consideration by the trial judge.

[22] In response, Mrs. Luthina Monthy submits that bad faith on the part of the Government is unfounded. She submits that the Government did not act on the first notice to terminate the lease when the purpose of the termination was challenged. She further submits that the evidence of Ms Monthy about what she had been told by Minister Bastienne and President Faure was not corroborated and did not merit consideration by the learned trial judge. With regard to the Planning Authority refusing the change of use by reason of the purported cancellation of the lease by the Government, this purported cancellation was brought to the attention of the Planning Authority by Ms Monthy herself, even though there ought to have been clear communication between the Ministry of Land and the Planning Authority as per the procedure for normal consulting purposes between stakeholders. As for the unauthorised driveway, that was clearly a breach of the lease agreement.

[23] With respect to good and bad faith in contractual law, Article 1134 of the Civil Code of Seychelles provides:

“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.”

[24] Article 2268 of the Code also provides:

“Good faith shall always be presumed. The person who makes an allegation of bad faith shall be required to prove it.

[25] The Code however 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.”*⁴

⁴ Cornell Legal Information Institute (LII) https://www.law.cornell.edu/wex/good_faith

[26] 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 référence à la bonne foi que des conséquences limitées, y découvrant un devoir de loyauté qui pèse sur chacun des contractants et qui permet, de manière en quelque sorte négative, 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

[27] 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)

[28] 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

[29] 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)

[30] 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.

⁵ François Terré, Philippe Simler, Yves Lequette, *Droit Civil: Les Obligations* (10e edition, Dalloz 2009) p 455

⁶ (1982) SCAR 67

⁷ *Ibid*, per Lavoipierre JA, p 76.

- [31] In light of these provisions and despite the Government's efforts to persuade the court otherwise, its actions can only be viewed in a negative light. It is clear that the breach of the lease relied on for termination was contrived. First, the initial notice of termination purportedly was for the Government's need of the premises for military purposes. When it was pointed out to it that this was not legally provided for in the lease agreement, it quickly changed its tack.
- [32] Secondly, as is pellucidly clear from the judicial review of the Planning's Authority decision to refuse the change of use of the premises from residential to day-care (the actual object of the lease), the Government interfered with the Planning Authority's functions to thwart the lessee's fulfilment of its obligations and the purpose of the lease.
- [33] Thirdly, in nit-picking the most minor breaches - the re-siting of bins on the site without permission and the construction of back access to the property through a hole in the boundary wall, which the Government's own witness, Mr. Chang Tave, the Chief Development Control Officer of the Planning Authority testified in cross-examination "was indicated on the site plan as [...] existing" in the plans submitted to the Planning Authority but had not yet approved. Mr. Chang Tave added that Ms. Monthy had been asked to make a retrospective application and this would normally have been granted. This was corroborated by another Government witness, Fanette Albert, the Principal Secretary of the Department of Lands.
- [34] Fourthly, the uncontested evidence of Ms. Monthy that the then Minister for Habitat, Infrastructure and Land Use, Minister Bastienne, informed her before the letter of termination was issued that the lease would have to be terminated because of directions from the President and her subsequent meeting with President Danny Faure, where he informed her that because of awkward questions from the leader of the opposition in the National Assembly the lease would have to be terminated lead to only one conclusion, namely that the breach of the lease was manufactured so as to cause its termination. In this context, the submission that such evidence was uncorroborated cannot be countenanced. Ms. Monthy testified and her evidence was not challenged in this respect. The legal effect of an absence of cross examination on a particular point is trite. The party is deemed to have adopted the

evidence of the untested witness (See *Shree Hari Construction (Pty) Ltd v Boniface & Or*).⁸ There is also no suggestion that she was not a credible witness and in the circumstances Mrs. Luthina Monthy's submission in this respect cannot be upheld.

[35] Fifthly, the lack of opportunity availed to Ms. Monthy to remedy the alleged breach given that the stop notice for the development of the premises was issued on 10 April 2017 and the lease terminated on 12 April 2017 is further evidence of bad faith and unfairness. In that respect, the finding of the learned trial judge that Ms. Monthy had ample time to remedy the default is not supported by evidence and cannot be upheld.

[36] These are certainly matters which the learned trial judge should have considered. The necessary inference from these facts was the bad faith of the Government and the unfairness of its actions.

[37] The elephant in the room was the politics in this case. Whether the Government had been criticised for allowing the conclusion of a lease with Ms. Monthy through nepotism or favouritism is neither here nor there. While contracts can be vitiated for many reasons and it certainly was an avenue open to the Government for the cancellation of the lease to argue that the lease had not been negotiated fairly, this was neither pleaded nor evidence of this nature adduced in the present case. Our courts are courts of law and justice and not arenas of political discussions. We are the bulwarks against the exercise of the autocratic, capricious and arbitrary will of the Government. We have to rise up to our duties in the respect of the rule of law.

[38] There was clearly bad faith and unfairness on the part of the Government. I am of the view therefore that these grounds of appeal succeed.

[39] The above would suffice in allowing the appeal but since Ms. Monthy's counterclaim was dismissed, it now befalls us to consider the remaining ground of appeal.

Ground 7 – The counterclaim

[40] Ms. Monthy in her prayers in this appeal has asked for:

⁸ SCA26/2013 [2016] SCCA 24 (16 August 2016)

“The whole judgment entered, and the award made against the Appellant be set aside, with costs, and that the Appellant's counterclaim and prayers be awarded in full.”

[41] At the hearing of the appeal, this court inquired whether Ms. Monthy was seeking a restoration of the lease or only damages. It was informed that only damages were sought.

[42] In this respect, it is Mr. Chang Leng's submission that the trial judge did not in any substantive way consider the counterclaim inasmuch as Ms Monthy should at least have been compensated for the developments made and also given relief for the fact she was not ever able to peaceably enjoy the leased premises. Mrs. Luthina Monthy contends that the learned trial judge analysed the case as a whole and decided that the only issue to be considered was whether the opening of the stone masonry wall and the access drive was in breach of the lease. When he found in the affirmative, he did not err in dismissing the counterclaim.

[43] I have difficulty following Mrs. Luthina Monthy's submissions. Even if the learned trial judge was right to find that rescission should have ensued as a result of a breach, this does not take away from the fact that Ms. Monthy had expended money in the fulfilment of the lease. The lease was for the express purpose of operating a day-care centre. In clear expectation of this purpose being realised, Ms. Monthy carried out works. She adduced uncontroverted evidence and provided documentary evidence of the cost of the works together with photographs of the upgraded premises.

[44] As I have found in any event that the lease was illegally terminated through the bad faith of the Government, I have considered the particulars of loss and damage as pleaded in the counterclaim. Ms. Monthy has made the following claims:

<i>a) Costs incurred to make alterations to the property</i>	<i>SR 656,000/-</i>
<i>(b) Out of pocket expenses</i>	<i>SR325, 000/-</i>
<i>(c) Salaries paid to staff</i>	<i>SR 432,053/-</i>
<i>(d) Loss of earnings to date</i>	<i>SR5, 600,000/-</i>
<i>(e) Moral damage</i>	<i>SR100, 000/-</i>

[45] Articles 1149 and 1150 of the Civil Code provide what damages are due in the event of breaches of obligations. They provide in relevant part:

“Article 1149

1. The damages which are due to the creditor cover in general the loss that he has sustained and the profit of which he has been deprived, except as provided hereafter.

2. Damages shall also be recoverable for any injury to or loss of rights of personality. These include rights which cannot be measured in money such as pain and suffering, and aesthetic loss and the loss of any of the amenities of life.

3. The damages payable under paragraphs 1 and 2 of this article, and as provided in the following articles, shall apply as appropriate to the breach of contract and the activity of the victim.

Article 1150

1. The debtor shall only be liable for damages with regard to damage which could have been reasonably foreseen or which was in the contemplation of the parties when the contract was made, provided that the damage was not due to any fraud on his part/”

[46] *Jurisprudence constante* in Seychelles has established the following principles in the interpretation of the above provisions: Damages are compensatory (*Belize v Nicette*)⁹, they must be reasonably ascertainable (*Kilindo v Morel*), moral damages may be awarded for inconvenience and for loss of peace of mind (*Zatte v Joubert*)¹⁰, damages can be claimed in terms of Article 1150 if they could have been reasonably foreseen (*Jumeau v Sinon*),¹¹ damages cover the loss a person has sustained and the profits they have been deprived of which are immediate and direct consequences of the failure by the other party (*Fisherman’s Cove v Petit*)¹².

[47] Further, in *Vidot v Planus Dental Technology (Sey)*¹³ the court stated that:

“damages are intended to compensate the innocent party for the loss that he has suffered as a result of the breach of contract, not intended to punish the one, who caused the breach”.

⁹ (2001) SLR 264

¹⁰ (1993) SLR132

¹¹ (1977) SLR 78

¹² (1979) SLR 40.

¹³ (259 of 2000) (259 of 2000) [2007] SCSC 3 (26 March 2007)

[48] The same case is authority for the proposition that in order to establish an entitlement to substantial damages for breach of contract a party needs to establish:

- “1. *The actual loss has been caused by the breach; and*
- 2. the type of loss is recognized as giving an entitlement to compensation; and*
- 3. the loss is not too remote; and*
- 4. the quantification of damages to the required level of proof”*

[49] However, it cannot be overemphasised that a party claiming a loss has to prove the loss that he has suffered and the quantum of the profit that he has been deprived by the breach. (See *Souffe vs Cote D’or Lodge Hotel Limited*)¹⁴.

[50] With these principles in mind I have examined the evidence tendered by Ms Monthy to support her claims. For the greatest time I have deliberated on whether this matter should be returned to the *court a quo* to decide on the losses incurred by Ms. Monthy. I am of the view that given the time elapsed such a course of action would inflict further injustice on Ms. Monthy. The power to decide on matters not resolved by the *court a quo* is given to this court under Rule 12(3) of the Seychelles Court of Appeal Rules and they are invoked for the purposes of settling the counterclaim.

[51] Although her evidence on the counterclaim was uncontested, I must however in the light of the provisions of Article 1315 of our Civil Code (repeating the Roman maxim *actor incumbit probatio* or “he who avers must prove”) examine the proof of her claims. With regard to the costs incurred for the alterations to the property, the invoices and receipts in evidence amount to the sum of SR656, 000 claimed and were not contested and must therefore be granted. The claim in respect of out of pocket expenses with respect to toys, books and other materials for the day-care centre and in the sum of SR325, 000 was also receipted and proven.

[52] I am unable however to find any proof of salaries paid to staff and cannot in the circumstances award any sum under this head of damage.

[53] With respect to the loss of earnings although these were reasonably foreseeable, the projection of losses for the whole lease period was not submitted to the court. The only

¹⁴ CC 24 of 2012 [2013] SCSC 25 (27 March 2013)

evidence I have is that of registration of children for the day-care centre and an excel sheet of the inflows and expenses from the operation of the day care centre for 2 years from 2017-2018. I can only calculate the losses incurred from this evidence.

[54] The evidence is that forty children were registered to start at the day-care centre on January 2017 and the income from their school fees would have generated SR 224,000 a month making a total of $(224,000 \times 24)$ SR 5,376, 000 for two years. Electricity and water bills were projected to amount to SR14, 000 for these two years. Rent payable at SR16, 500 after the agreed grace period of 6 months would amount to SR297, 000. The salary of the operator of the day-care centre, Ms Gernetzsky were omitted from calculations in the evidence tendered but I will allow a gross of SR30, 000 monthly $(30\ 000 \times 24)$ amounting to SR720, 000. The other staff salaries were projected to be SR315, 365. I have already allowed the total sum of SR950, 000 for the costs incurred in renovating and making ready the premises and these expenses would have to be deducted. The expenses therefore amount to SR2, 296,365. The profit would therefore have been $(SR\ 5,376,000 - SR2, 296,365)$ SR 3,079, 635. Obviously, business tax would have been payable on this income. Under section 6 of the Business Tax Act, no tax is payable on the first SR150 000 of taxable income, 15% between sums of SR 150,001 and SR 1,000, 000 and 33% on the remainder, hence $(1,000,000 \times 0.15) + (1, 929,635 \times 0.33) = 786,779.55$. The total business tax due would have been SR786, 779.55. This sum would have to be deducted from the income. After deductions of expenses and taxes, a total profit of $(3,079,635 - 786,779.55) =$ SR2,292,855.45 would have been realised and is therefore allowed under this head.

[55] Evidence of the moral damages suffered was also tendered and not challenged. It is always hard to gauge a correct figure for this loss especially when moral damages are only exceptionally allowed in cases of breaches of contract (*see Kopel v Attorney General*¹⁵ that *Pillay v Lesperance & Or*)¹⁶. However, given the obvious prejudice suffered, the stress and harassment by the actions of Government visited on Ms. Monthy I grant the sum of SR 50,000 in moral damages which I assess is a fair reflection of this injury.

¹⁵(1955) SLR 315

¹⁶ (1991) SLR 88

