IN THE COURT OF APPEAL OF SEYCHELLES

Reportable
[2023] (18 December 2023)
SCA 02/2023
(Arising in CC 34/2013)

MARYLENE ETHEVE **Appellant**

(rep. by Basil Hoareau

And

HARIKRISHNA BUILDERS (PTY) LTD **Respondent**
(rep. by Clifford Andre)

Neutral Citation:	*Etheve v Harikrishna Builders (Pty) Ltd (*SCA 02/2023) [2023] (Arising in CC 34/2013) (18 December 2023)
Before:	Twomey-Woods, Tibatemwa-Ekirikubinza, Gunesh-Balaghee JJA
Summary:	building contract-breach-whether pleadings and evidence at variance - section 75 of SCCP – expert evidence-standard of proof - Town and Country Planning Act- damages
Heard:	6 December 2023
Delivered:	18 December 2023

ORDER

The appeal is allowed. The judgment of the Supreme Court is quashed.
Harikrishna Builders is to pay the following sums as damages to Ms. Etheve:

i. ***Euro 200,000*** *(at the rate on the date of this judgment)*
*ii.****SCR 3,574,378.69*** *(SCR 215, 280.69 + SCR 3,200,000 + SCR9,098.00 + SCR 150,000)*
iii. interest from the date of this judgment
iv. costs of both courts.

JUDGMENT

TWOMEY-WOODS JA *(Dr. L. Tibatemwa-Ekirkubinza and Gunesh-Balaghee concurring)*

Background

1. Much ink has been spilt over this case, which concerns the construction of a building at Cote d'Or Praslin: the plaint was amended three times, the documentary evidence runs to 244 pages, the court proceedings to over 700 pages and the judgment to 110 pages. Multiple tests were conducted on the building at the centre of this case; several experts gave their opinions. Ten years have elapsed from filing the original petition on 5 December 2013 to delivering the Supreme Court judgment on 29 December 2022 and our decision on 18 December 2023. I state unequivocally that the manner in which this case was conducted and disposed of leaves a scar on our judicial history. It certainly makes a strong case for mandatory preliminary hearings, which seem to have been set aside in our jurisdiction and which, unless reintroduced to deter court delay and the histrionics of counsel, will continue to undermine the trust needed in our judiciary. I can only offer my sincere apologies to the two parties in this case.

2. Yet, there is much common ground: it is not contested that the parties entered into an agreement on 21 August 2012 in which Harikrishna Builders (Pty) Ltd (hereafter HKB) would build a 'storey building' at Cote d'Or, Praslin for Marylene Etheve (hereafter Ms. Etheve) for the sum of SR 800, 000 and Euro 200,000. The building was to comprise a commercial area on the ground floor and two residential units on the first floor to be run as a self-catering business. It is also common ground that Ms. Etheve has already paid Euro 200,000 in instalments to HKB.

3. The contract for the building had set out some specifications regarding the structure of the building and the concrete strength to be used. The poured concrete for the structure of the building, namely the foundation, columns, beams and floor slabs, when set, should achieve a strength of 30 Newton per millimetre square.

The evidence adduced

4. The construction of the building was contentious from the beginning. Ms. Etheve complained bitterly as to what she thought were poor building practices and the low construction standards used by HKB's workers; for example, hollow blocks and the wrong weld mesh were used in the foundation, structures were inadequately placed to

support the roof, the water tank was wrongly installed and caused water damage to part of the ceiling which had to be replaced. The straw which seemed to have broken the camel's back was the crumbling screed on the first floor of the building witnessed and experienced by Ms. Etheve when she visited the site in early September 2013. She called a halt to the work by a letter from her lawyer.

5. She sought the Seychelles Bureau of Standards' (SBS) assistance to investigate the construction quality. Their technician, Hazel Tomking, with nine years of experience in rebound and core tests, carried out Schmidt Rebound Hammer tests on the building on 5 September 2013. These tests were witnessed by two technicians from the Seychelles Bureau of Standards and three representatives from the Planning Authority, including Mr. Franky Lespoir, a civil engineer, Mr. Nilesh Laxmanhirani, and two other employees of HKB.

6. The results of the tests were concerning, and SBS asked Ms. Etheve to carry out core tests on the concrete in the building. SBS was not equipped to take the core samples, so Mr. Francois Sophola of Gondwana Granite was contracted by Ms. Etheve to carry out the test. Several samples were taken from different parts of the building in the presence of senior representatives from the SBS, the Planning Authority and HKB on 20 September 2013. These core test results were produced in a report by Ms. Tomkin and approved by the manager and head of the laboratory in the Engineering Section of SBS, Mr. Madeleine.

7. It was the defence case that HKB had already tested the compressive strength of the concrete in the building in cube concrete tests, and the results were above the required standard. Their evidence was that these results were from samples of concrete taken in December 2012 and submitted for tests to the SBS on 12 August 2013. These concrete cube results made by tests after a curing period of 224 days were challenged by Ms. Etheve on the grounds that they were taken by HKB without third-party supervision or other witnesses, that the maximum curing period of the concrete for such tests was 21 days and that the provenance of the samples was unknown.

8. Mr. Elvis Naya, a civil and structural engineer, inspected the building and prepared a report of his findings, which he submitted to Ms. Etheve on 10 July 2014. He stated in his report and later testified that the combination of the results from the rebound hammer tests and core concrete tests showed that the "tested structural elements ha[d] failed to achieve the specified concrete grid of 30 MPA…and in many instances that of the minimum compressive strength of 25 MPA expected from the normal code of practice."[1] He explained that this meant that the quality of the concrete used in the building fell outside the norms of normal practice and would put "negligent risk towards the structural integrity of the building and the future occupants." With regard to a further test – a load test on the building- he believed this was dangerous as the entire building could collapse.

9. HKB called their expert, Mr. Michel Savy, a civil engineer practising in structures and geotechnicals with over ten years of experience. He testified that the results of the rebound hammer test and the concrete core test (Exhibit P30 and P31) were not indicative of the structural competency and capacity of the structure of the building. This is because both tests measure the hardness of concrete and not its compressive strength. He further stated that the findings of the two tests were contradictory in that although they indicated that the concrete was very weak, there were no signs of structural weakness in the building. He concluded that given the poor strength of the concrete reflected in the results, one would not expect the building to still stand a year and a half later. He was of the opinion that the report by Mr. Naya could not be relied on because they did not address whether the results of the rebound hammer test and the concrete core tests were correct, given that the building had not been damaged or had deteriorated after one and half years of being built after the tests were conducted. In his opinion, only a load test using water would be conclusive, although he had no experience conducting such a test and no such test had ever been performed in Seychelles. In the event Ms. Etheve did not agree to the load test being carried out.

[1] 30 Mega Pascal =30 Newton per millimetre square

10. Mr. Ah-Kong, a civil and structural engineer Ms. Etheve retained for the project, was also skeptical about the core concrete results. He testified that the extraction of samples had neither been conducted by a certified person nor supervised by an engineer. He further stated that the concrete cylinders had not been tested for destruction but rather in an uncalibrated and partial manner. They both opined that the results should be disregarded. He also agreed that the cube tests were also unreliable.

11. The only independent witness was Mr. Franky Lespoir, another civil engineer who at the time of the construction in issue was working for the Planning Authority. He received Ms. Etheve's complaint and initiated an investigation. He called for SBS to conduct tests on the concrete used for the building. The results indicated that the concrete was defective and below standard. He made his report based on the results of the rebound hammer test and the core concrete test. He stated that the building would have to be demolished but stated that had he been allowed more time, he would have conducted further investigations. He admitted that he was present for both tests and that they were done correctly but that he had not been present when the samples were analysed. He disagreed that the concrete core samples need to be totally crushed to obtain good results. In his view, the results are evident when the sample starts to crack. He agreed that although the building was still standing, the fact that it was not "fully loaded" would have an impact. He issued a 'stop notice' to the contractor.

The Supreme Court's decision

12. The learned trial judge was meticulous in reporting the evidence the parties adduced. The summary of evidence ran to 124 pages.

13. In her decision, she found that the burden of proof had not been discharged by the claimant in the case. Ms. Etheve appealed this decision, but HKB has not cross-appealed.

The appeal before this court

14. The appeal grounds as submitted are as follows:

1. The learned trial judge erred in law and on the evidence in failing to hold that the Respondent had not pleaded all the material facts in its defence, which would have permitted the Respondent to –

(a) raise, and rely on the defence that the Respondent conducted the construction work in a workmanlike manner and

(b) challenge the results of the concrete core tests

2. The learned trial judge erred in law and on the evidence in failing to hold that the Respondent was estopped from challenging the results of the concrete core tests, in view that Mr. Nilesh Laxmanhirani, a director and representative of the Respondent and who also was a civil engineer, was present and was part of the process from the time the samples of the core tests were conducted, and no objections were raised by the said Nilesh Laxmanhirani, in respect of the manner the samples were taken from the building and in respect of the conduct of the concrete core tests.

3. The decision of the learned trial judge that the veracity and accuracy of the results of the concrete core tests could not be confirmed by the evidence cannot be supported by the evidence in the light of the evidence of the experts who were called by the appellant, the results of the rebound hammer tests and the concrete core samples produced by the court.

4. The learned trial judge erred in law and on the evidence in failing to –

(a) consider and take into account the testimony of Mr. Franky Lespoir, a civil engineer, when considering the Appellant's case, especially when considering the veracity and accuracy of the concrete core tests; and

(b) consider the results of the rebound hammer tests in considering the veracity and accuracy of the concrete core tests.

The issues before this court

15. Despite the extensive proceedings as outlined above, the issues raised in these grounds of appeal are very narrow. They are : (1) whether the learned trial judge was correct in permitting HKB to challenge the results of the concrete core tests carried out on the building outside pleadings for the same by HKB and because HKB's representatives were present and did not object to the samples being taken (2) whether the learned trial judge was correct to exclude evidence of the rebound hammer tests and the

concrete core tests given the evidence of the experts on the whole and (3) what damages are due if this Court finds liability is proved.

Alleged breach of Seychelles Court of Appeal Rules

16. At the appeal hearing, Mr André, learned Counsel for HKB, objected to the appeal being heard because Rule 24(1) (a) of the Seychelles Court of Appeal Rules (SCAR) had been breached in that Ms. Etheve's heads of argument had been filed one day outside the prescribed time. Mr Hoareau, learned Counsel for Ms Etheve, conceded that he was one day late in filing the heads but has submitted that the brief was incomplete, with the missing parts being served on him as late as November 2023.

17. I note that the brief was served on Mr. Hoareau on 6 October 2023, and the heads of argument filed on 7 October 2023. I also note that the missing parts of the brief, including missing pleadings and proceedings, were served on him on 6 November 2023. In that sense, filing the heads of argument is not in breach of the provisions of Rule 24(1) (a), and I so find. I now move on to the appeal proper.

Issue 1 - whether the challenge to concrete core tests were admissible (Grounds 1 and 2)

The challenge to the evidence without sufficient pleadings

18. With regard to ground 1, it is appropriate at this stage to set out the relevant parts of the Plaint and the Statement of Defence. In this respect, I shall only consider the final Amended Plaint and Defence as permitted by the Court on 23 January 2019. The relevant pleadings are set out in *seriatim:*

"Amended Plaint
The contract, contained inter alia, the implied term that:
(i)The defendant would construct the building:
- *in a workmanlike manner and with reasonable care and skill; and*
- *in accordance with all the plans and specifications relating to the building; and*

(ii) The building upon completion would be fit and safe to be occupied as a commercial and residential premises

…

(1) In blatant breach of the contract, the Defendant failed to construct the building in accordance with the terms of the contract.

<u>Particulars of Breach</u>

(i) The Defendant failed to construct the building:

- *in a workmanlike manner and with reasonable care and skill;*
- *in accordance with all the plans and specifications, in that the concrete structures of the building were not to grades and standards set out in plans, drawings and specifications and as such, the building is not sound structurally; and /or*

(ii) The building, upon completion would not be fit and safe to be occupied as a commercial and residential premises.

(2) As a result of the averments set out in paragraph 7 above, the tests conducted by the Seychelles Bureau of Standards have confirmed that the building is not structurally sound. Consequently, the structural integrity of the building has been greatly compromised and not of the required standards.

(3) Further the Plaintiff avers that –

(i) the building has to be demolished as no renovation work can remedy the defect;

Or Alternatively

(ii) substantial and major remedial works would have to be effected to render the building structurally sound and such works would completely change the façade, floor plan and layout of the ground floor building, which would result in –

(a) the building being completely different to the one which the Plaintiff hired the defendant to construct; and

(b) the building yielding less rental than it would have yielded as per its original plan and drawing referred in paragraph 5 (i) and 7 (i) of the Plaint.

19. HKB's Statement of Defence to the Plaint with relevant regard to the above averments are as follows:

Defence

(5) Paragraph 5(i) is denied. The Defendant avers that the contract only expressed the payment and materials to be used and how they would be purchased. The Defendant avers that all works he has done, and in this case it was not an exception, he normally does it in a workmanlike manner and in accordance to the Plan.

(6) Paragraph 5(ii) is denied. The Defendant avers that it is the Planning Authority who would upon application of the contractor determine whether the building is fit and safe to be occupied as a commercial and residential premise.

...

(8) Paragraph 7&7 (i) is vehemently denied. The Defendant avers that he performed the work as per the contract and that he performed the required test on the work as per the requirements and guidelines given by SBS. The Defendant further avers that it was the Plaintiff who asked him to make the changes of works ...

(9) Paragraph 7(ii) is vehemently denied. The Defendant avers that there is no way that at this stage and in accordance with the test done by the same SBS the building upon completion would be fit and/or safe to be occupied as per the contract signed on the 2lst August 2012.

(10) Paragraph 8 is vehemently denied. The Defendant avers that they performed tests on 6th November 2012, 4th October 2012 and l2 August 2013, and the test methods used were concrete cubes to test for compressive strength as per BS EN 12390-3-2002, whereas the test that the Plaintiff made were done on 20th September 2013 and the method used were concrete core to test as per BS EN 12504 1:2000. The Defendant/EXPERTS avers that the methods used were different and therefore would definitely bare different results and that the results should have been converted which would allow a real result to be obtained. The Defendant further avers that it was the same SBS which did both tests and that experts have stated that it needed to convert the result to show an accurate picture of the results. The Defendant avers that the building has since not even had a crack and if it was to be considered unstable it would have by now fallen and would not be standing AS PER THE PLAINTIFF SBS TEST TAKEN FROM SAME SITE. The Defendant avers that the building has now as the Plaintiff puts it in advanced stage, is in fact at more than 90% complete and does not have to be demolished, but it is rather the Plaintiff who has changed her mind about the whole project and is now trying to make believe that the building needs to be demolish as she doesn't want to pay the Defendant and is not sure as to whether she would be making good business with this building. (sic)

(11) Paragraph 9 (i) & (ii) are denied. The Defendant avers that the building is safe and that the Seychelles Licensing appeals board had ordered that a load test be performed on the said building, which the Plaintiff blatantly refused as she suspected that the test would confirm that the strength of the building was sound and could be used by the tenants she wanted to rent the said property to. The Defendant avers that

the defects on the building were not with regards to the structure otherwise the building would have already collapse. The Plaintiff refused the load test is indication that she is unable to be sure of the averments she is making and there the court should not believe such." *(Sic)*

20. It is Mr. Hoareau's submission that the averments in the Statement of Defence were not sufficient to permit HKB to challenge the evidence adduced by Ms. Etheve regarding either the workmanlike manner in which the construction had been conducted or the results of the concrete core tests. He submits that in terms of section 75(1) of the Seychelles Code of Procedure, the statement of defence must contain a clear and distinct statement of the materials on which the defendant would rely on to meet the claim. Relying on numerous authorities including the cases of *Galante v Hoareau,*[2] and *Tirant v Banane,*[3] he submits that that is necessary in order to give the opposing party fair notice of the issues to be raised at trial. In terms of the authority of *Pirame v Peri,*[4] and *Land Marine v Madeleine*[5] he adds that evidence outside pleadings, although not objected to, does not translate them into the pleadings of the case.

21. In repeating the averments contained in Paragraph 8 of the statement of defence as set out verbatim above, Mr. Hoareau further submits that at no stage does the Defendant clearly and distinctly aver that the work was performed in a workmanlike manner and with reasonable care and skills. In summary, he submits that in this regard, the pleadings are very evasive. He relies on the White Book[6] for the proposition that a traverse whether by denial or refusal to admit must not be evasive but must answer the point of substance. The pleader must deal specifically with every allegation of fact made by his opponent - that is, he must either admit it frankly or deny it boldly. Any half admission or half denial is evasive.[7]

[2] (1988) SLR 122.
[3] (1977)SLR 219.
[4] SCA 16 of 2005 (unreported).
[5] SCA 11 of 2021) [2023] SCCA 10 (26 April 2023).
[6] White Book, Supreme Court Practice Rules of England, parag 1836, 1979 Edition).
[7] Ibid.

22. Mr. Hoareau also submits that on the issue of the concrete core test, Paragraph 8 of the Statement of Defence states that the test confirmed that the building was not structurally sound but does not plead any material facts to the effect that the tests were not reliable. Instead, they aver that a correlation should have been made between the concrete core test and the concrete cube tests. In the circumstances Mr. Hoareau avers that the HKB has not provided fair notice to Ms. Etheve that the integrity and reliability of the samples and results obtained from the samples would be an issue at trial.

23. Mr. André has submitted in response that the issue about pleadings were not raised in the court below and that it cannot be raised at this juncture. In any case, he adds, the Statement of Defence as pleaded allows for the evidence led by Ms. Etheve to be contested.

24. I note that despite the lengthy proceedings in this matter, no closing submissions were filed by either Counsel in the *court a quo*. That would certainly have focused the trial court's attention on the issue now being raised on appeal. That together with the fact that the case took nine years to complete might explain why this issue was never dealt with.

25. In the circumstances, while I do not agree with Mr. André that the question of pleadings must be first raised in the court *a quo* as this would be contrary to consistent and settled case law on the issue as explained by Mr. Hoareau in his submissions, I cannot, on the other hand, agree with Mr. Hoareau that the pleadings are so vague as not to have allowed the tests to be challenged.

26. I find that paragraph 11 (see Paragraph 19 above) in particular, infers that the core concrete test needed confirmation by a load test which would have given notice to Ms. Etheve that the concrete core test was going to be challenged.

The challenge to the tests given the presence of the HKB's representative when they were being conducted

27. With regard to the second ground Mr. Hoareau has similarly submitted that HKB are estopped by their conduct to challenge the manner in which the samples were extracted for the core test and the results. He submits that Mr. Laxmanhirani, a civil engineer by profession and the director and representative of HKB, by being present when the samples were being extracted and by signing the samples taken, acquiesced to the propriety of the method of extraction and to the results of the tests.

28. In response Mr. André has submitted that the mere presence of Mr. Laxmanhirani does not infer that he agreed with the way the samples were taken and the subsequent results. In the circumstances, HKB could not be estopped from adducing evidence regarding both the way the samples were extracted and the core concrete test results.

29. I agree with Mr. André. The mere presence of a witness at an event and his silence in no way can constitute acquiescence on their part to what took place or that the method used was in compliance with standards. As Domah JA famously pointed out in *Petite Anse Development Ltd v Safa* [8] :

> *"[19] In life, "qui ne dit mot, consent." In love,"un silence vaut mieux qu'un language." But in law, "qui ne dit mot, ne consent pas." See Dalloz, ibid. para 124. "Il y a des approbations tacites, mais il y a aussi des réprobations muettes sans oublier les silences prudents."*
>
> *[20] Francois Terré, Philippe Simler, Yves Lequette cites an important decision of the Cour de Cassation which laid down the principle in law that in law the silence of someone from whom an obligation is due falls short of an affirmation from his part for the obligation alleged against him:*
>
> *"qu'en droit le silence de celui qu'on prétend obliger ne peut suffire, en l'absence de toute autre circonstance, pour faire preuve contre lui de l'obligation alléguée." See Dalloz, ibid. para 124.*[9]

[8] (SCA 16 of 2013) [2015] SCCA 18 (28 August 2015).
[9] "In life, silence infers consent. In love, silence is better than language. But in law who says nothing, does not consent…"

30. In the circumstances, Grounds 1 and 2 have no merit. Issue 1 is answered in the affirmative.

Issue 2 - whether the learned trial judge was correct in coming to her decision to exclude evidence of the rebound hammer tests and the concrete core tests given the evidence of the experts on the whole (Grounds 3 and 4)

31. Mr. Hoareau has submitted that the findings of the learned trial Judge in terms of the the concrete core test with respect to the method in which the samples had been removed and handled by unqualified personnel put into question the source of the data. This finding is made at paragraph 576 of the Judgment:

> *"[I] accept the opinion of Mr. Savy that the samples were obtained and handled by unqualified personnel, thus putting into question the source of the raw data."*

32. Mr. Hoareau further submits that given that Mr. Lespoir of the Planning Authority was the only independent witness called by both parties, consideration of his evidence should have been made by the learned trial judge. He submits that while the learned trial judge took into consideration the evidence of all the engineers including Mr. Savy, Ah Kong and Naya, she failed to consider either at all the evidence of the Planning Authority or the import of their evidence, especially as it is the Authority who ultimately is the decision maker insofar as the soundness of the building is concerned. In this regard, Mr. Lespoir's evidence was not challenged. As it stands the stop notice the Authority issued subsists to this day. In addition, the stop notice also included a statement that it would not be not safe to conduct a load test on the building. Mr. Hoareau further submits that the onus was on HKB to challenge the notice and to show that integrity of the building has not been compromised, in the manner the construction work was done and the building was safe for occupation.

There are tacit approvals, but there are also mute reprobations, not to mention cautious silences… in legal terms, silence should not be automatically interpreted as an admission of liability.
There needs to be additional evidence or circumstances to substantiate the claim of obligation against the person in question.

33. In response. Mr. André has submitted that the submissions made by Mr. Hoareau were not canvassed in the grounds of appeal. He however conceded that the stop notice subsists and has not been revoked to this day. With regard to the fact that the judgment does not indicate whether the learned trial judge accepts or rejects Mr. Lespoir's evidence, Mr. André submits that it is safe to assume that learned trial judge must have considered the evidence of Mr. Lespoir because she states that she has considered the evidence of the experts.

Discussion and determination of the Court on this issue

34. I note that Mr. Lespoir testified that both the rebound and core tests showed concrete samples failed by a large margin to obtain the specified strength of 30N/mm2 as required by the adopted BS standard. He recommended that the most appropriate solution was to demolish the building as its structure was not safe for occupancy. This was the same reasoning behind the September 27 2013 Planning Authority letter that informed Ms. Etheve that the building had to be demolished and the spirit behind the stop notice issued to HKB that led to the discharge of the contract. The lack of consideration of this recommendation by the trial court appears to undermine the impact of the Planning Authority's role in the discharge of this contract.

35. At this point, had the construction continued, both parties would have been breaking the law. The Town and Country Planning Act applicable at the time of the present case (but since repealed and replaced by the Physical Planning Act 2021) provides under section 15(3) in relevant part:

> *"(3) Any person who …. or in contravention of any enforcement notice, or who fails to comply with any conditions imposed by any planning permission or with any lawful directives set out in any enforcement notice, shall be guilty of an offence and liable on conviction-*
> *(a) …*
> *(b) in relation to any other offences to a fine not exceeding R.10,000 for each such offence;*
> *(c) in either type of offence to imprisonment for a term not exceeding three months or to both such imprisonment and fine…*

36. Having found that the structure was of questionable quality, the Planning Authority was well within their right to issue a stop notice. The Act provides under section 14(1):

> *"If it appears to the planning authority that …any conditions subject to which such permission was granted in respect of any development have not been complied with, then the authority may at any time, if they consider it expedient so to do having regard to the provisions of the development plan in force and to any other material considerations, serve on the owner and occupier of the land a notice under this section.."*

37. Section 14 (3) further states that:

> *"(3) Where or to the extent that the enforcement notice requires any person not to proceed with or to stop … any building, … that prohibition shall notwithstanding any appeal under subsections (4) or (6) come into effect immediately on service of the notice…"*

38. The provisions do not mandate the Planning Authority to carry out all the four tests discussed in the court *a quo.* There is no formal test required of the Authority. As long as there are reasonable grounds to believe that the integrity of the structure is in question, they can then issue the stop notice. The discussions on the tests were to this extent moot as the parties in court did not include the Planning Authority.

39. In addition, the learned trial judge was in error when she based her decision on the Plaintiff's refusal to carry out a load test, which is not a prescribed criterion for the Planning Authority to issue a stop notice under the Act.

40. Even if there was a formal test required, this would not be the business of the owner of the building to prove but rather that of the contractor. It was not Ms. Etheve's role to prove the integrity of the structure before discharging the contract. That was the job of the Authority in order to justify why they issued the stop notice. All Ms. Etheve was required to do was to prove that the Planning Authority had issued a stop notice to the contractor, and it was the duty of the contractor to appeal the stop notice by proving that the building was in good quality since that was their duty under the

contract. Indeed, the stop notice was served on HKB who kept this detail from Ms. Etheve for some duration, indicating a guilty mind.

41. Section 14(4) of the Town and Country Planning Act buttresses my view as it places the burden of challenging a stop notice on the person on whom it is served:

> *"Any person on whom an enforcement notice is served under this section may appeal to the planning authority against such notice within 30 days of its service giving reasons why the notice should be withdrawn or amended or why planning should be granted in respect of any matter prohibited or complained of in the enforcement notice."*

42. What Ms. Etheve as the plaintiff had to prove on a balance of probabilities was that progress in the construction of the house was stopped by the Planning Authority due to the poor workmanship of the contractor. The learned trial judge instead placed Ms. Etheve in the role of the Planning Authority, that is, bestowed on her the burden to prove that the building was indeed defective. This is seemingly unfair as under the contract, it was the HKB's role to ensure good workmanship.

43. In this perspective, the learned trial judge imposed a standard of proof over and above what was required of a plaintiff in a civil suit. Common sense, in this case, indicates that the party that caused defects in the structure was the contractor. Ms. Etheve was never involved in any of the construction and in fact advised several times against shoddy workmanship as per her testimony.

44. Had the evidence of Mr. Lespoir of the Planning Authority been properly considered, the error might not have occurred.

45. These grounds of appeal therefore succeed.

Issue 3 -The quantum of damages to be awarded

46. Having found that liability was proved, I now move on to consider the appropriate amount of damages payable. This is no small task given the different amended plaints and the dates the witnesses testified.

47. The starting point in the assessment of damages is the provisions of Article 1147 of the Civil Code which are to the effect that

> *"The debtor shall be ordered to pay damages, if any, either by reason of his failure to perform the obligation or by reason of his delay in the performance, provided that he is unable to prove that his failure to perform is due to a cause which cannot be imputed to him and that in this respect he was not in bad faith."*

48. In the present case, the prayers for damages were set out in the alternative. In the 2019 Amended Plaint they are as follows:

> *For the Court of Appeal to reverse the decision of the trial judge and to make the following orders:*
>
> *i. That the respondent pays damages in the sum of capital SCR 10, 824, 378.69 and euro 200,000, to the appellant, along with interest thereon and costs*
>
> *ii. Issue a mandatory injunction, compelling the respondent to demolish the building at its own course, within one month from the date of judgment:*
>
> *OR ALTERNATIVELY to i. and ii. Above*
>
> *iii. That the respondent pays damages in the sum of SR18, 236, 179.20 to the appellant along with interest thereon and costs;*
>
> *AND cumulatively with i. and ii or iii above*
>
> *iv. Make any other order this Honourable Court deems fit and necessary in the circumstances of the case*

49. In that Amended Plaint, the particulars of damages are also claimed in the alternative, that is, either to include the cost of demolishing the building or to include the cost of effecting major and substantial remedial works to render the building structurally sound:

> *"12. As a result of the building having to be demolished, the breach of contract has caused damage to the plaintiff.*

Particulars of Damages

(i) Part of the consideration price paid by the plaintiff to the defendant	*Euro 200,000.00*
(ii) Expenses incurred by the plaintiff in respect of the construction of the building	*SR 215,280.69*
(iii) Loss of profits for a period of four years only at the rate of SR200,000, per month as a result of the non lease of the building	*SR9,600,000.00*
(iv) Expenses incurred in respect of the carrying out of the necessary structural testing on the building	*SR 9,098.00*
(v) Mental suffering and moral damages	*SR 1,000,000.00*

…
"15 […] *as a result of having to effect major and substantial remedial works to render the building structurally sound, the breach of contract has caused damages to the plaintiff.*

Particulars of Damage

(i) Cost to effect major and substantial remedial works	*SR2,580,000.00*
(ii) Loss of rental for a period of 21 years as a result of building yielding less rental	*SR 14,647,081.20*
(iii) Expenses incurred in respect of the carrying out of the necessary structural testing on the building	*SR9,098.00*
(iv)Mental suffering and moral damages	*SR 1,000,000.00*

50. In his submissions, Mr. Hoareau has stated that HKB should bear the cost of demolishing the building. I do not believe this is feasible, given the already acrimonious relationship between the parties and given the fact that HKB was served with a notice to quit. I believe any demolition cost would have to be borne by Ms.

Etheve from the damages awarded by this court. In any case, the demolition costs have not been quantified in the Amended Plaint. I cannot, in the circumstances, award a sum of damages for it.

51. I also am unable to understand the discrepancy in the alternative claims between loss of profits and loss of rental in the 2019 Amended Plaint. In any event, Ms. Etheve testified in 2016 when her claim amounted to SCR5,524,378.69 and €200,000, per the amended plaint of 8 January 2016. She was not recalled when the Plaint was amended in 2019. As there is no evidence to support the inflated claims in the Amended Plaint of 23 January 2019, I can only base my assessment of damages on the Amended Plaint of 9 January 2016, which is supported by her documentary and oral evidence.

52. In the circumstances, I find the following damages claimed under the 2016 Amended Plaint proven:

> *Euro 200, 000 which was the undisputed sum disbursed to HKB as part of the consideration price.*
>
> *Further amounts spent on the building, which is receipted amounting to SCR215,280.69.*
>
> *Expenses incurred in respect of the carrying out of the necessary structural testing on the building amounting to SCR 9098.00, which are also receipted.*

53. I believe that loss of profits for a commercial building may also be granted when the debtor fails to perform his obligations per Article 1147 of the Civil Code.

54. Ms. Etheve claimed a loss of profits for a period of two years at the rate of SR 200 000 per month as a result of not being able to lease the building. She supported this claim by testifying that she intended to rent the two apartments on the first floor at €400 (€200x2) per day for twenty days each month. Also, she arrived at €400 per day as the Property was located in a tourist area at Cote D'Or. Regarding the ground floor of the building, she testified that she was expecting a rental income of SCR80,000 per

month for the ground floor from Barbara Wybrow née Port-Louis of the *Splendless Boutique,* who sells clothing.

55. A letter was produced from Ms. Etheve to Mrs. Wybrow cancelling the agreement for the lease as was a letter acknowledging the same from Mrs Wybrow. Ms. Etheve limited her claim to two years. Mr. Stanley Valentin, a quantity surveyor, corroborated this evidence when he testified that given correction factors, namely, rental values and occupancy probabilities, the net revenue per month from the ground floor would be SCR86,526.81, excluding tax.

56. Mr. Valentin went on to explore several options and factors, including a new design layout that could affect the rental value of the premises, but given the fact that Ms. Etheve has limited her claim in this respect to a rental value of SCR 80,000 per month for two years, I find her claim reasonable and proved in the sum of SCR1,600,00 (SCR 80,000 x 24).

57. With respect to the first floor, apart from her testimony, there is little evidence supporting her claim of Euro 400 per day for the apartments apart from her own testimony and that of Mr. Valentin regarding the going rate of rentals in the Cote d'Or area of Praslin. In any case, the building permission was for residential apartments not for a tourism business. In *Hari Builders (Pty) Ltd v S A Fabrication*,[10] this Court found that notwithstanding the submission of exact figures, the loss of rental income could be established by the evidence adduced in the case. In the present case, Mr Valentin testified that similar property in the area fetched about SCR75,000 monthly, but the present building would be in better condition. I, therefore, allow the same figure of SCR 80,000 per month as for the ground floor and for the same period, that is two years as claimed.

58. Finally, I have no doubt that Ms Etheve suffered moral damages compounded by the drawn-out events of this case. She testified that the building, not being fit for human habitation, has affected her mentally and morally. She suffered from a lack of sleep.

[10] (SCA 31 of 2021) [2023] SCCA 42 (25 August 2023).

She could no longer bear the sight of the building and she could no longer work, which impeded her lifestyle and health. She was diagnosed with acute stress, which affected her overall well-being. She testified that this situation was a heavy shock to her, hence her claim for moral damages amounting to SCR 500,000.

59. It is trite that moral damages are generally designed to compensate the claimant for actual injury suffered and not to impose a penalty on the wrongdoer. Article 1149 of the Civil Code of Seychelles Act also provides that:

> **"***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."*

60. I have looked at recent authorities where moral damages have been claimed in other instances of a breach of contract. The sums awarded vary from SCR 75,000 to SCR 100,000 (See *Elmasry and anor v Hua Sun,*[11], *Monthy v Payet,*[12] *Hari Builders (Pty) Ltd v S A Fabrication,*[13] *Longobardi and Anor v Rocchi.* [14]

61. I note, however, that the mental suffering here has been compounded by its duration of 9 years. I am of the view that SCR 150,000 would be just in the circumstances.

[11] SCA 28 of 2019) [2021] SCCA 66 (17 December 2021)
[12] (SCA 17 of 2019) [2021] SCCA 55 (10 September 2021)
[13] (SCA 31 of 2021) [2023] SCCA 42 (25 August 2023)
[14] (72 of 2022) [2022] SCCA 77 (16 December 2022)

Conclusion

62. For all the above reasons, the appeal is allowed with costs. The respondent shall also pay interests to the appellant as from the date of this judgment on the sums awarded to her as damages.

Order

63. I make orders as follows:

1. Harikrishna Builders is to pay the following sums as damages to Ms. Etheve:
i. ***Euro 200,000*** *(at the rate on the date of this judgment)*
*ii.****SCR 3,574,378.69*** *(SCR 215, 280.69 + SCR 3,200,000 + SCR9,098.00 + SCR.150,000)*
iii. interest from the date of this judgment
iv. costs of both courts.

Dr. M. Twomey-Woods, JA.

I concur

Dr. L. Tibatemwa-EkiriKubinza, JA

I concur

K. Gunesh-Balaghee, JA

Signed, dated and delivered at Ile du Port on 18 December 2023.