IN THE COURT OF APPEAL OF SEYCHELLES

Reportable

[2023] SCCA 45 (25 August 2023)

SCA 01/2022

(Appeal from CS 151/2018)

In the matter between

MARIA ELIZABETH **Appellant**

(rep. by Frank Elizabeth)

and

1. HELENE LESPERANCE

2. RONELLE LESPERANCE

2. RON LESPERANCE

3. RONDA LESPERANCE **Respondents**

(rep. by Manuella Parmentier)

Neutral Citation:	*Elizabeth v Lesperance & Others* (SCA 01/2022) [2023] SCCA 45 (Arising in CS 151/2018 (25 August 2023)
Before:	Twomey-Woods, Robinson, Tibatemwa-Ekirikubinza JJA
Heard:	10 August 2023
Summary:	Promesse de bail of lease – Promise to lease - invalidity – fiduciary - capacity of signatories - retrospective validation - nullity- absolute and relative
Delivered:	25 August 2023

ORDER

The appeal is dismissed with costs.

JUDGMENT

Twomey-Woods JA

(Robinson and Dr. Tibatemwa-Ekirikubinza concurring)

Background

1. Helene-Joanise and Romial Lesperance jointly bought a parcel of land (LD214) at Anse Reunion, La Digue, in 1981. They built their home and lived thereon with their three children. They borrowed money from various banks for their respective businesses - Romial, his fishing business and Helene-Joanise, her shop. These loans, including one from the Development Bank of Seychelles, were secured by mortgages on their land. On 2nd August 2008, Romial unexpectedly passed away.

2. It is Mrs. Lesperance's testimony that following her husband's death, debts accrued to her, and when the Development Bank of Seychelles threatened her with foreclosure, she was approached by Ms. Elizabeth with an offer to lease her home to turn it into a tourism establishment. She also testified that she initiated the legal process to have her husband's share of the property transferred to herself and her children.

3. It is further her testimony that in anticipation of title to the land being transmitted to herself and her children, she concluded a promise of lease (*promesse de bail*) with Ms. Elizabeth dated 27 May 2015. She gave early entry (1 April 2015) on the property to Ms. Elizabeth, who began the works as agreed.

The promise to lease

4. The recital (preamble) to the *Promise to Lease* reflects the status of the owners of the property, the subject of the agreement as follows:

   A. *Land Parcel LD214, situated at Anse Reunion, La Digue, Seychelles, is owned by Joanise-Helene Lesperance… and the late Romial Lesperance…(hereinafter 'the Deceased')*

   B. *The Deceased is survived by the Promisors as his legal heirs and as a result thereof, the property is owned by the Promisors.*

   C. *The Promisors are taking steps to transmit the property to them, and whereupon they will appoint Joanise-Helene Lesperance …as the fiduciary of the property to administer the property.*

   D. *The Promisee has agreed to lease the property from the Promisorss for a period of 10 years for the rent of SR 35,000 per month starting from 1 April 2015.*

E. In anticipation of the signature of the lease agreement for the lease of the property to the Promisee, the Promisors have delivered possession of the property to the Promisee for the Promisee to carry out renovations to the building on the property …to render it fit and fit it out for use as a tourism establishment."(sic)

5. The following were relevant terms of the lease:

1. "The Promisee shall take possession of the property and carry out works in the property for it to be used by the Promisee as a tourism establishment.

2. The Promisee shall:

2.1.1 Diligently and regularly carry out the works.

2.1.2 Carry out and complete the works using workmanship of the highest quality and standard and materials of quality and standard.

2.1.3 Complete the work within three months of the date of this agreement.

2.1.4 Not carry out any structural works to the building or do any works that would affect the structure of the building.

2.1.5 The Promisee hall be liable for rebuilding and repairing any defects in the building upon request by the Promisors…

3. The Promisee shall pay the promiser rent in the sum of SR 35,000 per month starting 01/04/2015.

4. On completion of the works or upon the appointment of Joanise as the fiduciary of the property, whichever occurs last, the promisers or Jonise as applicable, shall list the property to the Promisee for the term of ten years on terms and conditions set out in the proposed lease agreement…

5. In the event that upon the completion of the works, this agreement is rescinded on grounds attributable to the Promisee, the works and improvements brought to the property by the Promisee shall be the property of the Promises without any claim whatsoever oh at all by the Promisee against the provinces all their success are entitled all the fiduciary of the property for compensation or indemnity to the promise.

6. In the event that this agreement is rescinded and the works have not been completed, the Promisee shall either reinstate the building and the property in the state and condition that it was on delivery thereof to the Promisee or complete the works as design, all of the Promisee's cost and expense, failing which the Promisee

shall be liable to the Promisor in damages and to pay the full cost and expense of the reinstatement of the complete works.

7. The Promisors shall not withdraw from their obligations under this agreement so long as the Promisee is not in breach of any of the material terms of this agreement, express or implied, (which for the purpose of clarity non, payment by the Promisee of at least two (2) months' rent when due, shall be a material breach).

8. In the event of any material breach of this agreement, this agreement shall rescind by operation of law or ipso facto and the Promisors shall be entitled to take possession of the property, failing delivery thereof by the Promisee to the Promisors, the Promisee shall; be liable to pay the Promisors the rent until the delivery thereof…" (sic)

6. In accordance with the agreement, Ms. Elizabeth entered the property and began paying the rental amount. She also effected certain demolitions and works on the house.

The alleged breach of the promise of lease

7. In a Plaint filed on 31 October 2018, Mrs. Lesperance and her children averred that Ms. Elizabeth had breached the agreement in that she had only paid SCR 70,000 rent despite occupying the house until 8 February 2018. They further averred that she had failed to complete the renovation and improvement to the premises as agreed. They added that the premises were now inhabitable and in such bad repair that they could not live in the house and had to rent another house. They prayed for damages in the total sum of SR1,896,537, together with commercial interests.

8. At trial, Mrs. Lesperance gave evidence on behalf of all the heirs to support her Plaint and called a civil engineer, Mr. Nigel Roucou, to confirm the damages and their costs to her house. She also produced the *Promise to Lease* and various documents to support her claim.

9. Ms. Elizabeth filed a Defence and Counter Claim in response to the Plaint in which she averred in *limine litis* and *inter alia* that Mrs. Lesperance and her children had no standing to bring the case, that the *Promise to Lease* was against public policy and invalid in law and that Mrs. Lesperance and her children did not have the legal capacity to enter into the *Promise of Lease* which is therefore invalid.

10. On the merits, she averred that despite repeated requests, Mrs. Lesperance did not take steps to transmit the property as promised and to regulate the lease. She stated that she terminated the lease after finding out that that house was built without planning permission and without which she could not carry out the works planned. She also averred that she had paid SR126,000 in rent and spent a further SR 100,00 renovating the property and a fee of SR 15,000 to a draughtsman. She counterclaimed for the rental monies to be reimbursed together with the sums she had spent renovating the house, with commercial interests on the total amount of SR 241,000.

11. Learned Counsel for Mrs. Lesperance, Ms. Parmantier, moved the court to amend her pleadings to file an Answer to the Counterclaim which she submitted she had not filed through oversight. The court refused her leave to file the Answer.

12. At trial, Ms. Elizabeth testified that she had expected to sign a lease and not a promise for a lease. She started making rental payments, and then upon finding out that Mr. Frank Ally was dealing with the lease, she phoned him but was informed that he was acting for the Savings Bank rather than Mrs. Lesperance. She would not have entered into the agreement if she knew that Mrs. Lesperance did not own the property. Subsequently, she contacted the Planning Authority and discovered that the house had no planning permission and that house plans would have to be submitted before a change of use could be entertained.

13. She added that she informed Mrs. Lesperance that she would only pay rent once everything had been regularised. Mrs. Lesperance was appointed executrix of the estate in September 2015 but did not move to finalise the lease agreement. She subsequently wrote to Mrs. Lesperance on 8 February 2018 to terminate the promise to lease.

14. Attorney Mr. Frank Ally was called as Ms. Elizabeth's witness, and he confirmed that he had represented the Seychelles Savings Bank in 2015, with whom Mrs. Lesperance had a substantial outstanding loan on which interest had accrued since her husband’s passing. The bank had agreed that she would pay part of the debt, and the rest would be written off. In order to pay off that loan, she had proposed to rent her house. He had advised her that she could only give a promise to lease until she had been appointed executrix of the estate.

The judgment of the court *a quo*

15. In a judgment delivered on 8 February 2022, the learned trial judge granted Mrs. Lesperance's claim in the sum of SCR 350,000 for unpaid rent from 25th June 2015 to March 2016, surveyor's fees in the sum of SCR 7,500, unpaid utility bills in the sum of SCR3,621 and SCR 588,166 for damages to the property. Liability was decided on the basis that Mrs. Lesperance and her children had the capacity to enter into the promise to lease on the basis that they would regularise their status as clearly stated on the written agreement and that both parties had voluntarily signed the lease. Ms. Elizabeth had sought excuses for breaching the agreement, none of which were valid. The rationale for the quantum awarded was that the learned trial judge had no reason to doubt the valuation for the repairs to Mrs. Lesperance's property, which had been the only one proffered at trial. Further, an award was made for rent due from when Ms. Elizabeth occupied the property (1 April 2015) until she vacated it in March 2016. The counterclaim regarding money Ms. Elizabeth had spent renovating the premises was dismissed.

The appeal before us

16. Dissatisfied with the decision of the learned trial judge Pillay, the Appellant has fled eight grounds of appeal as follows:

    1. *The presiding judge erred in law and, in fact when she made a finding that the contract was not against public policy in law and that the Defendants' failure to call a witness from the Planning Authority to establish the fact that the Plaintiff did have planning permission to build the house was crucial in order to prove that the agreement to lease was against public policy.*

    2. *The presiding judge erred in her appreciation of the law of evidence and facts of this case, especially on the issue of planning permission since the Respondent had admitted in her evidence that she did not have planning permission to build the house, it wasn't necessary for the appellant to call a witness for the Planning Authority to establish a fact which was not in issue between the parties in light of the admission of the Respondent.*

    3. *The presiding judge's understanding of the legal concept of public policy and how its effects negate the legality of a contract was erroneous, mistaken, and unsound in law.*

    4. *The presiding judge erred in her findings that although it was unclear when the 1st Respondent was appointed as fiduciary, she had, in fact been appointed as fiduciary at the time of the filing of the matter, and hence had the capacity to sue.*

5. *The presiding judge failed to appreciate the Appellant's contention that the Respondents had no legal capacity to enter in the contract in law as opposed to whether the Respondent had the legal capacity to sue.*

6. *The presiding judge erred when she awarded the sum of SCR7500 in favour of the Appellants for the fees of the surveyor, as the same was not claimed by the Respondents in their pleadings. The claim is ultra petita.*

7. *The presiding judge erred in law when she refused to award the appellant damages on her counterclaim since the Respondents failed, refused, or neglected to file a defence to the counterclaim, the Appellants' counterclaim remained undefended. The presiding judge failed to consider the law of pleadings and evidence in that averments that are not specifically denied are taken to be admitted.*

8. *The Appellant submits that the presiding judge erred when she awarded damages in favour of the 1st Respondent on a contract which was null and void for being against public policy and for which the Appellants had no legal capacity to enter into.*

I must first of all point out that it is inappropriate to refer to the learned trial judge as the presiding judge; that term is reserved for the lead judge on a panel or a judge in charge of a particular division of the court. I also must remark that the grounds are long-winded and unclear, do not make for easy reading and obfuscates the issues to be decided by this court.

I also note that the appellant, at the hearing of the appeal, withdrew Ground 6.

17. In the circumstances, I have condensed the grounds of appeal. The grounds raised invite this court to resolve the following issues:

1. whether the *promise to lease* was valid in law.

2. whether the Respondents had the capacity to bring the suit.

3. whether the court should have entered judgment on an undefended counterclaim.

Validity of Promise to lease – Grounds 1, 2 and 3

18. Mr. Elizabeth, learned Counsel for Ms. Elizabeth, has made the following submissions with regard to the validity of the promise to lease: first, that the agreement was invalid as the house, the subject of the promise to lease, had been built without planning permission and therefore this fact vitiated the promise to lease; second, the agreement

was against public policy; and third Mrs. Lesperance had neither capacity to enter into the agreement nor to sue.

Planning permission

19. In expanding on these issues, Mr. Elizabeth submits first that the learned trial judge erred in dismissing the contention of Ms. Elizabeth that the agreement was void because the house had been built without planning permission. He states that the learned trial judge's reliance on the fact that Ms. Elizabeth had not confirmed this fact by calling a witness from the Planning Department was a misdirection in law and fact. Ms. Parmentier learned Counsel for the Respondent has submitted in reply that this is purely an excuse for breaching the lease and that Ms. Elizabeth as a seasoned businesswoman already running another tourism establishment, would have been aware that a change of use of a residential building into business premises would indeed require the submission of plans to the Planning Department.

20. I note that the Town and Country Planning Act provides for the retention of buildings constructed without prior planning permission, subject to the payment of a penalty fee and conditions. Such a building is, therefore, irregular, but its status can be regularised. With regard to the change of use of residential buildings into tourism establishments, provisions are also in place in the same Act and attendant regulations to control development within strict guidelines. The submission of the plans for the development of the tourism establishment would, in any case, have fallen on the shoulders of Ms. Elizabeth as she was the one seeking a change of use. The Planning Authority could have confirmed this position one way or the other, but whether the existing house had planning permission was certainly not the issue. In the circumstances, I fail to see the relevance of this argument.

21. Further, it is pertinent to note that Ms. Elizabeth was granted early entry onto the property and began works on the building prior to the signature of the Promise to Lease. It is unclear how and why she started work without planning approval in the first place. Therefore, she was in breach of planning regulations, which specify that approval must be sought and notice of commencement of work given to the Planning Authority. This strengthens the argument that her reason for terminating the agreement was not genuine.

Turpitude – public policy considerations

22. Mr. Elizabeth has also submitted that the agreement was null and void as it was against public policy. This was so, in his submission, as the house had no planning permission. He has referred to several cases on this issue, but as pointed out by Ms. Parmentier, these have no bearing on this case or the issue of public policy. Therefore, I find it unnecessary to address those cases' relevance further.

23. I have already addressed the issue of planning permission but need to add that the approximation of the facts of the present case with *NSJ Construction (Pty) Ltd and Anor v F.B Choppy (Pty) Ltd* (SCA 16 of 2019) [2021] SCCA 53 (7 September 2021) is fanciful and untenable. The object of the present agreement was a lease, a valid and legitimate agreement. As this was a legal objective, there was no turpitude, so the contract could not be deemed against public policy. The learned trial judge rightly comes to the same conclusion when she states that she is at a loss to understand its applicability to the present case.

24. I also add that it was a condition of the Promise to lease that Ms. Elizabeth "*shall take possession of the property and carry out works in the property for it to be used by the Promisee as a tourism establishment."* A literal interpretation of this clause is that she would do all necessary with the existing building to turn it into a tourism establishment – including submitting plans of the existing house, if necessary, together with plans for its change of use. Her reliance on the absence of existing planning permission for breaching the lease does not hold water.

L'exception d'inexecution

25. Mr. Elizabeth does not challenge the applicability of the concept of *l'exception d'inexecution* but made very heavy weather of the learned trial judge's remarks submitting that she was formulating a case for Mrs. Lesperance. I have difficulty following this line of argument. I am not convinced that she was making a case for the Respondents. A trial judge can surmise what position in law facts amount to. Law is not pleaded in a Plaint. She rightfully found that Ms. Elizabeth, in relying on the fact that Mrs. Lesperance had no plans for the existing house, was not a sufficiently grave reason for the termination of the lease. This is not a finding I can fault.

Capacity to enter into the agreement and to sue

26. Mr. Elizabeth has submitted that there was no evidence that Mrs. Lesperance had been appointed as fiduciary of the co-owned property that was leased and, therefore, she neither could enter into the agreement nor the capacity to bring the present matter to court. He refers to what he terms the learned trial judge's "intellectual gymnastics" in finding that all heirs had agreed to the promise to lease and that it was unclear when Mrs. Lesperance was appointed fiduciary. In reply, Ms. Parmentier has referred to the evidence of Mr. Ally, which confirmed that he had assisted Mrs. Lesperance in her appointment as both fiduciary and executor. She referred the Court to the Affidavit of Transfer by way of Transmission by Death (Exhibit D1A) and the appointment of executor (Exhibit P1).

27. It is correct that when land is co-owned, the rights of the co-owners can only be exercised through a fiduciary duly appointed (see Article 818 of the Civil Code). In the present case, at the time of signing the agreement on 27 May 2015, Mrs. Lesperance and her children were all co-owners of Parcel LD 214, subject to the promise to lease. She was appointed executor of her husband's estate on 25th September 2015 and by virtue of Article 1025 of the Civil Code, assumed fiduciary duties with regard to all the co-owners.

The duration of a fiduciary appointment

28. However, it is not contested that Mrs. Lesperance had already been appointed joint fiduciary with her husband of Parcel LD214 in 1981 when they bought the land. This is inferred from two exhibits in which she is named as a fiduciary and acted with her husband as joint fiduciaries to obtain bank loans (Exhibit D1A – Inscription in relation to a loan with Seychelles Savings Bank dated 27 April 1995 and a further loan with Seychelles Savings Bank dated 14 February 1996). The question to be answered is whether this appointment was terminated by her husband's subsequent death or whether, in the intervening four months between entering the agreement with Mrs. Elizabeth and her appointment as executor, her first appointment as fiduciary subsisted.

29. The issue has to be resolved because under the provisions of Article 818, co-owners cannot exercise *real* rights in co-owned property except through the intermediary of the fiduciary. In this regard, in *Jumeau v Anacoura,*[1] Sauzier J found that a co-owner had

[1] (1978) SLR 180.

no right to lease land that is held in co-ownership. Any alienation of property rights had to be executed by a fiduciary. In the present promise to lease, all the co-owners, including Mrs. Lesperance, the surviving fiduciary and co-owner, have signed. The signature of Mrs. Lesperance alone would have sufficed. I explain.

30. Article 828 of the Civil Code provides:

> *"If the consent of a person to be appointed fiduciary has not been obtained, or if he dies or is imprisoned for a crime or becomes insolvent or subject to some incapacity or resigns or refuses to act prior to entering into his functions, or if any of the aforementioned circumstances occur after he has assumed the office of fiduciary the co-owners may agree to appoint another. Failing such agreement, the Court, at the request of an interested party, shall make such appointment as it considers a fit and proper."* (emphasis added)

31. The provisions above enumerate circumstances in which a fiduciary ceases its functions. It is silent on the status of a surviving fiduciary to co-owned property when one co-owner dies, and his share passes on to his heirs. Logic infers that the fiduciary appointment survives the passing of the heir as it is not one of the instances specified in Article 828. I find, therefore, that Mrs. Lesperance remained a fiduciary after her husband's death in respect of Parcel LD214.

32. I am strengthened in this approach by the notes of A. G. Chloros[2], who drafted the fiduciary provisions in the Civil Code. To explain, I must make a small excursion into comparative legal history. Before the introduction of the Civil Code of 1975, the situation regarding co-owned land in Seychelles was dire. Many co-owners could not sell or transfer land because the laws required the agreement of all co-heirs, and many of them sometimes including fifth or sixth-generation heirs, either could not be traced or whose number and exact shares in the property were unknown. A solution was sought and addressed by Chloros.

The powers of the fiduciary and the co-owners

33. Whereas in French law, ownership on death passes of right to the heirs – *saisine de droit* (immediate vesting), the introduction of the fiduciary in Seychellois law in 1972 (borrowed

[2] A.G. Chloros, Codification in a Mixed Jurisdiction: The Civil and Commercial Law of Seychelles (North Holland Publishing, 1977).

from Scots law) has meant an interruption in the immediate ownership of property (deferred vesting) by heirs on the death of *de cujus*. The introduction of Article 818 meant that an executor or a fiduciary could hold the heirs' shares in the co-owned property. The fiduciary was meant to be the medium through which all the heirs dealt with their shares in co-owned property.

34. However, Chloros threw a spanner in the works by adding Article 817. It provided:

> *"1. When property, whether movable or immovable, is transferred to two or more persons, the right of co-ownership shall be converted into a claim to a like share in the proceeds of sale of any such property.*
>
> *2. Paragraph one of this article regulates the exercise of the right of co-ownership. It does not affect the right of co-ownership itself."* (Emphasis added).

35. The insertion of Article 817(2) caused the spilling of much ink. Still, the consensus seems to be that the cases of *Michel v Vidot*[3] and *Mathiot v Julienne*[4] settled the confusion by indicating that where there were issues in relation to rights held in co-owned property, co-owners could bring court actions without representation by a fiduciary if those actions relate to the protection of their individual rights of occupation of the property. A fiduciary is only necessary in respect of actions that affect the rights to the common property. Sauzier J 's dicta in *Michel* is to the effect that:

> *"Article 818 only affects the exercise of the right of co-ownership insofar as it relates to the immoveable property itself and does not affect the right of the individual co-owners to deal with their rights of co-ownership."*[5]

36. Later authorities such as *Jean & Ors v Jean*[6] have confirmed that co-owners can only bring actions in relation to property without representation by a fiduciary if those actions relate to the protection of their individual rights of occupation of the property and that a fiduciary was necessary in respect of actions, which affected rights to the common property.

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[3] *Michel v Vidot No. 2* (1977) SLR 214.
[4] *Mathiot v Julienne* (1992) SLR 135.
[5] *Michel* (n 2) 215.
[6] (CS 63/2015) [2017] SCSC 389.

37. The 2021 Civil Code has resolved this issue by deleting the provisions of Articles 817 and 818 altogether. Co-owners can now deal with their individual shares in the co-owned property, and fiduciaries are only appointed when necessary to facilitate a sale or deal with the co-owned property as a whole. However, the present matter was instituted before the reform of the Code.

38. The operation of Article 818 in respect of the present case would have meant that Mrs. Lesperance or the heirs had no capacity to enter into the agreement or institute a court case. However, I have already concluded that the promise of lease was valid as Mrs. Lesperance's original fiduciary appointment entitled her to sign the agreement. I believe it was with extra precaution that the names of the other co-owners were added.

Nullity

39. Even if I am wrong, the court's appointment of Mrs. Lesperance as executor of her husband's estate on 25 September 2015 would have retrospectively validated the promise to lease. This is because Article 1117 provides that.

"Contracts entered into by mistake, duress or fraud shall not be null as of right; they shall only give rise to an action for nullity or rescission…"

40. The concept of nullity of contract- of absolute and relative nullity - may be compared to the English concepts of void and voidable contracts. The doctrinal authors Francois Terré Phillippe Simler and Yves Lequette,[7] explain that traditionally, French law had viewed a contract as a living person composed of organs. These organs can be defective. Where the basic conditions for a contract are not met, the private agreement between the parties essential to bringing the contract to life is *stillborn*. In this case, nullity of the contract is absolute. However, when there exists a contract between the parties but there is a defect in the sense of error, fraud or duress, the contract is only *sick* and therefore can be cured; that would be relative nullity. The present case would be one of relative nullity - the defect in the agreement, if any, would have been cured by the later appointment of Mrs. Lesperance as executor with the capacity to enter into the agreement.

41. Viewed through either of the two different lenses I have outlined above, the promise of lease is a valid and enforceable document. The issues relating to the capacity to enter into

[7] Droit civil: Les obligations (Dalloz 10th edn 2009)106.

the agreement or institute a court case have been resolved. I cannot fault the ultimate decision of the learned trial judge on these grounds, although I have arrived at the same decision through a different route.

42. I now address the issue of damages.

Damages arising from undefended counterclaim – grounds 7 and 8

43. A counterclaim in the sum of SR 100,000 was made regarding what Ms. Elizabeth said she had spent for repairs, maintenance and renovations to the building. Mr. Elizabeth has contended that given that no defence had been filed to the counterclaim, it was incumbent on the learned trial judge to enter judgment in default in favour of Mrs. Elizabeth. He relies on section 128 of the Seychelles Code of Civil Procedure, which provides:

"If the defendant has neglected to file his statement on defence within the time ordered by the court, the court may either give judgment for the plaintiff on his claim or grant further time, subject to such orders as to costs."

44. The learned trial judge dismissed this plea because a motion was not made for an order to enter judgment in default. Mr. Elizabeth has submitted that the learned trial judge could only opt for one of the two options in the two provisions. In reply, Ms. Parmentier has submitted that section 128 must be read holistically with other procedural and substantive laws. She relies on the case of *Seychelles Savings Bank v Onezime and Another*[8] in which Renaud J (as he then was) stated:

"The failure of the Defendants to appear in Court at the hearing does not automatically lead to the Court accepting all the uncontroverted evidence of the witness of the Plaintiff. "The Plaintiff is suing the Defendants under a written agreement, and this Court has also to address itself to the contents of the agreement, when evaluating the ex-parte evidence."

45. I entirely agree. The legal burden remains with the claimant throughout the trial to prove his case; on the party who affirms and not the party who denies it. The Roman maxim *actor incumbit probatio* or "he who asserts must prove" applies. Similarly, and by parallel, Article 1315 of the Civil Code categorically states that

[8] (342 of 2008) [2010] SCSC 121 (09 December 2010).

"A person who demands the performance of an obligation shall be bound to prove it."

46. Hence the learned trial judge, as a fact finder, cannot be faulted for finding that there was no evidence to support the counterclaim and dismissing it. These grounds of appeal are, therefore, also dismissed.

Decision

47. In the circumstances, I dismiss this appeal in its entirety. The quantum of damages (SR 350,000 for unpaid rent, SR 7,500 in respect of surveyor's fees, SCR 3,612 with regard to unpaid utility bills and SCR 588,166 to make good the damage to the building) total SR949, 287) awarded to Ms. Lesperance were not disputed. Mrs. Lesperance claimed commercial interest but was not granted it. The damages, interest at the legal rate and costs as granted by the court *a quo* are affirmed by this court. I, therefore, make the following orders:

Orders

1. The appeal is dismissed in its entirety.
2. The damages in the sum of SR949,287 is affirmed.
3. Legal interest is payable on the award from the date of the Supreme Court judgment.
4. Costs of the court below and this court are ordered against Ms. Elizabeth.

Signed, dated and delivered at Ile du Port on 26 April 2023.

Dr. M. Twomey-Woods (JA)

I concur

F. Robinson (JA)

I concur:

Dr. L. Tibatemwa-Ekirikubinza (JA)