

IN THE SEYCHELLES COURT OF APPEAL

[Coram: F. MacGregor (PCA) ,M. Twomey (J.A) ,J. Msoffe (J.A)]

Civil Appeal SCA 35/2013

(Appeal from Supreme Court Decision CS 11/2012)

Alexander Kozhaev

Appellant

Versus

Eden Island Development Company
(Seychelles) Ltd

Respondent

Heard: 28 November 2016

Counsel: Mr. France Bonte for the Appellant

Mr. Kieran Shah for the Respondent

Delivered: 09 December 2016

JUDGMENT

J. Msoffe (J.A)

[1] In a sale agreement (exhibit P1) signed by the Appellant on 6th November 2007 and by the Respondent on 13th November 2007 the Appellant purchased from the Respondent a villa in the Eden Island development site at an agreed price of USD1,295,000.00. Since the Appellant is not a Seychellois the sanction to purchase the property was granted by the Government on 1st July 2008 (exhibit P2) as per the necessary requirement under the Land Registration Act (Cap 107).

- [2] In a letter dated 20th January 2010 (exhibit P3) Webber Wentzel, the Respondent's Attorneys, wrote to the Appellant to confirm that the purchase price and the optional extras amounting to USD12,900.00 had been paid in full. However, in a sudden change of events, in a letter dated 24th January 2012 (exhibit P5) the Respondent's Attorneys wrote to the Appellant to say that an outstanding amount of USD387,321.12 was yet to be paid. Apparently this letter (exhibit P5) was written on the understanding by the Respondent that upon reconciliation of the accounts by the bank it was realised that the above sum of money was still outstanding. In other words, the Respondent was of the view that the reconciliation done as per exhibit P3 was mistaken and reflected a bank error which was purportedly corrected. This alleged correction was only done four years later!
- [3] We wish to pause here and observe that some of the contents of exhibits P3, P5 and P6 were confusing and rendered no assistance to the Respondent. Exhibits P5 and P6 were written by the same person (Mr. Hendrik du Preez). It is curious to note that they were written on the same day (24 January 2012). Yet, exhibit P5 showed that the outstanding sum was USD387,321.12, not USD388,500.00, the amount in contention, while in exhibit P6 the outstanding amount was shown as USD36,435.19! This was in sharp contrast to exhibit P3 which was written by a different person altogether (Hanniyah Salie) in the same law firm to show that the purchase price and the optional extras had been paid in full. Surely, this kind of documentation must have confused the Appellant.
- [4] In response to the two letters, an email dated 23rd February 2012, asserted that payment in regards to villa B2 207 had been paid in full. The email also draws us to the attention that apartment A12 221 B1 for which the lawyers

were seeking payment for did not exist. This brings to our attention just how the lawyers for the Respondents were not certain with their allegations. We deem this to be unacceptable. The Respondent's lawyers are a well known firm of advocates in South Africa. As an acclaimed law firm, much was expected from them; they ought to have done their work in a much better way.

- [5] In a similar vein, we wish to point out from the outset that, in our reading and appreciation of the record before us, it seems to us that the bank was also partly to blame for not coming up with a true, correct and consistent picture of the payments in question. The Barclays bank is a well known financial institution of international repute. It is a pity that it could make a mistake and fail to explain it to its customer within a reasonable time. It took four years to note the alleged error! Further, it did not produce a reconciliation report to explain how the error happened! The bank had a definite and outright responsibility to their clients to make certain that their accounts were up to date. We think the bank could have done a better job in the circumstances of this case.
- [6] In a plaint dated 24th May 2012 the Respondent moved the Supreme Court for a Judgment in the sum of USD381,321.12 plus interest or in the alternative cancellation of the sale agreement and re-transfer of the property.
- [7] In his amended statement of defence filed on 7th November 2012 the Appellant denied liability and counter-claimed a sum of USD450,000.00 for non-completion "of the villa, moral damages of USD250,000.00, unpaid interest for all monies held in the escrow account, plus interest at commercial rate and costs".

[8] After hearing the parties the Supreme Court (Egonda-Ntende, CJ) allowed the suit “to the extent of USD385,471.12 plus interest, to be calculated at the contractual rate from the date of filing of this suit until the date of delivery of this Judgment, and thereafter at the legal rate.” The counter-claim was dismissed.

[9] Aggrieved, the Appellant is appealing. He has canvassed two grounds, to wit:-

(i) The whole of the decision is wrong.

(ii) The learned Chief Justice wrongly appreciated the evidence on record and reached a decision which is contrary to the principles of natural justice and grossly unreasonable in all the circumstances of the case.

[10] Of course, the manner in which the first ground is framed is vague and general. This offends Rule 18(7) of the Court of Appeal Rules, 2005. The sub-rule provides that a ground of appeal should not be vague and general.

[11] At this juncture, we are of the view that it is pertinent to make two observations. **One**, clause 25 of the Agreement (exhibit P1) provided for arbitration which, it is curious to note, was couched in mandatory terms. It is not clear from the record, and no reasons were advanced to explain, why this avenue was not pursued. We note that in his Heads of Argument learned Counsel for the Appellant is criticising the Chief Justice for proceeding with the case “without paying attention to that clause”. With respect, this is an unfair criticism. As correctly submitted by learned Counsel for the Respondent, there is no record that the parties or one of them

moved the court in terms of Article 110(3) or Article 113 of the Commercial Code of Seychelles. It is clear from these provisions that the parties or one of them must move the court to decline jurisdiction. This was not done by both or either of the parties. In the circumstances, the court could not have acted *suo motu*. Nevertheless, parties are reminded that whenever agreements provide for arbitration it is always safe and advisable to pursue that process before resorting to court action. This would save time, expense and effort.

Two, we think this was a case in which the parties could have easily settled out of court. The parties' accountants and bank officials could have sat together and reconcile the accounts. If this action had been taken presumably an amicable solution agreeable to the parties could have been found thereby, again, saving time, expense and effort.

[12] As per clause 4 of the agreement which deals with price payments and guarantees the agreed sum was to be paid in stages as summarized hereunder:-

- (a) 10% was to be paid into one of Eden Island's two escrow accounts with Barclays Bank and released to Eden Island from escrow on the date of signature. The 1st tranche of 20% of the purchase price was to be released from escrow to Eden Island on the transfer date itself, so that Eden Island received an aggregate amount of 30% of the purchase price on that date.
- (b) The outstanding balance (70%) of the purchase price was to be paid into escrow account and disbursed to Eden Island according to the progress in works, reflecting each stage of construction.

(c) the fifth and last instalment was to be disbursed on the final completion date.

(d) by clause 4.3 the Appellant was obliged to give a bank guarantee for the amount or to pay the full amount in cash as “security” 90 days prior to the anticipated date of transfer, unless the Respondent agreed to defer the security to a later date.

[13] In accordance with clause 6, particularly 6.1.3 of the agreement, the purchaser was required to comply with all his obligations under the agreement before registration of transfer could be effected in his name. This was intended to show that the Respondent was not expected to allow transfer to pass to the Appellant without being certain that the latter’s obligations for payment had been discharged as per the statement made in the transfer document (exhibit P2) which states “for which satisfactory arrangements for payment have been made”.

[14] The Appellant paid monies prior to the transfer and the property was transferred to his name on 24th July 2008. It was common ground at the trial that the reconciliation produced by the Respondent’s bank in January 2010 showed receipts covering the full amount of the purchase price. It was also common ground that the Respondent’s lawyers in South Africa wrote to the Appellant on the strength of this reconciliation to confirm that payment had been made in full. As mentioned above, the Respondent later confirmed that the reconciliation was mistaken and reflected a bank error which was supposedly corrected. Surprisingly however, the error was never explained to the Appellant, nor was the alleged corrected reconciliation report ever produced before the court below!

[15] As a general rule in civil cases the principle is that he who avers must prove. It is the duty of a party to present evidence on the facts in issue necessary to establish the claim or the defence.

[16] In this case it is on record (page 172 of the brief, page 11 of the Judgment) that the Appellant made a statement to the effect that it was not upon him to show that the claimed sum of money was paid. Counsel for the Respondent had argued otherwise, citing Article 1315 of the Civil Code that the burden had shifted to the Appellant. The Article states:-

A person who demands the performance of an obligation shall be bound to prove it. Conversely a person who claims to have been released shall be found to prove the payment or the performance which has extinguished his obligation.

[17] The general principle is that a person who pleads payment has the burden of proving it. In **Jimenez v NLLC, 1 GR No. 116960, 326 Phil. 89, 95** [1996] the court ruled that the burden rests on the debtor to prove payment, rather than on the creditor to prove non-payment.

[18] In this case, it may be fair to say that the Appellant as the debtor did his best to discharge the above burden. Bank records show that a transaction of an amount of USD388,500.00 was made. Furthermore, the Appellant received confirmation from the Respondent's lawyers in the letter dated 20th January 2010 to show that payment had been made in full. There was also the email from Haniyyah Salie dated 18th January 2010 to Karen Van Der Burgh

showing that the Appellant had paid the full purchase price and the optional extras.

[19] Yet again, the record of proceedings (pages 138 – 139) shows that the Appellant produced a number of documents which, despite objection by the Respondent’s Counsel, were produced and admitted in evidence as exhibit D3. Among this bundle of documents was the “TRANSFER ORDER No.8” dated 2nd July 2008 showing that a sum of USD388,500.00 was “partial payment under purchase and sale contract dated 13.11.2007 Alexander Kozhaev, Basin 2 Parcel 207 Villa type 6 Eden Island”.

[20] It is on record that although the Chief Justice admitted the above document as part of exhibit D3 he did not attach much weight to it for the reason that the TRANSFER ORDER was issued by MOMATUK VICTOR KONSTANTINOVICH, a different individual altogether; that it was not signed; and that the author of the document was not called as a witness. We will come back to this aspect of the case in relation to this document later in the course of this Judgment.

[21] It will be just to say that in the light of the above evidence the Appellant had discharged his burden of proof on a balance of probabilities. In this sense it is fair to assert that the evidence adduced was enough to shift the burden to the Respondent to show the court that the amount was not paid. The Chief Justice appeared to have appreciated this point when at page 12 of his Judgment under paragraph 40 thereto he opined:-

... where a creditor has purported to release a debtor and then subsequently alleges mistake, I do consider that it is reasonable to require proof of the alleged mistake. In such a case the creditor is

to some extent the author of its own misfortune. Having made the initial mistake, Eden Island has a responsibility to assist the court by providing the necessary information to set the record straight.

[22] Having made the above finding the Chief Justice went on to hold under paragraphs 42 and 43 thus:-

[42] It is however still necessary to decide whether Eden Island has done enough to enable me to reach “a determinate conclusion”. The evidence from Eden Island regarding the alleged bank error in this case is, I must say, unsatisfactory. The flow of funds indicated by the interim bank statements and explained by Mr. Lawrence is not directly supported by other documents (for example, by other bank documents confirming that the funds flowed between reservation and sales escrow, or by any contemporaneous correspondence or notes about the need to correct the mistake). There appears to be a second error on the reconciliation (showing a debit of USD388,500 from escrow on 3 July 2008, not 4 or 8 July) which has never been explained. And most importantly, I have never seen a corrected reconciliation. Mr. Kozhaev was certainly not given one. The January 2012 letter of demand makes no reference at all to the fact that earlier reconciliations are wrong. Eden Island, and its counsel, have thereby blurred and confused what should have been a clearcut claim of mistake.

[43] *Be that as it may, I have reached the conclusion on the available evidence that Eden Island’s version of events is significantly more likely than not to be true. The evidence cannot be said to be “evenly balanced” to the point where shifting the burden of proof back to Eden Island could alter the outcome. As Lord Hoffman put it in In re B (Children) [2008] UKHL 35 at [2], there is “no room for a finding that [something] might have happened. The law operates a binary system in which the only values are 0 and 1.” I am satisfied that the probability of non-payment in this case is closer to 1 than to 0 and, on that basis, Eden Island’s claim succeeds.*

[23] As it is, it is apparent from the above reasoning that, the Chief Justice ruled in favour of the Respondent not because he had “proven the existence of the payment obligation” but rather that the Appellant had failed to prove that the claimed sum was paid. With respect, having observed or arrived at the conclusion that it was incumbent upon the Respondent to prove non-payment it was unjust to rule against the Appellant in the circumstances of this case.

[24] It is trite law that in civil cases the plaintiff’s onus of proof can only be discharged if he proves his case on a preponderance of probabilities and the prerequisite is that the court must be satisfied that his version is true and that of the defendant is false. In the case of **Milner v Minister of Pensions** [1947] 2 ALL ER 372 Denning J. makes a pertinent distinction between

succeeding on the balance of probabilities and failing on the balance of probabilities, thus:-

If the evidence is such that the tribunal/court can say 'we think it more probable than not' the burden is discharged, but if the probabilities are equal, it is not.

[25] In the case at hand, the evidence availed to the Court does not indicate that the Respondent discharged this burden. We find that the probabilities were more or less equal. Case law provides for instances when probabilities are evenly balanced. In the case of **National Employers General Insurance Co Ltd v Jagers 1984 (4) SA 437** € at 440E-441 A, Eksteen AJP said:

... If however, the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.

[26] In the instant case, as already observed, there are several documents showing that the Appellant had made the transactions in question whereas the Respondent produced none before the court to explain the mistake claimed. We are therefore inclined to believe that the Appellant's version of events was more likely to be true. To justify our position we quote Lord Hoffman in the case of **Secretary of State for the Home Department v Rehman [2001] UKHL 47**, where he stated:-

It would need more cogent evidence to satisfy [a judge] that the creature seen walking in Regent's Park was more likely than not

to have been a lioness than to be satisfied to the same standard of probability that it was an Alsatian.

- [27] For us in this appeal to believe the version put forth by the Respondent, we needed coherent evidence indicating the error and how it came about. Without that kind of evidence it is not feasible for us to arrive at a conclusion that favours the Respondent.
- [28] There is another aspect of the case worth addressing in this Judgment. At page 149 of the proceedings the Chief Justice delivered a Ruling dismissing an application to recall Mr. Egbert Lawrence to testify in regard to exhibit D3 (supra). Quite correctly, in our view, in the Ruling the Chief Justice addressed the law on recalling a witness to adduce evidence. In the process, he cited the case of **Pomeroy v Ross** [1976] SLR at page 68 which held, *inter alia*, that the court has a discretion to call a witness but the discretion should always be exercised judiciously and only in special circumstances particularly where parties have already made out their cases.
- [29] We may also add that where a matter arises and which the parties could not have foreseen the court has a discretion to recall the witness – **R v Asuquo Eden** [1943] 9 WACA 25. Further, a party seeking to recall a witness has the burden of showing why he intends to recall the witness and what he intends to do with him – **ACB LTD V Uzor Bros Nig Ltd** [1997] 6 NWLR [Ot 510] 692, at page 697.
- [30] Also, the Nigerian case of **Adekanye Eleko v Akinriniola William Olokunboro** [1978] LPELR-FCA/B/9/78 provides useful guidance on this point. The court observed:-

*... where an application is made to a Judge in the course of the trial of a civil case to recall a witness who had already given evidence the overriding factor in the consideration of the application is whether or not the **interests of justice** require that the application should be granted. In other words an application by a party or counsel to recall a witness who had already given evidence should succeed where the **interests of justice** require it.*

[Our emphasis.]

- [31] Thus, we are of the considered view that while the court has a discretion to decide on whether or not to recall a witness the overriding consideration should always be “the interests of justice”.
- [32] In the instant case, the Chief Justice reasoned, quite correctly in our view, that the issue of payment was “at the heart of the dispute”. If so, we think he should not have declined the request to recall Mr. Egbert Lawrence to give evidence. It is interesting to note that he declined the request following an objection by learned Counsel for the Appellant! Anyhow, he should have granted the application in the interests of justice. We say so because, as already stated, there was the allegation as per exhibit D3 (supra) that the claimed sum of money had actually been paid. If so, the evidence of Egbert Lawrence could have been very relevant in lending credence to this assertion or in establishing exactly whether or not the sum of money alleged in exhibit D3 was actually paid. His evidence in this respect would presumably have settled the issue of payment once and for all and this could have probably been the end of the matter.

[33] This brings us to the counter-claim. In his Heads of Argument learned Counsel for the Appellant still thinks that the Chief Justice erred in dismissing it. According to him “the Appellant did bring to the attention of the Eden Island the defects with the immovable properties he purchased from Eden Island and no evidence of proof of rectification was proved before court by the Respondent”. Learned Counsel for the Respondent thinks otherwise. In his view, “the evidence was very scanty, only the bare statement of the Appellant; that whatever list of defects the Appellant sent to the Respondent were attended to”.

[34] Clause 14 of the contract of sale specified the means by which the construction defects were to be identified and rectified. The Appellant was under an obligation to provide the Respondent a ‘comprehensive and final’ list of defects within 90 days of receiving the ‘practical completion’ certificates. The Respondent was then obliged to rectify those defects. Additionally, clause 14.2 provided that any dispute “as to whether a defect exists or whether the defect had been rectified” should be finally determined by a nominated firm of architects in Cape Town. Clause 15 provided limited further protection to the Appellant in the event of major structural defects and roof leaks, provided that written notice of those defects was given within 5 years and 12 months respectively from the date of practical completion.

[35] The Respondent’s witness Mr. Synicle acknowledged under cross-examination that he had not inspected the house since May 2012 when the final certificate was issued. He did state however, that his company had not received any notification of defects independently of this proceeding. When the Appellant was asked whether he had submitted any list, he said that he had only done it orally and did not understand that the content of the contract

required him to submit a written one as the contract was written in English. As a general rule, a person is bound by their signature to a document, whether or not they have read or understood the document: **L'Estrange v Graucob [1934] 2 KB 394.**

[36] The Appellant further adduced no evidence in the court below to show the defects he complained about. At page 178 of the brief or page 17 of the Judgment the Chief Justice observed, and we quote:-

In this regard Mr. Kozhaev's evidence, which is unsupported by documentation or expert opinion, is contradicted by two professionals who were directly involved in the construction, including the representative of the company who signed the completion certificates and in any event, Mr. Bonte, as Counsel for the Appellant, made no attempt to explain why the contractual dispute procedures had not been followed except to assert that his client did not understand the agreements he had signed. I have no hesitation in dismissing the counterclaim”.

[37] With respect, we entirely agree with the Chief Justice and we propose not to say anything more on this point.

[38] In the upshot, having given careful thought and consideration to this matter, we partially allow the appeal in the sense that on balance we are satisfied that the Respondent failed to establish its case on the necessary balance of probabilities. Otherwise, the appeal in relation to the counter-claim lacks merit and we accordingly dismiss it.

[39] In the circumstances of this case, and particularly in view of the manner in which it was handled by the parties, we order that each party bears its own costs.

J. Msoffe (J.A)

I concur:. F. MacGregor (PCA)

I concur:. M. Twomey (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 09 December 2016