

**IN THE SEYCHELLES COURT OF APPEAL**

**[Coram: F. MacGregor (President), S. B. Domah (JA), A. Fernando (J.A)]**

**Civil Appeal SCA 26/2013**

**(Appeal from Supreme Court Decisions of 83/2011 and 84/2011)**

---

**Shree Hari Construction (Pty) Ltd**

**Appellant**

**Versus**

**Solana Boniface**

**Philip Lafortune**

**Respondents**

**Heard: 12 April 2016**

**Counsel: Mr. S. Rajasundaram for Appellant**

**Mr. A. Derjacques for Respondents**

**Delivered: 12 August 2016**

**JUDGMENT**

**S. Domah (J.A)**

- (1)** We have read the judgment of our brother Fernando, JA. We have no disagreement with him on the principles of law he has followed. However, our analysis of the real issues and the principles, as we see them in this appeal, lead us to a conclusion different from his.
  
- (2)** This appeal came to us on a judgment of the Supreme Court and involves a civil claim and a counter claim between, on the one hand, a builder, Shree Hari Constructions (Pty) Ltd (“SHCL”), and, on the other, its employers, a couple, Solana Boniface and Philip Lafortune (“the respondents”). The learned Chief Justice found in part for SHCL

and in part for the Respondents in the action and the cross action. He awarded damages as follows: SR 495,837.35 in favour of SHCL and SR492.508.64 in favour of S&P. SHCL appealed and the Respondents cross appealed.

- (3) We reproduce the grounds of appeal of SHCL verbatim on account of the involved language used. They are as follows:

*“GROUND 1*

*The learned Chief Justice erred in his decision in disallowing the Appellant’s claim under the fluctuation clause while he appreciates the legality of the claim through the uncontroverted terms of the contract.*

*GROUND 2*

*The learned Chief Justice failed to understand himself of the effects of the Appellant’s QS report in that he failed to see that the QS had considered the payments received by the Appellant and the net value of the works done exclusive of the payments made by the Respondents.*

*GROUND 3*

*The learned Chief Justice failed to justify in detail, as to how the defective works would have cost the respondent in the total sum of SR486,467.00 being the award against this Appellant.*

*GROUND 4*

*The learned Chief Justice failed to appreciate that the Exhibit D53 that he relies on for the award against this Appellant is not a genuine and straight forward document but is arbitrary and one sided.*

*GROUND 5*

*The learned Chief Justice despite having raised the issue for determination in page 8 of his judgment for alleged defective works at the time of termination of the contract to match the sum necessary for rectification of such works grossly failed to arrive at ant rational decision but concluded that the Appellant is liable for such defective works in the sum of SR464,017.00.*

*GROUND 6*

*The learned Chief Justice grossly failed to take note of the Appellant’s every single payment certificate bears in clear terms of the fluctuation clause, thus the Respondents were given due notice of adjustment of price due to fluctuation. It is wrong therefore to hold that no notice of fluctuation was given while disallowing the claims.*

*GROUND 7*

*The learned Chief Justice whilst not relying on D45, a valuation of report of Mr Oriarewo, citing the valid reason, wrongly concluded that he would rely on this document based on the evidence of another expert and through his report D53. Thus, The learned Chief Justice is inconsistent in his views and shown contrary*

*opinion to his own findings.”*

**(4)** The grounds of appeal of the Respondents are as follows:

1. *that the Honourable Judge erred in law in awarding the Appellant the sum of SR45,060.00 cts in extra works done, in that it was neither proven on the evidence, nor the said works agreed upon between the parties.*
2. *that the Honourable Judge erred in law in awarding the Appellant the sum of SR450,777.35 cts as part of the value of the works done in that:*
  - a. *It was not proven on the evidence adduced;*
  - b. *The evidence on valuation of work done was unreliable and arbitrary;*
  - c. *The Honourable Judge failed to take into account the delay in construction and its impact on the agreement and award;*
  - d. *The Honourable Judge erred in failing to take into account the Appellant’s defective work in the construction, and the resulting costs.*
3. *that the Honourable Judge erred in law in failing to award the Respondents the sum of SR42,843.00 cts for the materials purchased by the Respondents and lost and misplaced by the Appellant, whilst they were in the Appellant custody, on the work site.*
4. *that the Honourable Judge erred in law in failing to make an award for moral damages for the Respondents in that he determined that the works were delayed by the Appellant, and further there were defective works, inter alia, and consequently it was fair, proper and just to make a fair order.*

#### **STRUCTURE OF THIS APPEAL AND CROSS-APPEAL**

**(5)** We shall deal first with the appeal of SHCL in Part 1 of this judgment before we consider the appeal of the Respondents in Part 2. But before we do so, it is worth noting that all the above grounds – except one (Ground 7) - are grounds challenging the trial court’s finding of facts. The rule today is cast in stone that an appellate jurisdiction is ill-placed, hearing a dispute as it does relying on a record of transcript in black and white, in a 1-dimensional view on paper, to be a better judge than the trial judge who heard the case in a 3-dimensional view and in real life. One justification for the appellate court to interfere with the decision of the trial court would be where the appellant shows that the conclusion reached by the lower court on its findings of fact cannot reasonably be correct. Or that the trial court missed an important detail/s which, if it had taken into account, would have led to a different conclusion. The rule is the sovereignty of appreciation of the trial court. An appellate court should be more concerned with the law, which includes its application to the facts. But it may not substitute its own conclusion to the conclusion reached by the trial court. It was for

both SCHL and the Respondents to show that the conclusion reached by the learned Chief Justice did not follow. Ground 7, of SHCL's appeal, is a ground of mixed law and facts. We shall deal with that on its own.

- (6) Learned counsel for SHCL has argued before us that the cross action of the Respondents was engineered to defeat the action of SHCL. He relies on the dates on which the cases were lodged and the appeals were lodged. We have given this aspect due consideration. But we are unable to accept it for a number of reasons. That 84/2011 came late in the day cannot be denied whether as a case before the court or on appeal. But, first, the dissatisfaction of the Respondents with the work did not start after SHCL had lodged its case. The differences had started brewing from the very early days of the work: at first in a very polite fashion before it ended up in litigation. Second, the two parties in the case, on the facts, are unequal in resources to rush to court. Third, the averments in the action of the Respondents are the very reasons which led the Respondents to terminate the contract. The order in which cases are initiated in court does not necessarily reflect *ex post facto* tactic. While it is true that a later case may be brought as an afterthought, it is also true that the first case in time may be designed to steal a march upon a later case. Cases in court rely on facts in evidence. We cannot go along the line suggested by learned counsel for SHCL that the case of the Respondents was engineered to blow up the case of SHCL. Its genuineness is documented and the history of the grievances pre-dates the timings of both actions.

## **PART 1**

### **APPEAL OF SHREE HARI CONSTRUCTION (PTY) LTD**

- (7) With respect to the appeal of SHCL, we find it convenient to adopt the following structure: Grounds 1 and 6 will be taken together. So will Grounds 3, 4 and 5. On the other hand, Ground 2 will be treated on its own as well as Ground 7.

#### **GROUND 1 AND 6**

- (8) Grounds 1 and 6 have to do with the fluctuation clause and its applicability to the facts of the case. It is the case of the appellant that the then Chief Justice erred when he disallowed "*the builder's claim under the fluctuation clause inasmuch as that clause formed part of the contract and this was not denied.*"

- (9) The learned Chief Justice rejected “the claim arising out of an alleged fluctuation of currency or labour rates.” His reasons lay in the fact that this had not been pleaded and no notice had been given.
- (10) We have considered the matter. We note that the contract does contain a fluctuation Clause for labour and consumables (water and electricity) in Clauses 8, 9, 10 and 13. But the Clause did not give a Charter to SHCL to apply it at its will. The learned Chief Justice rightly applied section 71(d) of the Seychelles Code of Civil Procedure not to engage into this avenue. As regards currency fluctuation, it was not mentioned in the contract at all. The currency in the agreement is given in Seychelles rupees. If the letter subsequently confirming the agreement mentions currency, it is with regard to 15% of the contract sum intended to pay the wages and airfares of expatriate workers. It was an item sought outside the four corners of not only the contract but also the plaint and pleadings. Section 71(d) of the Seychelles Code of Civil Procedure operated to pre-empt any consideration of the fluctuation clause. Grounds 1 and 6 fail.

## **GROUND 2**

- (11) The language under Ground 2 is convoluted. I understand it to mean that the learned Chief Justice did not make a proper appreciation of the report of the Appellant’s QS as regards the sums that had been paid and the sums that were due.
- (12) Now, the appellant was awarded the sum of SR486,467.00 in a claim it had made of SR1,772,740.54. The reasoning process of the learned Chief Justice had been as follows. He had discarded the figure given in D45 which put the value of the works at termination at SR401,625.12. He had equally discarded the figure given by the appellant. Both figures came from parties’ witnesses and looked to be in the opposite extremes to be accepted. In such situations a court is in search of objective criteria to reach a reasonable figure. In this case, the learned Chief Justice picked up – and rightly so - the figures in the three Certificates which were either due for payment or had been paid. These amounted to SR810,778.13. He applied his judicial common sense to assess the rate at which the work would have progressed for the remaining period until it was stopped. He came to the figure SR940,333.20 as not too far off the mark.

(13) Was this reasoning erroneous? No reasonable person would think so. Witnesses of parties to a case come up throwing either inflated or deflated figures, depending upon who between the claimant and the defendant has summoned them. Nigel Roucou was no less a QS than Arthur Oriarewo. If the latter was incompetent to give the figures, so was the former. The Court's function is to come to a figure based on objective criteria where the experts' testimony are not acceptable. This is exactly what the learned Chief Justice did. The objective criteria in this matter were the payments as had been made to which the learned Chief Justice added some other objective variables of time and rate of performance. It showed an objective and scientific process of reasoning on ascertainable facts in the case. Ground 2 fails.

### **GROUND 3, 4 and 5**

(14) Grounds 3, 4 and 5 have to do with whether or not there were defective works and, if there were, the extent thereof. The learned Chief Justice came to the conclusion that there were.

(15) We have shown above that that the then learned Chief Justice did not "*solely relied on the report for entertaining the award against this appellant, especially the valuation of remedial works attached along with Exhibit D45.*" He had done anything but that.

(16) Learned counsel spoke of a clandestine arrangement between DW3 and Mr Oriawero for the production of the report in D45. He invited us to compare and match them to detect the complicity and bias. He submitted that no reliance should be placed on this document. If we were to go along the line suggested by learned counsel, we would be condoning a procedural lapse from the part of learned counsel.

(17) We explain. It was open to learned counsel for SHCL to cross examine the relevant witnesses, more particularly Aminu Yawale, on these matters. But he chose not to do so.

(18) To choose silence as an option in civil proceedings when there arises a duty to rebut documentary evidence which has been admitted by a formal Ruling is as good as laying down arms in a battlefield when the enemy is shooting. It makes no sense for one to raise allegations of complicity and bias – as learned counsel is doing now - after

the enemy shot has maimed one. Theories of complicity and bias are easily concocted in the absence of those against whom they are made until they are as easily demolished by facts by them. Provided that they are given to chance to demolish them. Was a chance given? It would have been, had learned counsel for SHCL raised these issues, subjected them for cross-examination and re-examination as the case may be. At that time, we would have legitimately examined the points along with him. As he did not given that chance, his theory is a mere theory without substance. We decline to consider it in the name of fairness and due process under the rule of law.

- (19) Learned counsel for the SHCL also submitted that reliance should be placed on Exhibit 38, the report of Architect Terrence Camille. However, the evidence of this witness is not of much help to the cause of SHCL. He admitted he had come to depose for three things basically: the form work of the roof; the direction of the grid lines and the finish on the columns. He acknowledged in his side comments that the client had dissatisfactions with the builder. Accordingly, we would not disturb the findings of fact of the learned Chief Justice. Grounds 3, 4 and 5 are dismissed for lack of sound reasoning.

#### **GROUND 7**

- (20) With this we come to the crucial issue raised by D45 in the case which is under Ground 7. First, this ground is worded this way:

*“The learned Chief Justice whilst not relying on D45, a valuation of report of Mr Oriarewo, citing the valid reason, wrongly concluded that he would rely on this document based on the evidence of another expert and through his report D53. Thus, The learned Chief Justice is inconsistent in his views and shown contrary opinion to his own findings.”*

- (21) Three aspects of this ground should engage our mind. One is that this ground does not challenge the admissibility of D45. Second, nowhere in the appeal is the Ruling of the learned Chief Justice challenged on the admissibility of the document. What is challenged is the weight which the learned Chief Justice attached to part of it.

- (22) In his submission before us this is what learned counsel for SHCL argues: “the learned Chief Justice solely relies on the report for entertaining the award against this Appellant, especially the valuation of remedial works attached along with Exhibit D45.”
- (23) The judgment reads: *“I have noted above the problem with Exhibit D45, in that it was not possible to test its veracity, given the absence of its author. Nevertheless in the light of the testimony of Jovan Yocette who inspected the works in question and made a report, I am prepared to accept firstly that there was defective works left behind by SHCL, ....I accept that to clear those defects would cost SR464,017.00 and when you add solution ‘b’ costed at SR22,450.00 the total sum comes to SR486.467.00 only.”*
- (24) It bears repetition that the learned Chief Justice did not rely solely on the evidence of D45. He sought support from the evidence of Gioven Yocette. There was ample evidence that there were defects in the delivery of the works undertaken by SHCL. Architect Terrence Camille was economical in speaking about it because he is an Architect whose tasks is different from that of an Engineer who can speak about it. In this regard, Mr Lownam, the Structural Engineer, gave details of the defects in the construction and the remedial works that were undertaken and that were due. Mr Lowlam, had been visiting the work site often and had to intervene to rectify the work time and time again. Even the QS Nigel Roucou, witness for the SHCL, in his report, does make the comment that he was put into the picture “that the works were not to the satisfaction of the client.” QS Nigel Roucou does add that he took these into account in the assessment. However, the least we would have expected of him is to show at least where and how he has taken them into account in his calculation. He does not.
- (25) DW1 spoke about them and produced documents and exchanges between them and the builder. Witnesses have spoken about them: the weak soil compaction which allowed for rivulets of water flow; the honeycombs in the masonry; the black and uneven plastering; the unevenness in the surfaces because old timber had been used as setters; the breaking down of three out of 5 columns; the sight of exposed steel when the form was taken out; the laying of blocks too high which needed to be removed; the doors that did not fit properly; the arch that did not look like one; the sound of void in the plastering etc. The failings are fairly documented: inter alia, in

D53, in the photographs produced not only in D45 whose admissibility has not been challenged on appeal.

(26) What the Project Implementation Unit through Mr Oriarewo did was simply make an autopsy of the defects of what had been happening. The type of defects we are talking about in this project is nowhere in the discipline of rocket science. The layman could see them, note them and make a case on them, without the need of an expert. As rightly pointed out by DW1: *“This sort of work, you usually go and you will see that;”* *“any woman will be able to see with your normal eyes.”* Jovan Yocette confirms it: these are defects which are visual on site and do not need an engineer or an architect to uncover. They are not inherent that require experts to use their science to diagnose, identify, detect and then report on. They were physical, visible, palpable and some of them measurable. SHCL’s witnesses adumbrate their existence. The report of Engineer Lowlam speaks of them. Above all, the oral evidence thereon is documented in letters to SHCL. One of the main reasons for the termination was the sub-standard work produced in this instance for reasons best known to SHCL. The case of the Respondents does not hang on the thread of D45. There is preponderant evidence in support. There is a duty implied in a contract of work that the work will be carried out in a good and workmanlike manner: **Billyard v Leyland Construction Co Ltd [1968] 1 All ER 783**. That would have been enough to dispose of this ground. But some further comments on the source of D45 would complete the picture.

(27) Mr Arthur Oriawero was a witness who could not come to depose personally on D45. But he had prepared his report after carrying out a visit on site. This report was produced by some other officer of the very office which had been mandated to carry it out. He was a Nigerian national and a foreigner on contract at the material time of the dispute. His contract having expired by the time of the hearing, he had left jurisdiction.

(28) Admittedly, it is he who had direct knowledge of the defective works. By profession he was a Quantity Surveyor. By post, he is much more than a Quantity Surveyor. He was heading the Project Implementation Unit in the Ministry of Land Use and Housing which is the Ministry that approves projects and imposes conditions on implementation. On the evidence, Mr Arthur Oriawero was not acting on his own as an expert for the respondent employers. The report had been triggered by a complaint to his Unit and prepared by him in his official capacity. The one person who came to

produce the report was his successor with the necessary authority from the Permanent Secretary of that same Ministry: namely, Mr Aminu Yawale. The official function of the Project Implementation Unit is project implementation from the beginning to the end. The Report was prepared under the heading of the Ministry and signed on behalf of the Ministry.

- (29) When learned counsel for the Respondents moved for the production of the report through Mr Aminu Yawale, learned counsel for the appellant builder objected not on the ground of admissibility but on the stated ground that “I will be unable to cross examine this gentleman.”
- (30) The learned Chief Justice quite rightly admitted the report following a formal ruling on the matter. After having stated the law, he invited learned counsel for the appellant to test the veracity and the credibility of the document. Learned counsel declined to do so. He chose to allow this witness to walk out of the witness box with his examination-in-chief intact and the content of the report untested.
- (31) The legal effect of an absence of cross examination is too well known to be rehashed here. A party which fails to cross-examine a witness in the box is deemed to have adopted the evidence of the untested witness. As such, learned counsel cannot be heard to say that he had objected to that report being taken into account before the ruling. There was a ruling against him to which he should have complied. He opted not to bow down to the Ruling, with legal consequences naturally flowing therefrom.
- (32) The fundamental rule on cross-examination is that a party who fails to cross examine a witness is taken to accept the deposition of that witness as is. In **Wood Green Crown Court, ex parte Taylor [1995] Crim LR 879**, this all-too-obvious principle was judicially consecrated in the following terms:

*“a party who fails to cross-examine a witness upon a particular matter in respect of which it is proposed to contradict him or impeach his credibility by calling other witnesses, tacitly accepts the truth of that witness’s evidence in chief of that matter, and will not thereafter be entitled to invite the jury to disbelieve him in that regard.”*

(33) What is the purpose of a cross examination? It is to “show that the witness is not to be believed on oath.” If he is not cross-examined, it is to be reasonably assumed that he is to be believed on oath. It was open to learned counsel for the appellant, if his position was that the evidence of witness Aminu Yawale was to be discredited, to put some basic questions in relation to what he had testified to. He should have been cross-examined, about his means of knowledge about the facts to which he has testified, his opportunities for observation, his powers of perception, the quality of his memory, mistakes, omissions and inconsistencies in his evidence and omissions and inconsistencies in previous statements that relate to his likely standing so that the Court may evaluate the truthfulness or lack of it of the document or even its weight for that matter. As **Peter Murphy on Evidence, 8<sup>th</sup> Ed., p. 586-8**, comments. There are two direct consequences of a failure to cross examine a witness. One is purely evidential in that “failure to cross examine a witness who has given relevant evidence for the other side is held technically to an acceptance of the witness’s evidence in chief.” The other is a tactical one: “Where a party’s case has not been put to witnesses called for the other side, who might reasonably have been expected to be able to deal with it, that party himself will probably be asked in cross examination why he is giving evidence about matters which were never put in cross examination on his behalf.”

(34) It would appear that learned counsel chose to do so for the purpose of canvassing the issue on appeal. He was basically contemplating an appeal, at the expense of his client, well before the hearing was completed. Gone are the days when counsel used to play a cat and mouse game in the conduct of their cases. Counsel are under a duty to put the case fairly to the Court, in the best interest of the client in search of truth and not otherwise. The proper course for learned counsel was to challenge the witness while he was in the witness box or, at any rate to make it plain to him at that stage, by the proper questions, that his deposition is not accepted: see **Hart (1932) 23 Cr. App. R 202**.

(35) As we pointed out, at the hearing of this appeal, a couple of simple questions would have sufficed such as:

Q: Mr Aminu Yawale, you do not have personal knowledge of the facts stated in the report you have produced?

A: .....

Q: Are you aware that witnesses who have left jurisdiction may be summoned by the court and they do come in many cases?

A: .....

Q: If I put it to you that the report is not reliable for this Court to find that there was defect in the construction?

A: .....

Q: If I put in to you that my client did everything that was his duty to do under the contract?

A: .....

(36) Once there is a failure to cross-examine, counsel may be prevented from even a suggestion in his closing speech to the jury that the unrebutted evidence should not be believed: see **Bircham (1972) Crim LR 430**. If he may be prevented from making a mere suggestion, he should be *a priori* prevented from raising such a question on appeal.

(37) The question now is as to what is the manner in which the Court assesses evidence which has not been cross examined upon. It may reject it if that evidence is manifestly incapable of belief: see **Lovelock [1997] Crim. LR 821**. This was not such a case. The Court may accept the unrebutted evidence in its entirety: see **Wood Green Crown Court, ex parte Taylor [1995 Crim LR 879]**. It may seek support of that evidence from other depositions: see **Laxmibai (Dead) Thr. L.Rs. & Anr. v. Bhagwanthuva (Dead) Thr. L.Rs. & Ors., AIR 2013 SC 1204**.

*“31. Furthermore, there cannot be any dispute with respect to the settled legal proposition, that if a party wishes to raise any doubt as regards the correctness of the statement of a witness, the said witness must be given an opportunity to explain his statement by drawing his attention to that part of it, which has been objected to by the other party, as being untrue. Without this, it is not possible to impeach his credibility. Such a law has been advanced in view of the statutory provisions enshrined in Section 138 of the Evidence Act, 1872, which enable the opposite party to cross-examine a witness as regards information tendered in evidence by him during his initial examination in chief, and the scope of this provision stands enlarged by Section 146 of the Evidence Act, which permits a*

*witness to be questioned, inter-alia, in order to test his veracity. Thereafter, the unchallenged part of his evidence is to be relied upon, for the reason that it is impossible for the witness to explain or elaborate upon any doubts as regards the same, in the absence of questions put to him with respect to the circumstances which indicate that the version of events provided by him, is not fit to be believed, and the witness himself, is unworthy of credit. Thus, if a party intends to impeach a witness, he must provide adequate opportunity to the witness in the witness box, to give a full and proper explanation. The same is essential to ensure fair play and fairness in dealing with witnesses.” (Emphasis supplied) (See also: **Ravinder Kumar Sharma v. State of Assam & Ors., AIR 1999 SC 3571; Ghasita Sahu v. State of Madhya Pradesh, AIR 2008 SC 1425; and Rohtash Kumar v. State of Haryana, JT 2013 (8) SC 181).***

- (38) This is exactly what the learned Chief Justice did. He asked himself whether there were other pieces of evidence which supported the evidence-in-chief. There was more than enough in support, independent of the content of D45, to conclude that there were defects in the construction. There was also evidence from which an assessment could be made scientifically of what were the obvious and visible defects and what would be the reasonable cost to remedy them. The judgment of the learned Chief Justice, accordingly, cannot be impeached on the ground that the judge relied on inadmissible evidence to decide in favour of the Respondents.
- (39) Were the officer/s moonlighting? In my view, the comment made by the learned Chief Justice was uncalled for. He made that inference from midair well before QS Nigel Roucou had completed his deposition. It was an inference drawn from inference and not inference drawn from facts in evidence. In truth, the facts in evidence showed a different story. Nigel Roucou had admitted that there is a duty on the authorities to supervise the work. The Learned Chief Justice again intervened to have his view across that Arthur Oriarewo was doing private work as a public officer and therefore moonlighting. Judges do sometimes give in to the temptation of leaping into the arena, thereby losing their cloaks as judges at that point in time and for that duration. This was one of those unhappy instances in an otherwise well-reasoned out judgment. Thereafter, to give a colour of legitimacy to his inference not drawn from facts, the

learned Chief Justice used the word “moonlighting” it in his judgment. In our view, that self-justification was avoidable.

- (40)** When the Ministry of Land Use and Transport gives an approval to any project, they have a duty to ensure that the construction is as per plan and as per conditions imposed. They have a duty of supervision as was admitted by Nigel Roucou. That is evident from the very name of the unit: the Project Implementation Unit of the Ministry of Land Use and Housing. Arthur Oriarewo was not privately engaged by the Respondents.
- (41)** The Respondents had regarded themselves, rightly or wrongly, having fallen prey to the vagaries of their trusted builder who, they felt, had started holding them to ransom. They began to question the company’s capacity and competence to deliver and to deliver at all. They had written letters upon letters but to no avail. A letter from their lawyer had also been sent. Their loan payments had been suspended and interests had started accruing on them. Their only recourse was to complain to the authority which had given the authorization for project implementation. More than a private matter between private parties, it had become a matter of official scrutiny. That is how the Ministry had entered the scene.
- (42)** To achieve an orderly transition from tree dwellings to new towns, various countries in the construction industry have tried to regulate the sector by introducing building laws as early as the seventeenth century. In a number of jurisdictions, legislations are antiquated, employers unprotected against builders, not all of alike competence, capability and honesty. In emerged jurisdictions, the legal protection is ensured, inter alia, to the small employers with limited funds and big loans intent upon realizing their only dream of a heavenly home of a lifetime. The construction industry is properly regulated with specialized professionals in a legal framework of up-dated construction laws administered by Construction Courts interpreting universally standardized contracts. In Seychelles, the Project Implementation Unit may not enter into the badly drawn up contracts between the builders and the modest employers. It does at least ensure within limits that the terms and conditions imposed on the project permits are complied with. A country not addressing the issues involved in the construction industry is taking a serious risk on its governance policy. It has come to our knowledge that the Fair Trading Commission is so concerned in the current weaknesses in the

construction industry in Seychelles that it has embarked on a research which will “enable the commission along with other authorities to create awareness with regard to the rights and responsibilities of both the consumers and the service providers where there is a gap, thereby improving consumer welfare and improving service quality.”

- (43) In our analysis, all the grounds of SHCL having failed, its appeal is dismissed. With costs.

## **PART 2**

### **APPEAL OF THE SOLANA BONIFACE AND PHILIP LAFORTUNE**

- (44) We now deal with the appeal of the Respondents who employed SHCL to provide the labour to get the project off the ground. In their appeal, their grievances are only as regards the quantum. They submit that the award of SR45,060.00 cts to the builder for extra works was unjustified in that there never was any agreement, nor any evidence for same (Ground 1); the award of SR450,777.35 was equally unjustified inasmuch as it failed to factor in the defect in the works and the delay which had resulted in the completion (Ground 2). They also submit that SR42,843.00 cts of material had been delivered to the builder which has been unaccounted for (Ground 3). Finally, they are aggrieved that there has been no award for moral damages which had been claimed in the sum of SR100,000.00 (Ground 4).

#### **GROUND 1**

- (45) On the issue of extra works, it is incorrect to state that there was no evidence and no agreement in relation to the extra works. The learned Chief Justice in his judgment stated that “(T)here has been evidence that the extra works were authorized.” We have checked the transcript and we have found that the Respondents were following the progress as well as the lack of progress of the work with great attention and they had been aware of the plan. As the work progressed, alterations had been made and new materials purchased for same. This could not have been done without the knowledge and implied agreement of the Respondents. Ground 1, therefore, fails.

#### **GROUND 2**

- (46) What we say about the evidence in Ground 1 is also true for Ground 2. That extra works had been done cannot be denied. Nor can it be denied that a construction had

come off the ground and the site not abandoned. The defective works have been taken into account as explained in Grounds 3 to 7 of the SCA 83/2011. We have also adverted to the rationale of the learned Judge in reaching the figures. As regards the resulting costs in correcting the defective works, there is evidence that corrective works had been done when identified. We also need to take into account that this was a case in contract rather than in tort where the prejudice caused by the act or omission is reparable. As regards the issue of delay, if the learned Chief Justice did not award for delay, it would appear that the delay was caused by the circumstances rather than by conduct of parties. It was ill advised for both parties: SHCL and the Respondents to agree to such an up market construction, all with their obvious limitations. On the evidence, SHCL did not have either the resources and/or the experience at that level. Likewise, the Respondents lacked the resources and/or experience of contract management of a project with materials to be supplied by the Respondents and labour to be supplied by SHCL. As rightly commented by the learned Chief Justice on the progress of the work, several extensions had been acquiesced in by the Respondents. Ground 2 fails.

### **GROUND 3**

- (47) Ground 3 relates to a claim of SR42,843.00 cts which was arguably ignored by the learned Chief Justice for materials purchased by the Respondents and lost or misplaced by SHCL. We note that the judgment simply speaks of the cost of rectifying the defects when there was evidence adduced by the Respondents that the timber that had been supplied to them were not found on site. The complaint on its disappearance from site had been reported to the Police. Later, some timber had been returned on site but not quite the one that had been supplied. Putting a value to what had been lost when some had been returned placed the judge in the same difficulty as the Appellate Court. How do we come to a figure when even the trial court could not on the absence of evidence by Solana Boniface? She spoke of 36 pieces of timber which had gone missing from the container which was under the custody of SHCL. What had been returned were in pieces glued together. Photographs of them have been produced (D39-D32). The other issue of law on material delivered to contractors is at what stage in the contractual relations could it be said that the property in the materials reverted to the employers in a contract of this nature which had been terminated. We have searched for evidence in vain. Ground 3 for that reason fails.

**GROUND 4**

- (48) Ground 4 relates to the question of moral damages. The learned Chief Justice was correct in his proposition of law that moral damages for breach of contract had to be specifically pleaded and proved. It cannot be presumed. This action was not based in tort but in contract. Ground 4 is dismissed for lack of merit as a matter of law.
  
- (49) The cross appeal of the Respondents, having failed on all the four grounds is dismissed with costs.

**OUR FINAL REMARKS**

- (50) The two cases SCA 83/2011 and SCA 84/2011 were consolidated and heard together in the court below as well as on appeal. All technicalities shredded aside, this consolidated appeal rested on an answer to three simple questions. First, in the case of SCA 83/2011, was there any outstanding sum due by the Respondents to SHCL less the disbursed sums for works that had been performed? The answer could not but be in the positive. Second, in the case of SCA 84/2011, was there any sum payable for defective works on the state of the evidence? The answer could not but be in the positive. Third, what is then the quantum: (a) left as payable by the Respondents to SHCL; and (b) payable for defective works by SHCL to the Respondents. The quantum in either case was decided by the learned Chief Justice rationally in the sum of SR495,837.35 in the case of (a); and in the sum of SR492,481.00 in the case of (b). Both parties argued on the peripheries and the technicalities but hardly on the crux of the case.
  
- (51) The appeal and the cross appeal are dismissed with costs. A copy of this judgment shall be filed in each of the records of SCA 83/2011 and SCA 84/2011.

**S. Domah (J.A)**

I concur: .....

**F. MacGregor (PCA)**

**Signed, dated and delivered at Palais de Justice, Ile du Port on 12 August 2016**

