

SUPREME COURT OF SEYCHELLES

Reportable

[2023] SCSC 409
(CC No. 3 of 2018)

In the matter of:

Odette Alcindor

(rep by Mr. F. Elizabeth)

Plaintiff

Versus

Philippe Rath

(rep by Mr. G. Ferley)

Defendant

Neutral Citation: *Odette Alcindor v Philippe Rath* (CC No. 3 of 2018) [2023] SCSC 409
(2nd June 2023)

Before: Andre JA (sitting as a Judge of the Supreme Court)

Summary: Breach of contract

Heard: 17 February 2023 (Filing of written submissions of the Plaintiff)

Delivered: 2 June 2023

ORDER

The Court makes the following orders:

- (i) With regards to the breach of Agreement, the Plaintiff has not proven breach by the Defendant and is therefore not entitled to damages for breach of contract. Since the Plaint is based on breach without any alternative prayers, the Plaint is dismissed.
- (ii) The Counter-claim is dismissed as the Defendant, Mr Rath, has based his counter-claim both in contract and delict, where he ought to have pleaded contract or delict in the alternative.
- (iii) Both parties shall bear their own costs.

JUDGMENT

ANDRE JA

(Sitting as a Judge of the Supreme Court)

Introduction

- [1] This judgment arises out of a complaint filed by Odette Alcindor (hereinafter referred to as the plaintiff) on 2 August 2018 against Philippe Rath (hereinafter referred to as the defendant).
- [2] The defendant Philippe Rath by way of statement of defence and counterclaim filed on the 22 October 2018 denies the claim of the plaintiff and counterclaims for moral damages arising out of both breach of contract and delict cumulatively.

Background

- [3] The Plaintiff and the Defendant entered into an Agreement where the Defendant was to carry out certain construction work on a project described in the Agreement as ‘vertical extension of existing shop to bedsitter’. The Agreement (Exhibit P3) was made on the 19th January 2017. Under the Agreement the sum to be paid to the Defendant was a total of SCR600,000. The work was divided into four (4) phases according to the Appendix C of the Agreement. The first stage required 30% down payment – SCR180,000; second phase required payment of SCR200,000; third phase – SCR120,000; and fourth phase – SCR100,000. Under the terms of the Agreement, the works had to be completed in 16 weeks (Appendix A).
- [4] The Plaintiff avers that she took out a loan with Barclays Bank amounting to SCR690,000 to finance the project (Exhibit P6). It is not disputed between the parties that payment for all phases was received by the Defendant. In addition, SCR20,000 was paid for demolition work that was not included in the contract. Further, SCR90,000 were paid together with the payment for third and fourth phases to the Defendant, the sum in excess of the contract amount (SCR310,000 was paid comprising of SCR120,000 and SCR100,000, total of SCR220,000 for 3rd and 4th phase, and an extra SCR90,000). The Defendant admits receiving the payments. In his Defence he also admits that SCR90,000 was an “*overpayment which the Plaintiff*

caused the bank to pay to the Defendant with the intention for her to recoup from the Defendant”.

- [5] The main dispute revolves around phase 3 and 4, where the Plaintiff claims that the Defendant breached the contract as the work for phases 3 and 4 were only partially completed. The Plaintiff claims the entire amount for phase 3 and 4 together with the SCR90,000 overpayment, total sum being SCR310,000. In addition, the Plaintiff also claims SCR171,000 for loss of revenue at the sum of 95 Euro per day; and moral damages in the amount of SCR100,000. Plaintiff’s total claim is for SCR581,000, and interest and costs.
- [6] The Defendant, on the other hand, claims that the work for phase 3 was completed and invoiced for in October 2017 but not paid. He states that sum of SCR310,000, which as stated by the Plaintiff was paid on 26th January 2018 included payment for October 2017 invoice (phase 3) and payment for 4th phase which was near completion; and additional SCR90,000 over-payment. The Defendant during his testimony alleged that the Plaintiff followed illegal procedure in that she asked the Defendant to write invoice for SCR310,000 instead of SCR220,000, which was the actual invoice sum, with the view to get back the SCR90,000 loan drawdown payment from the Defendant.
- [7] The Defendant avers that during near completion of phase 4, the Plaintiff in breach of contract ejected him and his workers from the site. It is Defendant’s position that phase 3 was completed and only minor works remained for phase 4 and that, *“The works not complete were additional works ordered by the Plaintiff”*. The Defendant further avers that payment of SCR310,000 covers *“in addition to the works carried out per the contract, other works instructed by the Plaintiff”*. With regards to damages for loss of revenue the Defendant states that these damages are not maintainable under the contract, and so is the claim for moral damages.
- [8] It should also be noted here that the Plaintiff in her Complaint states that under Agreement the liquidated damages amount to 10%. The Defendant denies it and states that it is 1%. Under the Agreement the liquidated damages amount to 1% (Appendix A). The parties didn’t elaborate further on the effect of this provision in the Agreement.

[9] The Defendant included Counter-Claim in his Defence. He avers that he carried out extra works, which is construction of the wall that was demolished at a cost of SCR45,000 and that the works were “*carried out on the specific instructions of the Plaintiff*”. Further, the Defendant avers that the Plaintiff forced the Defendant off the site; continued to harass and threaten the Defendant by means of phone calls and text messages and other verbal abuse. The Defendant states that such actions has caused him to suffer from anxiety and stress and that the actions of the Plaintiff amount to *faute* in law for which the Plaintiff is liable for damages to the Defendant, for which he claims SCR100,000 for moral damages. The Defendant therefore asks for SCR145,000 in his Counter-Claim.

[10] In Defence to Counter-Claim, a *plea in limie litis* is raised by the Plaintiff. It was submitted that the counter-claim was bad in law and it is tortious in nature. The Plaintiff stated that the Defendant should file a separate suit based in *faute*. Further, the Plaintiff stated that the counter-claim is frivolous, vexatious and bad in law. On the merits of the counter-claim, the Plaintiff denies that she owes any sums to the Defendant for any extra work as the parties agreed for her to pay SCR20,000 for extra work, which she did. The Plaintiff further denies harassment stating that she was calling and texting to recover the money she paid to the Defendant but he failed, refused or neglected to do the work.

Submissions

[11] Only the Plaintiff submitted Written Submissions. In the Written Submissions “Introduction” part, Counsel for the Plaintiff states that the term of the contract was that works shall be completed within 16 weeks of the signing of the Agreement and that the Defendant failed, refused or neglected to complete the work within the prescribed time.

[12] In relation to breach of agreement the Plaintiff relies on Articles 1134 and 1135:

“*Article 1134*

Agreements lawfully concluded shall have the force of law for those who have entered into them.

They shall not be revoked except by mutual consent or for causes which the law authorises.

They shall be performed in good faith.

Article 1135

Agreements shall be binding not only in respect of what is expressed therein but also in respect of all the consequences which fairness, practice or the law imply into the obligation in accordance with its nature.”

[13] Thereafter the Plaintiff addresses burden and standard of proof and cites decisions in *Ebrahim Suleman and others v Marie-Therese Joubert and others* SCA No.27 of 2010; *Tirant & Ors v Banane* SCA 1977 No 49 page 219; *Marie-Ange Pirame v Armano Peri* SCA 16 of 2005. The cases relate to the maxim “he who avers must prove”; that plaintiff must prove the case on the balance of probabilities; that evidence outside the pleading does not translate the said issues into the pleadings or evidence. The Plaintiff submits that she has proven her case that the Defendant was clearly in breach of contract in that “*he failed to complete the work within the stipulated time provided for in the contract. He has also received an overpayment of SCR310,000 which he admitted*”.

[14] In respect of damages, the Plaintiff submits that having established liability the only issue left for consideration is the quantum of damages. Plaintiff relies on Articles 1147 and 1149:

“Article 1147

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

“Article 1149

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

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

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

4. *In the case of delicts, the award of damages may take the form of a lump sum or a periodic payment. In the latter case, the Court may order that the rate of the payments should be pegged to some recognised index, such as the cost of living index or other index appropriate to the activity of the victim.”*

[15] The Plaintiff refers to decisions in *Bonham-Carter v Hyde Park Hotel Ltd* (1948) 64 TLR 177 and *Ratcliffe v Evans* (1892) 2 QB 524 for this Court to consider.

Legal analysis and Discussion of evidence

How much work was completed

[16] The Plaintiff claims the entire sums for phases 3 and 4, even though alleging that works were partially carried. To assist the Court in determination of how much work was carried out, the Quantity Surveyor’s Report dated 8th January 2019 (Exhibit P12) is considered. Even though the report is dated 2019 (roughly almost a year after the Defendant stopped working on site), Mr Nigel Roucou, the Quantity Surveyor who prepared the Report testified that the Report is reflective of the work completed by the Defendant (see page 5 of the Court Proceedings on 19th August 2020 at 9:00 AM). Mr Roucou further testified that at the time when they inspected the work they did not see any apparent defects in the work.

[17] The Report indicates that certain works were 100% completed. The works that have not been completed are: doors and windows (completed 75%); floor, walls and ceiling finishing (70% completed); and electrical, plumbing and drainage (65% completed). As per Appendix C of the Agreement between the parties the said described doors and windows works are in within phase 4 (“Tiling (first floor ONLY), painting, fixing of doors and windows”). Floor, walls and ceiling finishing may be under phase 3 (“Block work, linton, gabble end, wood placing, roofing, chasing, electrical work, plumbing, plastering”). Electrical and plumbing works are indicated in phases 2 and 3 (phase 2: “Formwork, shuttering, steel fixing and laying, any electrical work and piping, laying of first floor slab”).

- [18] According to the Report based on the estimated construction cost of SCR475,000.00 (which is not the contracted amount), the work completed represent SCR413,995.00. The sum for the completed work represents 86.95% of the total cost (SCR475,000 being 100%). By analogy, 86.95% of the contracted cost, SCR600,000 is SCR521,700 and 13.05% of incomplete work equals SCR78,300 from the total SCR600,000.
- [19] It should also be noted that the Plaintiff provided invoice from a different contractor, who completed the construction work. In my view, the Court should base its assessment on Quantity Surveyor's Report as it indicates how much work the Defendant has completed, whereas the invoice from another contractor is indicative of his work and costs taking into account modifications of the Plaintiff, which were not in the original Agreement between the Plaintiff and the Defendant.
- [20] Therefore, should this Court be of the view that sum for incomplete work should be paid back to the Plaintiff and adopts Quantity Surveyors Report, the amount for incomplete work is SCR78,300. Taking into account the SCR90,000 discussed earlier, the Plaintiff therefore could be entitled to SCR168,300 and not SCR310,000 as claimed.

Breach of Agreement

- [21] With regards to the main issue of the case revolving around the alleged breach of Agreement, the parties are not in dispute that the Agreement existed and was valid. According to the Plaint, the Plaintiff argues that the Defendant breached the Agreement as the work for phases 3 and 4 has been only partially completed. Even though the averment is that the work was partially completed the Plaintiff is asking for the entire sum for phase 3 and 4 without further elaboration in the submissions why the entire sum is being claimed. Further, not in the Plaint but in the Submissions, the Counsel for the Plaintiff also states that breach is in that the Defendant failed, refused or neglected to complete the work within prescribed time.
- [22] The Defendant averred that work for phase 3 was fully completed and work for phase 4 was not fully completed because the Plaintiff in beach of agreement ejected him and his workers from the site.

[23] With regards to the time of completion stipulated in the Agreement which is dated 19th January 2017, the Plaintiff argued that the work has not been completed within 16 weeks from the signing of the Agreement. Sixteen weeks from the date of agreement would be 11th May 2017. As seen from the Barclays Bank Statement (Exhibit P19), the first payment was only effected on the 31st May 2017. During the proceedings the Defendant averred that commencement date is not the date of the signing of the contract. Commencement Notice (Exhibit P17) is dated 21st July 2017 and was acknowledged by the letter from the Planning Authority on the 8th August 2017 (Exhibit P18). The Defendant stated that there were several delays since the commencement of construction due to delay in payments and also Stop Notice being issued (see Exhibit P14, Stop Notice dated 16/10/2017; Exhibit P16 Letter from Planning Authority). Nevertheless, the second payment was effected on the 26th September 2017 and third payment (for phases 3&4) was effected on the 26th January 2018; and there is no correspondence produced from the Plaintiff to the Defendant indicative of delay on his part in performance of the obligations. The Defendant stated that third payment was late payment for phase 3 and payment for phase 4. According to Appendix D of the Agreement stage 4 is fourth month and thereafter another 2 weeks' adjustment of delay and site clearing. Therefore, if third payment was for the 4th stage the Defendant still had a month and two weeks' time to complete the works. Which would be 11th March 2018. If at the time of the payment there was a breach on the part of the Defendant in delay due to his fault, it could also be considered that by payment in advance for works the Plaintiff affirmed the said alleged breach (if any). Nevertheless, if the completion date became due in March 2018, by Determination of Agreement Letter dated 19th February 2018 (Exhibit P9), the Plaintiff terminated the contract prior to the completion date.

[24] Upon examination of the correspondence between the parties after the third payment transfer was done (26th January 2018) it appears that the Plaintiff requested further modifications to be done in addition to the original Agreement and was not satisfied by the quoted costs. In the Letter dated 11 February 2018 (Exhibit P8) the Defendant provides quote for the extra work, which was presumably requested by the Plaintiff. Under paragraph (a) the Defendant further states that "*no other window will be provided on first floor... as it was not approved by the architect*".

- [25] In her reply to the said letter, “Determination of Agreement” (Exhibit P9), the Plaintiff states that the quotation is unacceptable to her. She acknowledges that she has made some modifications to the building which were approved by the Planning Authority and handed over to the Defendant for necessary costing. The Plaintiff stated that she “*will not entertain any future works excluding these changes*”. The Plaintiff was further dissatisfied that the Defendant indicated that certain works cannot be carried out. The Plaintiff further states that she was prepared to negotiate with the Defendant should he reconsider his position on the submitted quotation. In the alternative, as written by the Plaintiff, she stated that the parties will be required to evaluate the amount of work done to date and that the Defendant would be required to refund the balance for outstanding components.
- [26] The Defendant replied to the said letter on the 21st February 2018 (Exhibit P10) indicating his willingness to meet with the Plaintiff to find resolution.
- [27] The Plaintiff testified that after receiving the sum of SCR310,000 the Defendant did not do any work and walked out. She further testified that she wanted to add small veranda and that she told the Defendant that she would pay him separately, but that the Defendant did not want to do it and just walked out. When asked whether there was any disagreement between her and the Defendant, the Plaintiff replied “*not that I can say*”. The Plaintiff did not recall receiving the letter with the quotation, however, she obviously replied to the said letter. It was put to her by her Counsel that after her reply she decided to terminate the contract. The Counsel further produced reply from Mr Rath, indicating that Mr Rath agreed to have evaluation done. There was not much further elaboration in the examination in chief regarding what happened after. The Letter of Demand (Exhibit P7) demanding payment of SCR310,000 dated 12 June 2018 was thereafter sent by the Plaintiff’s Counsel.
- [28] According to the Defendant’s Defence and testimony he did not fully complete phase 4 work as he was fired.
- [29] As was put by Plaintiff’s Counsel, she terminated the Agreement by the Letter dated 19th February 2018. Upon examination of correspondence between the parties, in my view,

such termination also could have been unjustified as there is no indication that there was particular issue with the Defendant's performance of the obligations under the Agreement but the Plaintiff did not accept his quotation for the extra work she decided to modify. Even though the modifications were approved by the Planning Authority, it does not mean that the Defendant had obligation to carry out the said constructions if they were outside the scope of the Agreement between the parties. In fact, under the Terms and Conditions of the Agreement, the contractor "*is only following the instructions set down on the drawings*".

[30] In my view, the Plaintiff has not proven that the Defendant breached the Agreement as according to his testimony he was prevented from completing the works as he was fired. Credibility of his testimony in my view is supported by the exhibited correspondence between the parties. Therefore, due to not establishing the breach by the Defendant the Plaintiff is not entitled to claim damages arising from the breach.

[31] The problem arises with regards to payment which was done for the works not completed. The Defendant has averred in his Defence that the Plaintiff in breach of contract evicted him and his workers from the site. However, the Defendant has not claimed damages for the alleged breach. His counter-claim is in relation to sum for extra work and moral damages, which will be addressed later.

[32] Generally, upon termination of contract the parties' obligations due after the termination cease. Which would have meant that the Plaintiff is not obliged to pay for works after the breach and the Defendant is not obliged to perform his obligations and the parties could sue for damages for breach of contract. The Plaintiff however at the time of termination has paid for all the works, which, as admitted by the Defendant and as per the Surveyor's Report were not fully completed as he was evicted from the site. Since the Plaintiff's case is based on breach of contract only and no alternative prayers are included in the Plaint, this Court finds that the Defendant did not breach the contract, therefore there is no basis under the Plaint to award damages.

[33] The Court cannot formulate the case for the Plaintiff (*Charlie v. Francoise* [1995] SCAR) and order that the money paid by Plaintiff be returned to her as it was not prayed for.

Such order would be *ultra petita*. Court of Appeal in *Chetty & Anor v Chetty* (77 of 2022) [2022] SCCA 82 (16 December 2022) referred to decision in *Tex Charlie v/s Marguerite Francoise* Civil Appeal No. 12/1994, where the respondent had sued the appellant on the basis that she had a proprietary right in the matrimonial home but the trial judge awarded damages on the basis of unjust enrichment, in essence on the basis of a cause of action, which had not been pleaded. Such award was *ultra petita*.

[34] With regards to the overpayment of SCR90,000, although, it is not disputed by the parties that SCR90,000 was not a sum payable due under the Agreement, since the Plaintiff pleaded the sum under damages claim for SCR310,000, the amount cannot be awarded as prayed for.

Counter-claim

Plea in limine litis

[35] In the plea *in limine litis* in Defence to Counter-claim, the Plaintiff avers that the counter-claim is bad in law as it is tortious in nature and separate suit should have been filed based on tort. The issue was not further addressed in the Written Submissions.

[36] Article 1370 (2) of the Civil Code states that, “*When a person has a cause of action which may be founded either in contract or in delict, he may elect which cause of action to pursue. However, if a law limits the liability in either of the two causes of action, the plaintiff shall be bound to pursue the cause of action, to which that law relates. A plaintiff shall not be allowed to pursue both causes of action consecutively*”.

[37] *Pool v Souris* (1996-1997) SCAR 23 and *Gill v Gill* (2004-2005) SCAR 133 are authorities in which the Court held that, “*A person must elect whether to claim in contract or tort if the facts give rise to a claim in both*” and that “*Where a claimant pleads in contract and tort, the court will invite the claimant to elect one of the causes of action*”. More recent decision of the Court of Appeal in *Hermitte v Attorney General & Anor* (SCA 48 of 2017) [2020] SCCA 19 (21 August 2020) has provided in depth analysis of application of Article 1370(2):

“[15] The principle of non-cumul de la responsabilité contractuelle et délictuelle as obtained in France and applied by the Mauritian Courts had consistently held that where damage resulted from a breach of contract, it was not open to the plaintiff to base an action in tort: see the Judicial Committee of the Privy Council in the case of *Mediterranean Shipping Company*, supra. In *Mediterranean Shipping Company*, supra, the Privy Council authoritatively reaffirmed the doctrine and jurisprudence whereby parties linked in contract, must ground any claim that they may have against each other based on contractual liability and not in tort.

...

Seychellois law

[18] Given the above, the question which arises for consideration is whether or not the principle of non-cumul de la responsabilité contractuelle et délictuelle as obtained in France and applied by the Mauritian Courts, is applicable in Seychelles. With respect to this question in issue, I read from A. G. Chloros, *Codification in a Mixed Jurisdiction*, at page 121 —

"14. COINCIDENCE OF CONTRACT AND DELICT

One of the most intractable problems is the question of choice between an action in contract and an action in delict when the facts may give rise to either or both. This is known as cumul des responsabilités, on which the Code is silent. There may, in fact, be very good reasons why a plaintiff may prefer, if he has a choice, to sue in tort rather than in contract and vice versa. [...]. In this connexion, French law has not adopted any distinct solution though the traditional answer is that the action in contract excludes the action in tort. It is clearly unfair to imply the considerable theoretical discussions and case law which have kept this part of the law in a state of flux, into the law of Seychelles. For that reason, the Code now expressly resolves the controversy in article 1370 §2. The rule is that the plaintiff has a choice of actions but, if the law limits liability in respect of one action, the plaintiff is bound to sue thereunder [...]."

[19] It is clear that the approach followed by the Seychellois Courts is contained in our law. Article 1370 alinéa 2 of the Civil Code of Seychelles grants a person the right to base his action either in contract or in tort, when the person has a cause of action which may be founded either in contract or in tort. It is also settled by the Seychellois courts that Article 1370 alinéa 2 of the Civil Code of Seychelles does not constrain a person, who had sustained damages as a result of a breach of the conditions of a contract, to ground his action in contract only, when that person has a cause of action which may be founded in either contract or in tort and does not provide that a person cannot plead both causes of action in contract and in tort in the same action as long as they are pleaded in the alternative: see *Multi Choice Africa Limited v Intelvision Network Limited and Anor* SCA 45/2017 (delivered on the 9 April 2019)1.

[20] Article 1370 alinéa 2 of the Civil Code of Seychelles prevents a person from pursuing both causes of action in contract and in tort, when a person has a cause of action which may be founded either in contract or in tort, consecutively or cumulatively.

In other words, a person cannot have recourse to "cumul" in such a way as to recover damages both under contract and in tort.

[21] My analysis of the above doctrine, authorities, Article 1370 alinéa 2 of the Civil Code of Seychelles, our rules of pleadings and having regard to the spirit of justice and fairness, leads me to the inevitable conclusion that the principle of non-cumul de la responsabilité contractuelle et délictuelle derived from French law, which is also applicable in Mauritius, is not applicable in Seychelles. I find that the principle of non-cumul de la responsabilité contractuelle et délictuelle derived from French law has no bearing on this case.

[27] I commend Counsel for the Appellant for doing his utmost to convince us of the Appellant's position. Nonetheless, in the light of the legal principles stated above, I cannot accept his contention that the averments contained in the plaint met the test of Article 1370 alinéa 2 of the Civil Code of Seychelles. The Appellant was simply required to plead the two causes of action in the alternative under Article 1370 alinéa 2 of the Civil Code and not have recourse to a combination of contract and tort as suggested by his Counsel. Thus, I hold that the Appellant's pleadings did not meet the test of Article 1370 alinéa 2 of the Civil Code of Seychelles.

[38] In Maurel & Or v Geers & Or (CS 30 of 2015) [2022] SCSC 460 (6 June 2022) it was held:

"[19] It is clear that Article 1370 (2) of the Civil Code of Seychelles Act grants a person the right to base his action either in contract or in tort, when the person has a cause of action which may be founded either in contract or in tort. It is also well settled by the Seychellois Courts that Article 1370 (2) of the Civil Code of Seychelles Act does not constrain a person, who had sustained damages as a result of a breach of the conditions of a contract, to ground his action in contract only, when that person has a cause of action which may be founded in either contract or in tort and does not provide that a person cannot plead both causes of action in contract and in tort in the same action as long as they are pleaded in the alternative: see Multi Choice Africa Limited v Intelvision Network Limited and Anor SCA 45/2017."

[39] In Finesse v Cesar (SCA 47 of 2019) [2022] SCCA 21 (29 April 2022) it was held that:

"[18] ... it is unclear what the cause of action is. It appears to be an action in both delict and contract which is not permitted by our laws against cumul d'indemnités¹ (Article 1370 alinéa 2 of the Civil Code) ..."

[40] Most recent Court of Appeal decision in Machinery and Equipment Limited v Cousine Island Co. Ltd (SCA 18 of 2021) [2023] SCCA 13 (26 April 2023) affirmed that "The principle of non cumul de responsabilite is no longer part of the Law of Seychelles" and "The law in Seychelles is to the effect that claims in both delict and contract can be pursued in the same plaint as long as one of them is pleaded in the alternative".

[41] In the present case the Defence indicates that one part of Counter-claim is based in contract law (SCR45,000 for extra work) and the other part is based in delict (moral damages). The Defendant has not pleaded contract or delict in the alternative. The Defendant cannot bring action both in contract and delict.

[42] Therefore, plea *in limine litis* raised by the Plaintiff succeeds and the Counter-claim is dismissed.

Conclusion

[43] Against the above analysis, I find and orders as follows:

- (i) With regards to the breach of Agreement, the Plaintiff has not proven breach by the Defendant and is therefore not entitled to damages for breach of contract. Since the Plaintiff is based on breach without any alternative prayers, the Plaintiff is dismissed.
- (ii) The Counter-claim is dismissed as the Defendant, Mr Rath, has based his counter-claim both in contract and delict, where he ought to have pleaded contract or delict in the alternative.
- (iii) Both parties shall bear their own costs.

Signed, dated, and delivered at Ile du Port on the 2 June 2023.

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ANDRE JA
(Sitting as a Judge of the Supreme Court)