IN THE SEYCHELLES COURT OF APPEAL

CIVIL APPEAL NO. 6 OF 1994

GENERAL INSURANCE CO. OF SEYCHELLES LTD. APPELLANT

v.

DANIEL BONTE RESPONDENT

Before : Silungwe, Ayoola & Adam JJA

Mr. Pardiwalla for the Appellant
Mr. Boulle for the Respondent

JUDGMENT OF ADAM, J.A.

The Appellant was given leave by this Court to call further evidence as it was felt that exhibit P4 - the letter of November 9th 1981 - may not necessarily constitute a contract for future services, but as that exhibit formed the basis of the findings of the learned trial Judge, further evidence which seeks to shed light on that exhibit would probably have an influence on the result of the appeal.

The Respondent in his Plaint averred in paragraph 1 that he is and was at all material times a Director of the Appellant; in paragraph 2 that by way of various agreements with the Appellant received director's fees £8000 in 1978 and £10000 in 1979 and 1980 plus bonuses; in paragraph 3 that it was agreed in 1981 that the remuneration shall be £7500 per annum effective November 1st 1981; in paragraph 4 that he was paid that remuneration up to December 31st 1982 and thereafter the Appellant ceased all remuneration payments; in paragraph 5 as a result of the breach of contract the Appellant is indebted to the Respondent in the amount of SR.700,000 for remunerations due for the period 1983 to 1992 and SR.10,000 for moral damages and in paragraph 6 that

despite a mise en demeure made on August 17th 1992 the Appellant failed to pay.

In its Defence the Appellant admits paragraph 1 of the Plaint and averred that the Respondent was only a nominal director; that it denies the Respondent received director's fees but only received a monthly salary during his employment with the Appellant, that it denies that remuneration of L7500 per annum shall be paid from November 1st 1982 but that whatever was received was by way of salary during his employment, that it denies a breach of contract and being indebted to the Respondent but the Respondent received his employment salary up to December 31st 1982 only when his employment ceased due to an Act of God since the legislation put an end to all insurance business but the Respondent with his own consent stayed on as a nominal director only in order to satisfy company regulations; that the Respondent was well aware of this and had acquiesced; that it denies that despite a mise en demeure it failed to pay and that such mise en demeure was itself out of time and asked that the claim be dismissed as it was time barred and that matters relating to employment have been removed from the jurisdiction of the courts by virtue of the Employment Act, 1990.

The Respondent was awarded SR.280,500 and moral damages of SR.10,000 by Perera J., who held that exhibit P2 - Appellant's memorandum of August 19th 1980 showing Respondent's salary for 1978 to 1980 - confirmed that he was paid a salary, that he left in September 1981 to live in Britain, that the last payment he received of L625 was in Britain on October 7th 1982, that on March 23rd 1984 the Appellant's Chairman treated him as a director and requested him to sign company documents and that on August 17th 1984 he also asked him to sign a company resolution in his capacity as a director.

The Respondent's claim was based on a "To whom it may concern" letter of November 9th 1981 (exhibit P4) signed by the Appelant's General Manager. It was by this letter, Perera J. held, the Appellant agreed to pay L7500 per annum as remuneration to the Respondent for future services as a director. But he rejected the evidence of the Appellant's Chairman that this was one year's severance payment. He held that, as for the Court's lack of jurisdiction in terms of the Employment Act, 1990, it did not apply to the Respondent. Also, he was unable to accept that the Respondent continued to hold the dual position of director and employee. Further, in the November 1981 agreement of the payment of ₤7500 no distinction had been made between salary, fees and bonus. Previously in 1979 and 1980 more had been paid to him, hence Perera J. held he had received reduced remuneration when he left Seychelles so he should entitled to payment on the basis. The Appellant asserted that due to legislation insurance business was terminated from November 1982, from which the Respondent's employment ceased because of Act of God but he continued on his own consent as a nominal director. Perera J. held that the Appellant therefore impliedly submitted that since January 1983 the Respondent held the directorship without remuneration and that he decided only after arriving in Seychelles to make his claim. Perera J. therefore said he had to ascertain whether prescription had been interrupted. As for the Respondent's assertion that by not replying to first mise en demeure of May 12, 1992 this constituted a waiver, Perera J. held that he agreed with the Appellant's counsel that there must be positive declaration or a positive overt act to interrupt extinctive prescription. But he observed that the Appellant in its Defence admitted that the Respondent is and was a director, although a nominal director. He found that documentary evidence disclosed that the Appellant's services were being used even in 1984 as a director and that the Appellant is still in operation. In 1992

when the Respondent was in Seychelles he was given free accommodation at Vista Do Mar on the basis of company policy in respect of directors. The Chairman of the Appellant reiterated that the Respondent functioned as a nominal director. Perera J. held that in this context the defence of Act of God was inconsistent with the Chairman's evidence. He said that the legislation with effect from November 1982 only affected the Respondent partially. He found that the Respondent's rights through directorship were quite separate from his rights as employee. Hence, he held, relying on documentary and oral evidence there was and is a continuous contract between them and so the Respondent was entitled to remuneration of £7500 per annum. But as there was no waiver of prescription the Respondent could only be given five years payment. Since he held that the Respondent would have suffered pain of mind due to the behaviour of an ungrateful employer, Perera J. awarded SR.10,000 as moral damages.

In the Memorandum of Appeal the Appellant's grounds were that although the learned Judge was correct to hold there had been no waiver of prescription, he was wrong not to have given full effect to the plea of prescription; that the right of action only arose or accrued one year after December 31, 1982. In terms of Article 2271 of the Civil Code of Seychelles such right of action was prescribed after 5 years which would have been after January 1, 1989 when it could no longer be exercised. He was wrong to hold that there was a continuing contract for future services and allowed 5 year's remuneration. He was wrong to have awarded moral damages since Article 1153 Civil Code of Seychelles applied and so only interest was due from the day of demand. He was wrong to hold that the Defence of Act of God was not available to the Appellant as the claim was against it and not the Appellant's subsidiaries which have a separate legal existence from the Appellant. He was wrong to hold that

section 4(3) of the Employment Act, 1990 did not apply and to rely on exhibit P4 as confirmation of an alleged agreement by the Appellant to pay £7500 to the Respondent as remuneration for services as Director. He was wrong to rely on Exhibit P10 as proof that the Appellant continued in existence for the purpose of this. Further an analysis of exhibit P10 would have shown that the Appellant was not a Director of the Appellant since 1983. He was wrong to come to the conclusion that some one could not hold the position of Director in name only without remuneration and/that conclusion furthermore was not supported by evidence. In view of the evidence adduced he was wrong to come to the conclusion that the Respondent had reduced his remuneration when he decided to leave Seychelles and that he failed to place reliance on the contents of the mise en demeure of May 12, 1992 and the evidence of the Appellant's Chairman regarding director's fee. He was wrong to come to the conclusion that the Appellant in its Defence admitted the Respondent is and was a Director.

In the Notice of Cross-Appeal the Respondent contended that the judgment be varied by finding that he is entitled to his claim for 9 years because the learned Judge erred in law by holding the Respondent's claim was prescribed as there were admissions in the pleadings by the Appellant that the Respondent had not been paid his salary since December 1982 which admissions nullified the operation of prescription.

Mr. Pardiwalla for the Appellant submitted that in terms of Article 2271 of the Seychelles Civil Code the Respondent's claim was prescribed as from December 31, 1982 or if it could be said that his services were sought by the Appellant, as found by the learned Judge, as from August 1984. He argued that the learned Judge was wrong, in treating the agreement as a continuing contract, in allowing in consequence 5 years remuneration, because the Respondent

left Seychelles for his own purposes and though the learned Judge had not accepted that the Appellant had terminated its business entirely, legislation had effectively terminated the insurance business. He further submitted that the insurance aspect of the Appellant's business had nothing to do with its subsidiaries, therefore the learned Judge was wrong by relying on the fact that it was managing its investments in the subsidiary that the Appellant was still in existence. Mr. Pardiwalla conceded that there was no direct evidence that the Respondent's appointment as a Director had been terminated. In the alternative Mr. Pardiwalla argued that the learned Judge should have held that there was a complete change of circumstances as a result of the legislation with regard to the insurance business.

Perera J. had said that he was unable to agree that the Respondent continued to hold the dual position of employee and director. He also had rejected the Appellant's Chairman assertion that exhibit P4 was a severance fee. He had no hesitation in holding that by exhibit P4 the Appellant agreed to pay ₹7500 per annum to the Respondent as remuneration for future services as a director. But he also went further and observed that in exhibit P4 no distinction had been made as regards saary, fees and bonus. But in the attorney's mise en demeure of May 1992 the Respondent demanded remuneration of SR.12,000 per annum as a director.

In his argument Mr. Pardiwalla also argued that although the Respondent was a nominal director he was never paid a fee when he had been a Director. In the alternative he submitted that in light of the mise en demeure of his attorney of May 1992 the Respondent should not be awarded anything more than SR.12,000 per annum, taking into account the learned Judge's observations with regard to the position of director and employee.

It cannot be disputed that there was evidence before him from which Perera J. correctly concluded that Respondent was still a Director after his departure in 1981 from Seychelles. The question that was for the learned Judge to determine was whether the Respondent was entitled to be paid L7500 per annum as claimed by him. Under cross-examination the Respondent himself accepted that the amounts he had been paid by the Appellant included salary, bonus and fees but he did know the proportion of each. By coming to the conclusion that in exhibit P4 no distinction had been made between salary, bonus and fees the learned Judge erred since that exhibit merely stated a fact that the Respondent was in receipt of £7500 per annum. It is true that Perera J. found that when the Respondent left the country he received a reduced remuneration. However, in light of his specific finding that the Respondent could not be said to have continued to have held the dual position of employee and director, it was incumbent upon Perera J. to have determined the amount he was entitled to as a director. Moreso, as the Respondent himself accepted that L7500 per annum was for salary, bonus and fees. Had he compared exhibit P9 of August 17, 1992 from his advocate and exhibit D1 of May 12, 1992 from his attorney with the Respondent's evidence, the learned Judge would not have held that the Appellant agreed to pay the Respondent £7500 per annum as remuneration for future services as a director.

Mr. Boulle for the Respondent on the Cross-Appeal submitted that the learned Judge erred in subjecting the claim to the effect of prescription because there were admissions in the pleadings in paragraph 4 of the Appellant's Defence that the Respondent had not been paid since December 1982. He referred to Article 2275 of the Civil Code of Seychelles and jurisprudence that has extended the scope of that Article whereby the operation of prescription could be overcome by the creditor's possession of a written acknowledgment of the debt by the debtor. It is true that

nothing in the Seychelles Civil Code invalidates any principle of jurisprudence of civil law or inhibit its application in Seychelles except to the extent it is inconsistent with the Seychelles Civil Code. However, the Seychelles Code of Civil Procedure clearly requires that material facts alleged in the Plaint must distinctly be denied or they will be taken to be admitted. Mr. Boulle cited Marcel Planiol and George Ripert Treatise of on the Civil Law, Vol.2, Part 1, 11th ed., 1939 Translated by the Louisiana State Law Institute at para. 695 which states:

> "The jurisprudence admits that even a tacit acknowledgment suffices, and that such acknowledgment may be inferred from the fact that the debtor has commenced his defence by allegations incompatible with payment. He may, for example, allege compensation, and if it should result that his creditor owed him nothing, he will find himself in the position of having acknowledged the debt (Cass., 31 Oct., 1894, S.95.1.29), and it will be the same if the debtor commences by declaring that he owes nothing (Cass. Req., 8 July, 1926, Gaz. Palais, 14 Sept.)."

Nevertheless before jurisprudence that holds that notwithstanding a denial in the Defence it would still constitute an admission and it would have to take account of the Seychelles Code of Civil Procedure. Also, Article 2219 provides that prescription involves loss of rights by failing to act within time limits. While Article 2248 states that prescription shall also be interrupted by an acknowledgment by a debtor. As Mr. Pardiwalla correctly submitted that in paragraph 4 of the Defence the Appellant denied having paid £7500 per annum up to December 31, 1982 and thereafter the Appellant ceased payments and averred that the Respondent received a salary up to December 31, 1982. It follows that the Appellant had neither tacitly acknowledged nor given a written acknowledgment of debt to the Respondent.
Accordingly there is no merit in the Respondent's Cross-Appeal.

Turning now to Mr. Pardiwalla's contention that there was a complete change of circumstances brought by the legislation concerning the insurance business. This did not form part of the pleadings in the Appellant's Defence. Further, the documentary evidence reveals that the Respondent did act as a director and there was no direct evidence that his directorship was terminated. It follows that it could hardly be maintained by the Appellant that there was such a complete change of circumstances which could not be controlled by the parties that the performance of the agreement could no longer fulfil the common design of the parties. Had that been the position Mr. Pardiwalla would not have in the alternative argued before Perera J. that since the Respondent's claim was for director's fees, SR.600 to SR.700 per month, as Mr. Etzin's evidence disclosed was the normal director's fees in Seychelles, should be considered as payable to the Respondent.

In making the award the learned Judge concluded that each year's remuneration was subject to the effect of prescription and so the Respondent in terms of Article 2271 of the Seychelles Civil Code was only entitled for 5 years. Therefore Perera J. was correct in making his award for a period of 5 years since the Respondent's Director's fees would be due each year. Looking at the amount of the award made by him, there is no doubt that in giving the Respondent L7500 per annum the learned Judge failed to take into account that he was only entitled to fees as a director whereas the amount of L7500 per annum according to the Respondent himself was inclusive for salary and bonus (as an employee) and fees (as a director). Mr. Pardiwalla in the alternative submitted that because of mise en demeure of May 1992 on behalf of the Respondent he should at most only receive SR.12,000 per annum. The learned Judge should have considered this.

Now Article 1149 of the Seychelles Civil Code states that damages payable under it and as provided in Articles following it shall apply as appropriate to breach of contract and the commission of delict. Article 1153 provides that where the obligation merely involves the payment of a certain sum the damages arising from delayed performance shall only amount to an interest payment fixed by law or by commercial practice but should the creditor sustain special damage caused by a debtor in bad faith and not merely by reason of delay he may obtain damages in addition to interest payment. The learned Judge awarded SR.10,000 as moral damages because the Respondent according to Perera J. would certainly have suffered pain of mind due to the behaviour of an ungrateful employer. It would appear that by this the learned Judge must have had in mind the Appellant's refusal to make payment which should really be described as delayed performance. It is clear that special damage was not pleaded and there was no evidence led that the Respondent sustained special damage caused by the Appellant in bad faith and not merely by reason of delay. It follows that the Respondent should not have been given moral damages.

In the result the award of £7500 per annum for 5 years must be set aside and instead the Respondent is awarded SR.12,000 per annum for 5 years for a total SR.60,000. The award of moral damages is also set aside. Costs of appeal shall be borne by each party.

Dated at this day of 1995.

M. A. Adam

Mahomed Ali Adam
JUSTICE OF APPEAL