

IN THE SEYCHELLES COURT OF APPEAL

- **VIJAY CONSTRUCTION PTY LTD.**
THE SEYCHELLES GOVERNMENT

1st Appellant
2nd Appellant

VERSUS

ALUMINIUM AND STEEL WORKS (LTD)

Respondent

SCA2/02

(Before: Ayoola P, Pillay & Matadeen JJA)

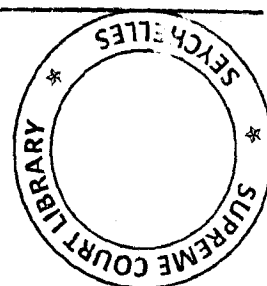
Mr. S. Rajasundaram for the 1st Appellant

Mr. B. Hoareau for the 2nd Appellant

Mr. P. Boulle for the Respondent

JUDGMENT

(Delivered by Ayoola, P)



Aluminum and Steel Works Ltd, ("Aluminium") was a nominated sub-contractor pursuant to a building contract entered into by Vijay Construction (Pty) Ltd. and The Seychelles Government for the construction of the National Library Building in Victoria, Mahe. It was at all material times engaged in the business of manufacturing, supplying, selling and installing aluminium windows, doors and other fittings, and was engaged by virtue of the sub-contract to supply doors and windows and install skylight. Vijay Construction(Pty) Ltd ("Vijay") a building contractor was the main contractor. Aluminium alleges that upon completion of the sub-contract a sum of R.388,925.06 was due to it "for material supplied and works done on the National Library". By the plaint dated 3rd March 1998 it commenced an action against Vijay and the Seychelles Government, respectively 1st and 2nd defendants, in the Supreme Court claiming that sum against them jointly or severally.

The averments in Vijay's plaint were extremely scanty. The substance of its case as pleaded is that Vijay was liable for amount claimed, being the money due for doors and windows supplied and for works done, because it was the main contractor; and, that the Seychelles Government was liable as the employer whose project manager and architect, Hughes and Polkinghorne, had awarded the tender. In the alternative, it was averred that the Seychelles Government was "indebted to the plaintiff for unjust enrichment" but that was not pronounced upon by the trial judge nor is it an issue on this appeal.

By its defence Vijay denied that Aluminium was its nominated contractor and averred that Aluminium acted as a direct contractor of the Seychelles Government from which it took direct instructions. It averred that Aluminium was "paid everything that was certified by the second defendant's agent as being due to the plaintiff". It averred that the Seychelles Government was solely liable to Aluminium. The substance of the defence of the Seychelles Government was that it had no contract with Aluminium. It relied on the doctrine of privity of contract as contained in Article 1165 of the Seychelles Civil Code.

The trial Judge, Perera, J, entered judgment for Aluminium in the sum of R274,297.72 and held that that sum was jointly and severally due from Vijay and the Seychelles Government with interest at 14% from 1st December 1994 and costs on a pro-rata basis. He had earlier made a provisional award subject to "proper assessment" of sum to be deducted for the alleged delay and defects. However, at the end of the day, he confirmed the provisional award "in terms of the averment in para (9) of the plaint".

Vijay and Seychelles Government appealed from that decision. Two main issues raised by counsel on behalf of Vijay on its appeal are (i) whether Perera, J was not in error in finding that Aluminium was entitled to SR274,297.72 when he had found that there were delays and defects in the works which were attributable to Aluminium and the sums awarded had never been certified as being due to Aluminium; and, (ii) whether he was correct in awarding interest at 14% in the absence of an agreement that that interest at that rate was due or proof of commercial practice . The grounds of appeal that the learned Judge erred in finding the defendants jointly liable and also that the Judge ought to have given Vijay another chance to bring evidence in support of deductions for defects and delays will be considered, in regard to the latter, along with the first of the main issues; and, as regards the former, in relation to the appeal of Seychelles Government.

For the Seychelles Government, Mr. Hoareau, learned State Counsel, argued that the trial judge was in error when he found that-

"The 1st defendant was liable to the 2nd defendant, the 2nd defendant would be indirectly liable to the plaintiff in respect of payments for which the 2nd defendant alone was solely liable"

Learned State Counsel puts the Seychelles Government's case thus: Vijay and the Government were not bound by the same obligation to Aluminium so as to make them jointly liable in terms of Article 1200 of the Civil Code; the finding of several and joint liability was contrary to the provisions of Article 1165(1) of that Code; and, the finding was contrary to the case put forward by Aluminium which was not that Seychelles Government was indirectly liable but rather that it was directly liable.

Learned counsel for Aluminium, Mr. Boulle, argued that the point raised by Vijay as to defects and delay was not pleaded in the defence and could therefore not be relied upon by Aluminium. He relied on Tirant v Banane (1977) SLR 49; Dubignon v Marie (1975) SLR 18; GIC v Bonte SCA No. CA 6 of 1994 (Judgment delivered on 11.5.95); Pillay v Aeroflot SCA No. 13/94 of 11.5.95 and Gallante v Hoareau (1988) SLR 122. In regard to award of interest at commercial rate it was submitted that the learned trial Judge had discretion which he exercised under Article 1153 of the Civil Code and did so justifiably on the basis that the subject matter before the Supreme Court was commercial in nature. In regard to the appeal of the Seychelles Government, Mr. Boulle submitted that there was a larger contract constituted by the tender awarded by the project manager and architect of the Seychelles Government to the respondent, by virtue of which the Seychelles Government was directly liable.

The law is clear that a party must put forward his case in his pleadings where the trial is on the pleadings. Wood, J. put it clearly in Tirant & or v Banane 1977 SLR 219 at p 220 when he said:

"In civil litigation each party must state his whole case and must plead all facts on which he intends to rely, otherwise strictly speaking he cannot give any evidence of them at the trial".

In this case the defence of Vijay as pleaded was not that it was not liable to pay the sum claimed because of any defect in the works or defects in the performance of the contract. Any evidence on such facts not pleaded goes to no issue raised on the pleadings. There was no averment in the pleadings

that the entitlement of Aluminium to what it claimed was conditional on the amount being certified. The defence of Vijay was that Aluminium was not its sub-contractor and that it was the Seychelles Government which was solely liable to Aluminium.

The trial Judge found that Aluminium was Vijay's direct contractor. He also found that:-

"The evidence shows that although there were delays in deliveries the defects in installing the skylight, which is the basis of the final claim of the plaintiff, cannot be solely attributed to the plaintiff. The court has not been referred to any clause in any Agreement which provides for the non-payment of the entire sum claimed in this respect".

These findings have not been criticized by counsel for Vijay on this appeal. We think they are enough to dispose of the appeal of Vijay on the question of its liability.

In regard to the commercial interest awarded to Aluminum at the rate of 14% per annum, the provision of Article 1153 of the Civil Code is clear. The present case was one of a delayed performance of an obligation, which involved the payment of a certain sum. The case falls within the ambit of Article 1153. In terms of that Article, damages arising from delayed performance shall only amount to the payment of interest fixed by law or by commercial practice, or by a rate of interest fixed by the agreement of the parties. As to what is commercial practice the decision of Sauzier, Ag CJ in *Seychelles National Commodity Co Ltd v. Laure* (198) SLR 160, 161-162 is apt. It is the rate of interest that is charged in normal commercial practice in

such transaction as was involved in the case. The burden is on the party who claims interest at a commercial rate to aver and prove commercial practice. Where there is proof of commercial practice, rather than refuse to award any interest, the court will award interest fixed by law. In this case, although in the relief the plaintiff, Aluminum, claimed interest at commercial rate, there are no averments of commercial practice nor, consequently, proof of such practice. In the circumstances award of commercial interest at 14% per annum made by the trial judge was erroneous. He should have awarded interest fixed by section 3 of the Interest Act at 4%.

The reasoning by which the learned trial judge found the Seychelles Government jointly and severally liable is contained in the following passage of his judgment where he said:

"The liability of the 2nd defendant does not therefore arise directly vis-à-vis the plaintiff. But as the 1st defendant was liable to the 2nd defendant and the plaintiff was liable to the 1st defendant, the 2nd defendant would be indirectly liable to the plaintiff in respect of payment, for which the 2nd defendant above was solely liable".

The first part of the finding that the liability of Seychelles Government was not direct is not challenged in this appeal. The question whether its liability to its contractor makes it liable to the sub-contractor whose contract is with the contractor was one which arose from the finding of the trial judge but was not the basis of the case set up by Aluminum at the trial. The finding of the trial judge that the Seychelles Government was not directly liable to Aluminum was a clear rejection of the basis of liability pleaded by

Aluminium. That should have been the end of the claim against the Seychelles Government.

The learned trial judge was right in holding that the sub-contract, which was the foundation of the action, created an obligation between parties to it which were Aluminium and Vijay. He was also right in holding that the main contract, pursuant to which the sub-contract was entered, created an obligation between Vijay and the Seychelles Government. Where he fell into error is in the reasoning that the obligation created by the main contract that gave rise to an obligation of the Seychelles Government to pay Vijay for the entire contract also enabled Aluminium to enforce the rights created under the sub-contract against the Seychelles Government, even though the Seychelles Government was not a party to the sub-contract.

Article 1165 of the Civil Code provides that:

"Contracts shall only have effect as between the contracting parties, they shall not bind third parties and they shall not benefit them except as provided by Article 1121".

Article 1121, which permits stipulation for the benefit of a third party is not relevant to the present case. In the present case, Vijay is a common party to two contracts one with the Seychelles Government and the other with Aluminium, but that does not make the Seychelles Government a contracting party to Vijay's contract with Aluminium or Aluminium a contracting party to Vijay's contract with Seychelles Government. Seychelles Government is by virtue of Article 1165 not bound by the obligation created by the contract entered into by Vijay and Aluminium. It is bound by a separate obligation to

Vijay, created by its contract with Vijay. It follows from this that the circumstances do not give occasion to joint and several liability of Vijay and Seychelles Government in respect of Vijay's contract with Aluminium. In terms of Article 1200 of the of the Civil Code:

"There is joint and several liability of debtors when they are bound by the same obligation in such manner as to make each one of them liable for the whole and when the payment made by one above releases the others with regard to the creditor".

Article 1202 also provides that:

"Joint and several liability shall not be presumed; it must be expressly stated".

The obligation of the Seychelles Government under the main contract to pay moneys to Vijay upon due performance of the contract was not the same obligation as Vijay had under the sub-contract to pay moneys to Aluminium upon due performance of the sub-contract, even though the sum due on the sub-contract may have been included in the sum due to Vijay from the Seychelles Government on the main contract.

The flaw in the reasoning of the trial judge that would have made the Seychelles Government liable on a contract to which it was not a party and severally and jointly liable with Vijay on such contract, is so evident that nothing more than has been said needs be said on the issue.

For the reasons which we have given, the appeal of Vijay must be dismissed in regard to liability but its appeal in regard to the award of interest succeeds. The award of interest at the commercial rate is set aside. In place therefor, interest is awarded on the sum awarded by the Supreme Court at the rate of 4% per annum, pursuant to section 3 of Interest Act (Cap 100: Laws of Seychelles 1991 ED), such interest to be calculated from 1st December 1994 until payment in full.

The appeal of the Seychelles Government succeeds and is allowed. The judgment entered against it by the Supreme Court is set aside. In place therefor judgment is entered, dismissing Aluminium's claim against the Seychelles Government in its entirety.

Aluminium and Vijay are, as between themselves, to bear their respective costs of the appeal. The Seychelles Government is entitled to costs of the trial and of the appeal against Aluminium to be assessed.

E.O. AYOOLA
PRESIDENT

A.G. PILLAY
JUSTICE OF APPEAL

K.P. MATADEEN
JUSTICE OF APPEAL

Dated this 11th day of April 2003