IN THE COURT OF APPEAL OF SEYCHELLES

MARLENE HOAREAU

APPELLANT

vs

A2B (Pty) Ltd

RESPONDENT

SCA 34 of 2012

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Counsel: **Mr Basil Hoareau for the Appellant**
Mrs Alexia Amesbury for the Respondent

JUDGMENT

DOMAH, S.,

[1] This is an appeal from the decision of the learned Chief Justice who, in an action and a cross action arising out of a sale contract of a car hire business, found that the parties were both in breaches of their respective contract obligations. He, accordingly, ordered the respondent to pay SR318,000.00 to the appellant as the unpaid balance on the agreed contract price and the appellant to pay to the respondent SR 918,000.00 as damages for the prejudice caused to it by her refusal to honour her part of the bargain.

[2] The ground for the first order was that the respondent had defaulted on its obligation to pay its contractual installment at the due date. On the other hand, the ground for the second order was that the appellant had defaulted on her obligation to transfer the licences of the vehicles that the respondent had bought from the appellant. The Chief Justice relied on the clear provisions of articles 1134, 1135 and 1142 of the Seychelles Civil Code to so decide.

[3] The grounds for the appeal and submissions have been made under three main heads as follows:

"A. In respect of awarding SR918,000 to the Respondent Against the Appellant -

1. *The Learned Chief Justice erred in holding that the Appellant was under an obligation to transfer the vehicles, "on the 21st of April 2011 when the first payment was effected or six weeks later after the Defendant had satisfied the other conditions that the Licensing Authority had demanded, which would be with effect at least the beginning of July 2011," in that the Appellant was legally right to suspend her obligation under the contract, in accordance with the principle of "l'exception d'inexecution" and on the basis of Article 1162 of the Civil Code.*
2. *The Learned Chief Justice erred in law in relying on Articles 1134, 1135 and 1142 instead of relying on the principle of "l'exception d'inexecution" and on the basis of Article 1162 of the Civil Code.*
3. *The Learned Chief Justice erred in law in holding that a "breach of one of the terms or conditions by the other party does not entitle the other party to withhold performance of its obligations."*
4. *The Learned Chief Justice erred in law in and on the evidence in assessing the damages of SR918,000 in favour of the Respondent, as there was no sufficient evidence adduced before the Court, to enable the Learned Chief Justice to come to such a figure on a balance of probabilities.*

B. *In respect of the dismissal of the Appellant's claiming unpaid rent in the sum of SR327,500 -*

5. *The Learned Chief Justice erred in law in and on the evidence in holding that "the alleged rental due to the Plaintiff fails as this must surely remain part of the asset of the firm that was sold as a going concern to the Defendant," in that the Appellant was the sole trader and as such the right to the unpaid rent was personal to the Appellant rather than belonging to a company or partnership.*

C. *In respect of the award of costs -*

6. *The Appellant will rely on the basis of all the above-stated grounds of Appeal."*

[4] The facts relevant to this appeal may be stated to be as follows: Appellant had been running the business of car hire operator under the name of White Sands Car Hire which, on 27 January 2011, she sold to the respondent for a total sum of SR1,118.000. The payment conditions were that the respondent should pay SR800,000 upon signature of the transfer document and the balance of SR318,000 by monthly installments of SR50,000 on or before 31 July 2011. Respondent made the first payment but defaulted on the monthly installments – which have remained unpaid up to this date. Appellant, therefore, claimed SR445,625 with interest at the commercial rate of 12% as from 13 July 2011 with costs. She included in that figure a sum of SR127,625 which she averred was the unpaid rental due on the cars which the respondent had hired from her while the appellant was running the business.

[5] It was the case of the respondent: that the transfer document was signed on 28 April 2011 and that the total sum included consideration given for 3 working contracts; that the licences for 5 vehicles were to be transferred with the vehicles but that the appellant defaulted in the transfer of the 5 licenses to enable the respondent to remain in operation; that the unpaid sum of SR318,000 related to the 3 working contracts which remained undelivered and had been included in the package; and that, if that sum was not paid, the appellant should hold herself responsible on account of her breach in failing to honour the 3 lucrative contracts and her failure to transfer the licences of the 5 vehicles.

[6] The respondent, accordingly, lodged a counter claim on the basis of the Appellant's breach for SR1,097,250 with interest at the rate of 12% as from 28 April 2011 until the licences for the vehicles are transferred and also for a rescission of the contract with a refund of SR800,000 paid as well as a reimbursement of all the money spent on repairs and maintenance of the said vehicles at the rate of 12% p.a. until the sum is duly paid.

[7] The grounds of appeal may be taken together inasmuch as they all challenge the findings of fact of the learned Chief Justice and his application of the law to those facts.

[8] The central issue raised in the matter is whether the breach by the appellant could be held to be correct in her plea that she was entitled to put an end to the contract in the circumstances where the respondent was itself in breach. To her, the situation did not attract the application of articles 1134, 1135 and 1142 of the Civil Code as the learned Chief Justice had done but that of article 1612 which enabled her not to discharge her remaining obligations because the respondent was not honouring his.

[9] Article 1612 provides:

> *"The seller shall not be bound to deliver the thing if the buyer has not paid the price, provided that the seller has not granted him time for payment."*

[10] Appellant's obligation related to her obligation to transfer the vehicles and respondent's obligation to pay the outstanding sum in the written contract. The Chief Justice took the view that "breach of one of the terms or conditions by [one] the other party [sic] does not entitle the other party to withhold performance of its obligations." And he relied on the provision of article 1142 for it citing as follows:

> *"Every obligation to or to refrain from doing something shall give rise to damages if the debtor fails to perform it."*

[11] We agree with the learned Chief Justice in his application of article 1142 to the facts of the case. First, article 1612 properly finds its application in a case where the *quid pro quo* is delivery of goods against purchase price. It makes sense that where there is no price paid, there should be no delivery. It finds no application in a case such as the present one where there is a contract which provides for staggered performance and a substantial sum has been paid. In such a situation, the seller is bound to discharge his or her contractual obligations without holding the other to ransom and resort to a system of *justice privée*: see **Jumeau v Sinon (1977) SLR 78; Peters v Bazen (1975) SLR175**

[12] From the evidence, the appellant in this case was responsible for the breach. The Licensing Authority was clear on the point that it is the appellant who, after starting

the procedure for the transfer of the vehicles, began to hold up the process towards completion.

[13] True it is that there is a plea of *exception d'inexecution* that is available to a party which may be invoked so that the breach of the other party becomes a ground for treating the contract as terminated. But for a plea of *exception d'inéxecution* or *non adimpleti contractus* (unperformed contract) to succeed, the party who invokes it should show that the breach of the party was grave. It is not available for every kind of breach. In general in such cases the courts try to strike a balance between the competing obligations of parties bearing in mind the essential obligation in the agreement.

[14] In this case, it cannot be said that the breach of the respondent in terms of his default in payment was of sufficient gravity for the appellant to refuse to transfer the licences of the 5 vehicles.

[15] In **Jumeau v Sinon 1977 SLR 78,** Sauzier J. laid down the conditions under which a plaintiff could claim *exceptio non adimpleti contractus:*

> *"(a) that it is raised in good faith and not as mere dilatory measure; and*
>
> *(b) that the alleged breaches by the lessor of his obligations under the lease do not bear on secondary or subordinate matters of no real importance but are sufficiently grave."* see also: **Synthetic Marble Products Ltd v Allied Builders Ltd [1998 SCJ 184].**

[16] In fact, the respondent had already paid to the appellant SR800,000. What remained was SR318,000 on which there was a further agreement that it should be payable in installments of SR50,000 because of the then financial strait in which the respondent had landed because the ongoing business was hampered by the delay in the formalities involved in the transfer of the vehicles. What the appellant did was to add her own complication into it by further delaying the process with her refusal.

[17] Indeed, when the parties proceeded to the Licensing Authority for the first time and it became clear that the transfer of the car hire business licence could not be

executed until certain procedural and material factors were met, she did not rescind the contract.

[18] The defence of *exception d'inéxecution* may also be available when a contract requires concurrent performance such as daily delivery of consumables against payment so that it permits one party to refuse to perform until the other party performs. But that is not the type of contract we are involved in this case.

[19] The respondent pleads that it had a right to withhold payment of installment because the appellant was holding the process of transfer. Indeed, Article 1653 confers upon a buyer a right to withhold payment but only in certain circumstances, which is not the case here.

[20] Even if the defence of *l'exception d'inexécution* were to apply, which we say does not -, it is to be noted that such a measure is only a temporary remedy in law:

> *"[t]he contract and the duties under it remain and the party making use of the exception… must be ready to perform if and when the other party does"* Barry Nicholas, "The French law of Contract" (2nd ed. Oxford University Press 1992 at pp 214).

[21] A party cannot simply take it upon himself or herself to repudiate a contact altogether when the payments are late. He has to seek an "action en resolution" under Article 1184 of the Civil Code. French law resists self-help and even in the case of delayed performance, the promisee may not reject the performance on the grounds of delay without having the contract formally terminated by judicial sanction: see Article 1184(1) paras 3 and 4, and not otherwise.

[22] In the case of **Emerald Cove Ltd v Intour SCA 5 of 2000**, this Court held that, in the absence of a clear clause to that effect, a rescission is only possible through the judicial process and that if rescission is resorted to by any party this type of self help renders the party in breach to liability in damages: see also **Estate of Grand Court and Another v Christopher Gill SCA 7 of 2011.**

[23] We have no hesitation in saying that the decision of the learned Chief Justice on the fact and in law was correct as regards the breaches and respective liability of the parties.

[24] The only part of the judgment that is obviously unsound is the manner in which a business sold at SRs1,118,000 would within a couple of months fetch such a lucrative return that the learned Chief Justice awarded the sum of SRs918,000 as damages for prejudice caused to the respondent by the appellant. That the appellant is entitled to the balance of the purchase price of R318, 000 is borne out by the evidence. But what is not borne out by the evidence is the damages for the unpaid rental of the cars. He agreed that the evidence of material prejudice caused to the business by the appellant's non performance was tenuous. He relied on the figure given by the appellant herself. We have evidence of the fact that the respondent was completely new in the business. If, with all the experience of the appellant to bear, the business was going downhill and was up for sale to the respondent, one wonders how the respondent who lacked the business savvy in the new venture he had undertaken, with a magic wand, generate SR918,000 of return which is the sum awarded to him in damages.

[25] We have evidence of the fact that even if the respondent did not use the cars for hiring purposes, he did make use of them otherwise. Recalling the fact that we are not in the field of tort but in contract where the damages have to be of the direct consequences of the breach, it cannot be said that the respondent was entitled to a sum of SRs918,000. We consider the sum awarded grossly on the high side for the reasons given.

[26] In our view, both parties should bear responsibility for the plight they landed in to the extent of their breaches. The cars have already been transferred and the SR318,000 are due to the appellant. It should bear interest at the legal rate from the time it became due up to payment. On the other hand, the appellant, unreasonably delayed the process of the transfer and rendered herself liable in damages for the prejudice caused to the business. In the facts and circumstances of the case, we think that the sum of SR400,000 is a reasonable sum to which the appellant has become liable to the respondent for her *laches* in fulfilling her obligations under the contract. In this case also,

we order the sum to carry interest at the legal rate from the time of the claim up to the time of the payment.

[27] Each party to bear half the cost of the case.

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F. MACGREGOR	**S.B. DOMAH**	**M. TWOMEY**
PRESIDENT	**JUSTICE OF APPEAL**	**JUSTICE OF APPEAL**

Dated this 11th April 2014, Ile du Port, Seychelles.