

IN THE SEYCHELLES COURT OF APPEAL

[Coram: S. Domah (J.A) , A. Fernando (J.A) , J. Msoffe (J.A)]

Civil Appeal SCA 28/2014

(Appeal from Supreme Court Decision 357/2010)

The Seychelles Port Authority

Appellant

Versus

John Desaubin

Respondent

Heard: 10 April 2015

Counsel: Mr. B. Hoareau for Appellant

Mr. F. Bonte for Respondent

Delivered: 17 April 2015

JUDGMENT

S. Domah (J.A)

- (1)** John Desaubin had been running a bar and a restaurant, Le Marinier, for the past 21 years on the premises of the Seychelles Ports Authority (“SPA”), Inter Island Quay. On the expiry of the lease in 2006, John Desaubin requested for a renewal and was refused. He, therefore, soon after lodged a case in Court against his likely eviction by the SPA coupled with a Motion for Injunction. At one stage, learned Counsel appearing for the appellant gave an undertaking that pending the disposal of the case, the respondent will not be evicted. The case dragged on for one reason or the other. The blame is being cast on him for the delay when the evidence and the record shows that it was not he who was in control. If the SPA wanted to have the case heard earlier, it was open for it to make the motion for same or write to the Registrar or the Chief Justice for that matter. The SPA did none of this.

- (2) Be that as it may, the matter was fixed for 19 January 2011. On 10 December 2010, a month before the case was to be heard and just under two weeks before Christmas, SPA landed *manu militari* out of the blue, defying Court, defying law, defying counsel, defying the respondent, broke open the door and took all his movables out in the open. There is evidence that following the eviction and the humiliating treatment, the respondent's health deteriorated markedly. He had to proceed abroad a couple of times for such medical treatment as he could not obtain in Seychelles spending his savings. He brought a case for illegal eviction against the SPA and claimed SRs2,157,500. He survived the hearing of his case at the trial below. But he has not survived the hearing of this appeal.
- (3) The learned Judge in a particularly well written judgment dealt with all the relevant issues in law and facts. He also referred to the relevant judicial authorities, some of which had not been submitted to him by counsel. He found the case proved against the appellant and awarded him damages in the sum of SRs869,500.00. The SPA has still prosecuted this appeal, pursuing the deceased respondent as it were even beyond his grave.
- (4) The appellant had pleaded that the respondent had failed to take steps to have the case disposed of with due dispatch so that by January 2011, even the motion let alone the main case was still awaiting disposal on account of the delaying tactics employed by the respondent. It is common knowledge that there are a number of factors beyond the control of litigants which delay cases in court. And the evidence hardly points to the Respondent's laches. On the contrary. The least said about it the best.
- (5) The SPA's excuse for its reprehensible conduct is that the respondent had been carrying out his trade illegally inasmuch as the Licensing Authority on 12 August 2010 had notified the appellant as the owner that the premises were being used to conduct business without a valid licence. It is the case of the appellant, therefore, that being a statutory corporation, wholly owned by the Government, it fell under a duty and an obligation to evict the respondent from the premises and used only such force as was reasonable in the circumstances. It has produced no authority to show that it could, as a agency of government, so conceive of a law on its own, decide illegality on its own, deliver justice to itself on its own and then execute the orders on its own. Our comment on this misconceived zeal by SPA is that this is the very type of despotism which our

democratic system of government cannot brook. An investigation should have been carried out by government to decide who took, and who were those who became privy to, such a rash and reckless decision for the purposes of an appropriate action.

(6) Be that as it may, the appellant has appealed against that decision of the learned Judge. It has advanced 6 grounds of appeal, as follows:

1. The Learned trial Judge erred in law on the evidence in holding that the Respondent had adduced evidence to prove damages awarded by the trial judge.
2. The Learned Trial Judge erred in law and on the evidence in failing to attach sufficient weight to the failure of the Respondent to produce and keep commercial books, account and business documents and to draw the necessary inferences from such failure.
3. The Learned Trial Judge erred in law and on the evidence in relying on the testimony of the Respondent, in respect of the damages, as the respondent was not a credible witness.
4. The Learned Trial Judge erred in law and on the evidence in holding that there was an unwritten agreement or undertaking that the Respondent would continue to operate his business without a licence until the issue of the lease and licence were [sic] resolved.
5. The Learned Trial Judge erred in law and on the evidence in failing to hold that in view that the Respondent did not have a licence to operate a bar and restaurant business in the premises, the Respondent cannot legally claim damages for loss and profit from an illegal business.
6. The Learned Trial Judge erred in law and on the evidence in awarding damages to the Respondent for an activity which was against policy [sic].

(7) The respondent is resisting the appeal and supporting the decision of the learned Judge.

(8) All the grounds evoked have to do with the appreciation of evidence. The law needs no citation that an appellate court will not interfere with the appreciation of the evidence of a trial court unless it is shown that the conclusion reached was wrong in the application of the relevant law, based on irrelevant facts, not supported by sufficiency of evidence

or simply unwarranted. Grounds 1, 2, 3, 5 and 6 have to do with damages. Ground 4 makes no mention of damages and we assume in favour of the appellant that it has to do with liability. We propose to deal with the issue of liability before dealing with the issue of damages.

GROUND 4

- (9) Ground 4 questions the learned judge's finding that there was an unwritten agreement or undertaking that the Respondent would continue to operate his business without a licence until the issue of the lease and licence were [sic] resolved.
- (10) We would grant the appellant the argument that the respondent could not assume that he could operate without a licence and no one has the authority to represent to another that you may operate without a licence. An agreement therefore that someone operates without a licence, whether written or unwritten, is against public order and invalid.
- (11) However, the action of the plaintiff was not based on that. It was based on the fact that the SPA itself defied the law and the Courts to enter the premises *manu military*, remove his movables and, thereby, accelerate his demise.
- (12) Learned counsel can only challenge that finding if he can show that there was no evidence at all on which such a finding was based. As a court of appeal, we are ill-placed to come to our own conclusion in a matter where the trial court retains sovereign competence of appreciation: see **Government of Seychelles v Shell Company of the Islands SCA 11 of 1988**.
- (13) On the question of whether the respondent was operating with or without a licence, there are at least 8 pages of transcript where the issue has been canvassed in examination in chief, cross examination and re-examination. It would be pedantic to recite them in this frivolous appeal.
- (14) In the light of the above, we see no merit in Ground 4. We dismiss it. We now come to the other grounds of appeal.

GROUND 1

- (15) Ground 1 and 3 are general grounds. As such, they amount to no grounds at all. They are dismissed. Any comment of evidence will be taken along with other proper grounds. Credibility is a matter for the trial court. What reads one thing in a transcript may present itself very differently in real life. True it is that the respondent shows himself irascible and impatient but his answers are typical post-traumatic reactions. No one either in the Ports Authority or the Licensing Authority for that matter would have liked to be treated in such a fashion in a democratic society, albeit the fact that he is not an angel.

Grounds 3

- (16) Grounds 3 challenges the basis on which the learned Judge awarded the damages in that the Respondent had not adduced evidence for the purpose; that the necessary inference was not drawn from the failure of the Respondent to produce and keep commercial books, account and business documents; that the Respondent was not a credible witness. Our short answer to it is that this was not a claim by the tax officers on the returns of his day to day business. It was a claim in tort and all he had to show was to give a reasonable account and amount of the prejudice which had been caused to him, moral and material. The case was postponed so that he could come with some papers. He came with some papers on which the Court was entitled to come to the conclusion it did with respect to his earnings per month, his profits, what he paid to the workers, the prejudice he suffered in terms of loss of good-will, equipment, furniture, kitchenwares and other materials. A court is entitled to make a reasonable assessment of damages on whatever little evidence which is at his disposal in a claim: see **Monica Kilindo v. Sidney Morel SCA 12 of 2000**.

Grounds 5 and 6

- (17) Under ground 5, the decision of the learned trial Judge is impugned for the reason that in law and on the evidence he should have held – which he did not - that since the Respondent did not have a licence to operate a bar and restaurant business in the

premises, he could not legally claim, and if he did, the learned Judge should not have allowed, damages for loss and profit from an illegal business.

- (18) Ground 6 repeats the principle with a different wording in that the learned Trial Judge erred in law and on the evidence in awarding damages to the Respondent for an activity which was against policy [sic].
- (19) Learned counsel argued for the application of the maxim *ex turpi causa non oritur actio*. He cited **Halsbury Laws of England, Vol. 12(1) 4th Ed. Reissue**. However, the same citation goes on to state that “many regulatory offences are not reprehensible.” In **Beresford v Royal Insurance Co. Ltd [1937] 2 KB 197 at 200**, Lord Wright is cited to have observed that there were statutory offences and crimes of inadvertence where the application of the principle of *ex turpi causa non oritur actio* lacked moral justification (see also **Marles v Philip Trant & Sons Ltd (no. 2), (Mackinnon) [1954] 1 QB 29.**)
- (20) Learned counsel would have had a point and the above maxim would have applied if the respondent was operating without a licence *stricto sensu* in that he had never been licensed or cared to obtain one. But this was not the case. This was a case where the respondent had been operating under a valid licence for the past 21 years but, on a dispute arising between them as to the nature of the lease which ended up in court. The Licensing Authority of prosecuting the respondent for trading without a licence did none of those things. Instead, it chose to consort with the Ports Authority to administer a *justice privée* while at the same time aiding and abetting it to commit a contempt of court. The Licensing Authority has no business to write to a lessor to inform him that any trader is carrying on his activities without a licence. Its business is to prosecute and not to act as informant. The plea that they are government agencies so they act under a duty and obligation to evict does not permit them to use muscular power but institutional power. They had no power to evict by taking the law, the procedure and the determination and the execution into their own hands. This is exactly the sort of State activity that has been sought to be prevented when the Constitution speaks of democracy and the rule of law. The objective was to replace mini-despots exercising *justice privée* by democratic people at the head of agencies under the rule of law account taken of the Separation of Powers.

- (21) Such an argument cannot ignore a number of facts particular to the case: first, that there was a dispute both as regards the lease and the licence; second, that this dispute was before the court and was *sub judice*; third, that the learned judge had found as a fact that an agreement had been reached that the respondent would continue trading pending the decision of the court. As to whether the action lodged by the respondent was a reasonable action, the facts show that he was a protected tenant because the furniture belonged to the respondent. What the Ports Authority attempted to do is by high handed means to oust him of his legal rights.
- (22) Parliament by creating authorities did not intend them to be a law unto themselves with pockets of unbridled power outside the rule of law. They were created to operate within the bounds of their statutory powers and functions for the purposes of regulating certain specific activities and not for the purposes of ruling over people under the guise of their statutory power: see **Doris Raihl v Ministry of National Development SCA 6 of 2009**. .
- (23) On the issue of damages, it was incumbent upon the appellants to show that the damages were excessive: see **Danny Mousbe v Jimmy Elizabeth SCA 14 of 1993**. On the contrary, taking account of the fact that the learned Judge should have awarded exemplary damages for the high-handed manner in which a public authority attempted to flout government authorities to do *justice privée* to itself. It is fortunate that the respondent has not cross appealed for an increase in the sum awarded.
- (24) We order interests in this case to be paid from the day of the lodging of the plaint at the legal rate on account of the conduct of the appellant, the unsoundness of the pleas, the unreasonableness in prosecuting this appeal.

(25) We are grateful to learned counsel for the appellant for having shown his good faith in seeking last minute instructions from his client before standing in for them in this appeal to the best of his ability.

(26) All the grounds having been seen to have no merits, we dismiss the appeal with costs. The appeal was frivolous and a culpable waste of tax payer's money. We only wish that no government and no government agency resorts to such reprehensible conduct in the future and no counsel lends itself to condone such actions. We order that the damages bears interest at the legal rate from the date of the lodging of the plaint.

S. Domah (J.A)

I concur:. A. Fernando (J.A)

I concur:. J. Msoffe (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 17 April 2015