COURT OF APPEAL OF SEYCHELLES

Reportable
[2023] (18 December 2023)
SCA 06/2023
(Arising in CS 15/2019)

In the matter between

NIZAM UDDIN AHMED — **Appellant**
DIRECTOR DNS RISING FARM (PTY) LTD
(rep. by Mr Frank Elizabeth)

And

First Respondent

SERGE LARUE
DIRECTOR DNS RISING FARM (PTY) LTD
(rep. by Miss Manuella Parmentier)

DAVE DINE
DIRECTOR DNS RISING FARM (PTY) LTD — **Second Respondent**
(rep. by Miss Manuella Parmentier)

Neutral Citation: *Ahmed v Larue and Anor* (SCA 06/2023) [2023] (Arising in CS 15/2019) (18 December 2023)
Before: Twomey-Woods, Robinson, Tibatemwa-Ekirikubinza, JJA
Summary: action is bad in law or misconceived
Heard: 6 December 2023
Delivered: 18 December 2023

ORDER

1. We make an order dismissing the appeal as a whole as having abated or as being defective.
2. The order of the trial Judge dismissing the plaint is upheld.
3. We make no order as to costs

JUDGMENT

Robinson JA (Dr. M. Twomey-Woods, Dr. L. Tibatemwa-Ekirikubinza, JJA concurring)

1. This appeal arises from an action filed by the Appellant against the Respondents for loss and damage he has suffered in the sum of 410,000 rupees with interest and costs.

2. The trial Judge found that no evidence was adduced to support the matters alleged under the head of "Particulars" (rehearsed at paragraph [11] hereof) and, hence, dismissed the plaint on the ground that the Appellant had not proven the breaches of the contract on a balance of probabilities.

3. The Appellant has challenged the judgment on the following grounds, reproduced verbatim hereunder —

> "Ground 1
>
> 1. The learned Judge erred when she made a finding that the respondents were not in breach of contract when they failed to open a bank account for the company as the appellant was occupied with criminal proceedings. (para. 46)
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> Ground 2
>
> 2. The learned Judge erred when she made a finding that the appellant was the majority shareholder in the company and his signature was therefore required to open the bank account. (para. 46)
>
> Ground 3
>
> 3. The learned judge erred when she made a finding that the appellant has failed to prove that the respondents were the ones collecting the sales proceeds and that the appellant as the majority shareholder would have been more likely to have the record of sales. (para. 50)
>
> Ground 4
>
> 4. The learned Judge erred when she made a finding that there is no evidence adduced to support the appellant's claim with respect to the amount of proceeds made by the business and due to him. (para. 51)
>
> Ground 5

5. The learned Judge erred in law when she made a finding that the appellant has failed to prove that it was the respondents' obligation under the contract to keep proper accounting for the expenses and expenditures of the company. (para. 52)

Ground 6

6. The learned Judge erred in law when she made a finding that breaches (d), (e) and (f) in paragraph [11] of the submissions are irrelevant in the case before the court and that the appellant does not have locus standi in respect of these issues.(para.53)

Ground 7

7. The learned Judge erred in law when she concluded that the appellant has failed to prove his case on a balance of probabilities as required by law and dismissed the appellant's plaint. (para 54)".

THE PLEADING

4. The precise amount claimed by the Appellant for loss and damage is 410,000 rupees with respect to the matters alleged under the head of "Particulars", at paragraph [15] of the plaint. Along with this, the plaint has raised numerous miscellaneous issues.

5. It is undisputed that the Appellant and Respondents are directors and shareholders of DNS Rising Farm (Proprietary) Ltd, which was incorporated on the 19 April 2017, hereinafter referred to as the "Company". It is also undisputed that the Appellant owns forty-four percent of the shares, the First Respondent owns forty six percent of the shares, and the Second Respondent owns ten percent of the shares, of the Company. It is also undisputed that an agreement was signed by all parties on the 31 March 2017, hereinafter referred to as the "Agreement", before the incorporation of the Company. The Agreement stated how the business was to be operated and the share holding of each party in the Company. The Agreement is reproduced at paragraph [19] below.

6. It is averred in the plaint that clause 1 of the Agreement required the Appellant to invest 500,000 rupees in the Company. The Appellant has invested 606,137 rupees to date, as follows —

"a. House rent for 7 workers for 10 months (from September 2017 to June 2018) SCR 120,000

b. Transport (Bus fare) for 7 workers from February 2018 – July 2018 SCR 34,000

c. Payment of salary for 7 workers on an average for 3 months – SCR 107,137

d. Construction of vegetable sales centre (shop) - SCR 120,000

e. GOP fees, air tickets, and other costs for 7 workers - SCR 90,000

f. Farm excavation work - SCR 30,000

g. Farm expenditure (investment) - SCR 55,000

h. Cash paid to defendant 1 and defendant 2 – SCR 20,000

i. Expenditure for workers' accommodation, furniture, beds, mattresses, fans, bed sheets, kitchen equipment, refrigerator, cooking utensils, etc. – SCR 30,000 ".

7. Clause 3 of the Agreement stated that the Company must open a bank account into which shall be deposited all proceeds from the sale of vegetables, and that transactions must be made through cheques, and cash withdrawals were not allowed.

8. At paragraph [8] of the plaint, the Appellant averred that, in February 2018, they started growing different vegetables, fruits and other items on the farm. By the end of March 2018, the farm was in full production and selling the produce under the supervision of the Respondents. The Appellant alleged that the Respondents took all the proceeds of sale for themselves. At paragraph [9] of the plaint, the Appellant averred that despite repeated requests, the Respondents failed, refused and neglected to open a bank account and deposit the proceeds of sale.

9. At paragraph [10] of the plaint, it is averred that the Respondents took an average of 60,000 to 70,000 rupees per month from the proceeds of sale between February 2018 and September 2018 in the amount of 450,000 to 500,000 rupees over the mentioned months.

10. The Appellant claimed to have invested around 120,000 rupees in constructing a sale centre at the farm, which started operating in September 2018. According to the claim, the

vegetable sale centre has been generating sales of approximately 3,000 to 4,000 rupees daily since its opening. However, it is alleged that the Respondents have collected these daily proceeds of sale without paying the Appellant his rightful share (at paragraph [11] of the plaint). It is alleged that more than one thousand cassava plants were planted in May 2018 and will mature by January 2019, with an expected revenue of approximately 200,000 rupees. The Appellant also averred that the Respondents failed, refused, or neglected to pay the workers' salaries and other employment benefits.

11. It is alleged that the Respondents are liable for loss and damage suffered by the Appellant particularised as follows —

> "a. 44% of the sales proceeds of SCR 500,000 for eight months from February 2018 to September 2018
>
> b. 44% of sale proceeds of the daily sale of SCR 3,000 at the vegetable sales centre from October 2018 till 17 December 2018 (78 days)
>
> c. 44% share of SCR 200,000 from expected sale proceeds from cassava crops
>
> The total of which amounts to SCR 410,000. "

12. The Appellant prayed the trial Court to give judgment in his favour in the sum of 410,000 rupees with interest and costs.

13. The Respondents filed a joint defence on the 2 October 2019. The Respondents admitted that there was an agreement between the Appellant and themselves to incorporate a company, and that they had agreed on how the business would operate and the shares would be allocated. They also admitted that the Company was incorporated on the 19 April 2017, and that the Appellant was required to invest 500,000 rupees as per clause 1 of the Agreement.

14. The Respondents denied the claims made at paragraphs [8] and [9] of the plaint. In reply, they averred that the farm was already in operation when the Company was incorporated.

The Company had started the process of opening a bank account, but it was stopped due to allegations of the Appellant's involvement in human trafficking.

15. The Respondents denied the claims at paragraph [10] of the plaint. In reply, they averred that the Appellant was responsible for collecting the proceeds of sale, and that the amount that the Appellant had invested in the Company was not known to them. Furthermore, the Respondents claimed that they purchased the building materials with their funds, and that the Second Respondent carried out the carpentry and masonry work.

16. At paragraph [6] of the defence, the Respondents denied the expectation of cassava proceeds due to the abandonment of the plantation when the Appellant was accused of human trafficking, and the workers stopped working.

17. At paragraph [7] of the defence, the Respondents deny failing, refusing, or neglecting to pay the workers' salaries and other employment benefits. They claimed that the Appellant collected the proceeds from the sale of vegetables and was responsible for paying the workers. The Respondents also claimed that the Appellant borrowed money from the expatriate workers and refused to repay them. As a result, the Respondents had to pay the workers for the period between August 2018 and October 2018.

18. The Respondents disputed that the Appellant incurred a loss and damages of 410,000 rupees. The Respondents claimed that no documentary evidence supports the claim of the Appellant for loss and damages. They further stated that the record of sale was in the possession of the Appellant. Based on the averments in their defence, the Respondents prayed the trial Court to dismiss the plaint with costs.

THE EVIDENCE

19. With respect to the evidence, it is enough to reproduce the Agreement, Exhibit P2 —

"**AGREEMENT**

AN AGREEMENT made on this 31st day of March 2017.

BETWEEN

Serge Larue, Dave Dine and Nizam Uddin Ahmed, herein referred to collectively as the parties and individually by their names.

AND

WHEREAS the parties have agreed to incorporate a company under the Companies Act 1972 named **DNS RISING FARM (PROPRIETARY) LIMITED**, hereinafter referred to as "the company" for the purposes of operating a farm "hereinafter referred to as the business" situated at Grand Anse, Mahe, and to conduct the business of agriculture generally;

AND WHEREAS Nizam Uddin Ahmed, a Bangladeshi national who agrees to provide capital and expertise to the company, including the recruit of foreign workers to work on the farm, build temporary accommodation for foreign workers to work the farm, build temporary accommodation for foreign workers, do excavation works and provide irrigation pipelines.

AND WHEREAS Serge Larue and Dave Dine jointly and severally shall contribute the sum of SR516,387/- to the business.

NOW THEREFORE the parties agree as follows:

1. **Nizam Uddin Ahmed**, shall provide working capital for two months, provide for excavation work in the sum of approximately SCR30,000, provide irrigation pipelines to the costs of approximately SR30,000, pay for 6-7 expatriate workers including all costs and including GOP fees and provide for the costs of building for office accommodation for the said workers. Their investment shall not be less than SCR500,000.

2. **Serge Larue and Dave Dine** shall and have already contributed, jointly and severally, the sum of SR516, 387 to the business which sum has already been injected therein. The sum is made of loans borrowed by them, the repayment of SR9773/- monthly shall be done by the business.

3. The company shall open a bank account to be operated by two signatories, to be agreed among the parties, at any given time. All moneys derived from the activities of the business shall be deposited in the said bank account and in no other account whatsoever nor kept in the possession of any of the parties. All payouts from the account shall be done by cheques, no cash withdrawals shall be permissible.

4. At the end of every month, after expenditure, all proceeds collected during the

month shall be distributed amongst the parties in the proportion of their share holding in the company PROVIDED ALWAYS that a sum equivalent to one month's expenditure shall be kept in the account.

5. All future investment or emergency investment shall be met by the shareholders in proportion of their share holding in the company PROVIDED ALWAYS that a sum equivalent to one month's expenditure shall be kept in the account.

6. The company shall set production targets and the parties shall use their best endeavours to ensure that the said targets are met, the parties hereby give, individually undertakings accordingly.

7. This agreement shall be valid for a period of seven years from the date hereof and shall be extended, by mutual consent of the parties, for any further period(s) thereafter.

8. This agreement may be terminated by each party by giving the other parties 6 months notice.

9. Proper accounting records shall be governed by the laws of Seychelles.

IN WITNESS WHEREOF the parties have signed this agreement in two originals on the date, month and year abovementioned. […]."

DISCUSSION

20. The issue that arises for determination of the Court is whether or not the case may proceed between the Appellant and the First Respondent on the death of the Second Respondent. The Second Respondent passed on after the filing of the notice of appeal.

21. At a sitting of this Court on the 30 November 2023, the Court instructed both Counsel to prepare submissions regarding this point, namely whether or not the Appellant's action is misconceived and bad in law. Concerning this issue, it is noted that Counsel for the Appellant and the First Respondent could have provided more helpful material for this Court to rely on.

22. With respect to this issue, Counsel for the Appellant submitted inter alia that the action is brought on breach of the Agreement [Exhibit P2]. Since the Appellant, through Counsel,

is claiming that the action is brought on the Agreement [Exhibit P2], the Appellant should *inter alia* name the parties so as to identify the Agreement.

23. Ex facie the Agreement [Exhibit P2], the parties are Serge Larue, Dave Dine and Nizam Uddin Ahmed. Paragraph [2] of the plaint averred, "**[t]he Plaintiff avers that before the incorporation of the company on 31st day of March 2017, an Agreement (Memorandum Of Understanding) was signed by the Plaintiff, the 1st Defendant and the 2nd Defendant, whereby the parties agreed how the business will be operated and the shareholding of each party in the company**". Additionally, paragraph [1] of the plaint averred that the "**Plaintiff and the 1st Defendant and 2nd Defendant are all Directors and shareholders of DNS RISING FARM (PTY) LTD**".

24. Upon reviewing the issue, it is noted that the parties stated at the head of the plaint are —

> **"Nizam Uddin Ahmed Director DNS RISING FARM (PTY) LTD OF Victoria, Mahe, Seychelles ----------Plaintiff;**
>
> **Vs**
>
> **Mr Serge Larue Director DNS RISING FARM (PTY) LTD OF Victoria, Mahe, Seychelles ---------- 1st Defendant**
>
> **Mr Dave Dine Director DNS RISING FARM (PTY) LTD OF Victoria, Mahe, Seychelles ---------- 2nd Defendant."**

25. During the hearing of the appeal, we asked Counsel for the Appellant to explain what the plaint was seeking to convey in the light of the observations above. Counsel for the Appellant submitted *inter alia* that the case did not involve the Company, despite the averments contained in the plaint. He stated that the Appellant had filed this action of breach of contract in a personal capacity for loss and damage against the Respondents in their personal capacity. When asked to clarify this point, Counsel for the Appellant failed to provide any material on which the Court could rely on.

26. On the other hand, Counsel for the First Respondent suggested in her submissions that the Agreement could be a pre-incorporation contract, and that this case concerns the Company.

However, this was the extent of the assistance that Counsel for the First Respondent could offer the Court.

27. With due respect to Counsel for the Appellant, we state that we are unable to comprehend the case presented by the Appellant without proper guidance and submissions from Counsel for the Appellant. The Appellant's plaint is difficult to comprehend, and, hence, it is difficult to understand what the cause of action is in this case. We refrain from making any further comments on the pleadings in this case. Consequently, the only conclusion we can reach is that the Appellant's action is misconceived and bad in law, therefore we strike out the Appellant's plaint.

28. In view of the findings we have reached in this case, the only conclusion we can reach is that the action is either defective or abated.

DECISION

29. We make an order dismissing the appeal as a whole as having abated or as being defective.

30. The order of the trial Judge dismissing the plaint is upheld.

31. We make no order as to costs.

F. Robinson, JA

I concur

Twomey-Woods, JA

I concur

Dr. L. Tibatemwa-Ekirikubinza, JA

Signed, dated and delivered at Ile du Port on 18 December 2023.