

**Swiss Reinsurance Company Ltd v General Insurance Company of Seychelles
(1999) SLR 117**

Antony DERJACQUES for the plaintiff
Pesi PARDIWALLA for the defendant

Judgment delivered on 4 May 1999 by:

BWANA J: The plaintiff is an insurance and reinsurance firm in Switzerland. The defendant is an insurance company incorporated in Seychelles. Both parties entered into numerous insurance contracts and policies agreed upon for fees to be paid by the defendant. The plaintiff formerly carried out this obligation for some time.

incorporated in Zurich, Switzerland and registered in Seychelles. The plaintiff entered into insurance contracts with the plaintiff. The plaintiff formerly carried out this obligation for some time.

It is averred by both parties that on 15 March 1995, the plaintiff acknowledged a debt signed by Mr Etzin, exhibit P9 - agreed to pay the plaintiff the accumulated amount and interest in monthly instalments of R15,000 from 31 March 1995. It is admitted by both parties that thereafter the defendant agreed to pay the plaintiff the accumulated amount and interest in monthly instalments only, each of R15,000, then stopped. The said agreement was entered into by Mr Etzin in terms of art 1326 of the Civil Code of Seychelles.

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Art 1326(1):

A note or promise under private signature whereby one party undertakes an obligation towards another to pay him a sum of money or something of value shall be written in full, in the presence of a person who signs it; or at least it shall be necessary that the signature he adds in his own hand the formula "valid for" followed by the amount in letters or the quantity of

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It is averred that Mr Etzin complied with the requirements of art 1326(1) as shown in exhibit P9 by adding the following words in his own handwriting: "valid in the sum of nine hundred sixty thousand rupees, seven hundred twelve cents and 7 cents". He then signed over the title: "DEBTOR, GENERAL INSURANCE COMPANY OF THE SEYCHELLES hereby represented by its Director, Mr Bernard Etzin".

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In his amended defence as well as in his evidence, Mr Etzin admitted that he signed that document for the plaintiff. He stated that he signed under extreme duress and pressure from Mr Derjacques, who cited his letters (exhibit P3, 6, 7 and 8) wherein he states that "I signed under extreme duress" to support that averment. However, in his submission, Mr Etzin denied that allegation, citing the following articles of the Civil Code of Seychelles: 111 and 1112.

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It was further agreed upon by the parties (as per exhibit P9) that if any of the instalments were not paid within time or the date it falls due, the said Swiss Reinsurance Company would have the rights to immediately bring an action before the Seychelles Supreme Court for the entire amount. Further, it is stated in exhibit P9 that

any single installment unpaid shall incur an interest at 10% per annum which shall also fall due for payment within this expressly agreed period with no extension of time whatsoever. As stated above, the defendant made only two payments each of R15,000. Because of the defendant's failure to honour his commitment as contained in exhibit P9, this action was filed on 14 September 1995 whereby the plaintiff prays for a total sum of R960,712.147 minus R30,000 that is paid already, plus interest at 10% per annum and costs.

The following issues are important for the determination of this suit-

1. Whether or not the suit is prescribed;
2. Whether or not Mr Etzin signed exhibit P9 under duress;
3. Whether or not Mr Etzin alone could bind the defendant company in his dealings with the plaintiff; and
4. The exact amount of money owed.

In so far as the issue of prescription is concerned, it is the defence case that the alleged debt became prescribed in 1989 and cannot be reactivated by an acknowledgment of debt in 1995. Between 1981 and 1995, it is admitted that the parties did not carry out any meaningful business due to changes that had taken place in Seychelles, introduced by the Government, concerning the insurance business. The defence therefore argues that the plaintiff should have taken Court action within five years, in terms of art 2271 of the Code. The said article states, inter alia:

Art 227(1):

All rights of action shall be subject to prescription after a period of five years except as provided in arts 2262 and 2265 of this Code.

The said articles 2262 and 2265 are not relevant in the instant case. The main issue in this case is not the lapse of time between 1981 and 1995. Rather, it is the failure, on the part of the defendant, to honour the acknowledgement of debt as per exhibit P9. The cause of action arises from the day Mr Etzin signed that exhibit P9, that is, 15 March 1995. His failure to honour that obligation led to the filing of this suit on 14 September 1995. Therefore, it cannot be successfully argued that this suit is prescribed.

The next issue for consideration is whether or not Mr Etzin was under duress when he signed exhibit P9. I must state at the outset that the format of exhibit P9 is within the prescribed requirements of art 1326(1) supra. In his letter, Mr Etzin makes reference to matters such as –

1. "When I received summons to appear in Court in November issued by Mr Derjacques, I became so depressed that I have simply not been able to function as a normal person" (exhibit P3) (emphasis

mine). It must be noted however that the summons referred to were issued well after the 15 March 1995 signing of exhibit P9. Therefore such summons are irrelevant to the issue under discussion.

2. "However, faced with an impending Court action (which I took as a pistol aimed at my head) I had very little option but to go along with the pressure exerted on me" (exhibit P6). This letter is written on the same day - March 1995 - after signing exhibit P9.
3. "I am saying here in order to have a meaningful discussion notwithstanding what I signed under extreme duress" (exhibit P7). This letter was written one year after exhibit P9.
4. In exhibit P8, Mr Etzin blames the plaintiff for "raping him financially" while it continues to trade with SACOS. No direct mention of duress in connection with the signing of exhibit P9.

In his evidence before this Court, Mr Etzin, aged 67 at the time, suggested that the acknowledgment of debt was obtained through duress. He stated in cross-examination:

When I walked into your office you had a piece of paper that said Seychelles Government... was the receipt. You put that on the table, you said this morning we filed a suit against you, just out of blue. And then produced the acknowledgment which I have never had a chance to read and you told me to sign right there and then I signed there and then (emphasis mine)

However, Mr Etzin's evidence shows elsewhere that there had been "discussions" before signing. He had discussed with both Mr Derjacques (for the payment of R15,000 in installments) and in the presence of both Mr Derjacques and Mr Mumenthaler. This is reflected in exhibit P6 wherein he states:

This afternoon I had a meeting with your locally appointed lawyer and your travelling representative, Mr Jan P Mumenthaler when the meeting commenced this afternoon. I was shown proof that your lawyer had commenced a Court action At no point did I deny responsibility for this debt and the main point at issue was to arrive at a formulae which had been agreed, in correspondence. However faced with an impending Court action I had very little option. (emphasis mine)

There is therefore no threat to his person or property. He only considers the said "piece of paper" (summons) and the words by Mr Derjacques (waving the paper) that this morning I have filed a suit against you to be duress. I consider this not to be so, in terms of art 1112 of the Civil Code, which states:

There is duress when it is of a kind to impress a reasonable person and

put him in fear of substantial harm in respect of his person or property (emphasis mine).

There is no evidence of any form of harm to his property. As to his person, I do not find one, be it substantial or in any other form. Mr Etzin tried to impress upon the Court that his skin disease is a result of that duress(!). There was, however, no medical proof of that. Furthermore, my impression of Mr Etzin is that of an intelligent, stable man and outstanding businessman, very knowledgeable of many issues. He could have not, therefore, been put under pressure or duress by a mere presentation of a Court document/summons or words that a case has been filed against him in Court. He admits to have had other four cases in Court around that time (including CS 7/87; 160/95; another against Timbertec - to mention some). So, he was not a newcomer to Court proceedings. A mere presentation by a lawyer and in the presence of another person, could not, it is my considered view, have put Mr Etzin in fear of substantial harm, as required by the law.

In addition to the foregoing, Mr Etzin admitted in cross-examination that he signed exhibit P9 in good faith. He stated:

Q: When you signed the acknowledgment of debt, it is stated clearly there: I Bernard Jacob Etzin, Director of General Insurance Company of Seychelles

A. Yes.

Q. When you signed the document, did you sign it in good faith as an honest man?

A. Yes.

The second part of art 1112 states:

With regard to this matter, the age and condition of a person shall be taken into account in the sense that the wrongdoer must take the victim as he finds him.

I have stated above that together with his age of 67, Mr Etzin seems to be stable, intelligent and an outstanding businessman. I am of the view that mere presentation of a Court case being filed against him would have not amounted to duress, his age and condition at the time notwithstanding.

It is equally important to take note of the provisions of art 1113-1 of the Code, which states:

If the duress consists of a threat to do what a person is lawfully entitled to do the contract shall not be null, unless the promise obtained by the threat

is irrelevant to that threat or unless the promise obtained is excessive having regard to the nature of the offer. (emphasis mine)

It is my view therefore that even if there was duress - which I find to be absent - then it was legitimate in terms of art 1113-1 to enable the defendant meet his obligations to the plaintiff. However, Mr Pardiwalla seems to rely on the second limb of the article by arguing that the sum claimed is excessive. He shows that the sum owed is only R320,000 but not over R900,000 as stated in exhibit P9.

The sum of R320,000 was owed in 1981 when the defendant company "went out of business" (exhibit P6). How subsequent negotiations/discussions "for a better formula of repayment" that sum had arisen to R600,000 (if the defendant would pay R50000 per month) and R900,000 plus (if as it were agreed - the defendant paid R15,000 per month). The increase in the amount payable clearly takes into consideration interest and the period it would take. Thus, R600,000 was to be payable within one year (Exh P7) and SR900,000 plus, was to be payable up to the year 2004 (Exh P8). Mr Etzin himself wrote in Exh P8:

If you will speak with Mr. Mumenthaler, he will confirm to you that the sum of circa 900,000 rupees includes interest charges till the year 2004.

The foregoing therefore shows the willingness and understanding reached by the parties for the settlement of the debt as signed in exhibit P9. There is thus an absence of duress, pursuant to the second part of art 1113-1 (supra).

All in all, the above discourse taken into consideration I am of the view that Mr Etzin was not under duress or pressure when signing exhibit P9 - the acknowledgment of debt. His subsequent reference to duress may be said to be an afterthought.

I will now consider whether Mr Etzin alone as director of the defendant company could bind it in his dealings with the plaintiff. It should be borne in mind at the outset that all the transactions between Mr Etzin and the plaintiff company were official. In exhibit P9, Mr Etzin clearly identified himself as the director of the General Insurance Company of Seychelles. Likewise he signed so. His non-use of the title 'director' in his subsequent correspondence (exhibit P6-8) may be said to be, again, an afterthought. In fact in exhibit P6 he refers to himself as ex-chairman of the defendant company. Daniel Bonte - PW4 - who also at one time worked for the defendant company as director, deponed that Mr Etzin was both chairman and director who would "give all directions and instructions". Therefore as director, could he alone bind the company? PW 4 says he could and he did so.

The 1972 Company Law of Seychelles is very elaborate on the issue. I will examine some of its relevant provisions. I am mindful of the general provisoes of section 172(1) (b) that directors have the duty to obtain the authorisation of a general meeting before doing any act or entering any transaction for which the authorisation of the general meeting is required. However, this general and broad provision should be read together

with the provisor to that section thus:

Provided that nothing in this section shall affect the operations of sections 33, 34 and 39 .

The said section 34 empowers directors to act on behalf of the company. It states:

- (1) The directors of a company shall have powers to do all acts on its behalf which are necessary for or incidental to the promotion and carrying on of its business (emphasis mine)

These general powers may be carried out by a single director "without the concurrence of any other director" (s 32(2)) and may even bind the company in those matters specified in the third schedule to the act (s 34(3)). The said schedule refers to implied powers of directors which include:

- (1) To enter into, agree to modification or termination of, perform and accept performance of contracts in the company's name (emphasis mine)
- (2)

In this regard, therefore, it is my view that Mr Etzin alone, could transact business on behalf of the defendant company and bind it without prior authorisation of a general meeting. It is also important to note that there is no evidence of shareholders taking action against Mr Etzin for his dealings with the plaintiff, starting with exhibit P9 and followed by exhibit P6, 7 and 8, pursuant to sections 28 and 165 of the Act. There has been no application for the expulsion of Mr Etzin from the company because of the above dealings (s 28). Nor have there been any steps against him in terms of section 165. To the contrary, there is evidence by Mr Scholl, PW2, that during the material period the plaintiff company continued to correspond with Mr Etzin in his capacity as a legitimate representative of the defendant company. Therefore, Mr Pardiwalla's reliance on sections 50, 51 and 53 of the first schedule to the Act does not affect or change the meaning behind the clear provisions cited above.

It is further evident that in terms of section 33 of the Act, the defendant company did have power (through its directors) to enter into contracts such as the ones between it and the plaintiff, including exhibit P9. Section 33(1) states inter alia-

A company shall have the same capacity to enter into contracts, incur liabilities and may sue or be sued in its corporate name.

- S 33(2) The capacity of a company shall not be limited by any provision of its memorandum or articles as to its objects, powers..... or as to the powers of its directors..... (emphasis mine).

S 33(3) Nothing in this section shall relieve a director or officer of a company from liability....or for entering into transactions unconnected with the promotion or carrying on the company's business (emphasis mine).

Thus, a director who enters into an agreement on behalf of a company binds the said company to the extent of the contents of that agreement. Section 35(2) of the Act states:

A contract made according to this section shall be effectual in law in point of form, and shall bind the company and all other parties thereto (emphasis mine).

In view of these clear provisions of the law and the evidence before this Court, it is apparent that Mr Etzin could carry out transactions on behalf of the defendant company and in so doing the said company became bound by these transactions. In the instant case, he bound the company by his acknowledgment of the debt - exhibit P9. The defendant company is therefore bound by the contents of that document.

Lastly, in so far as the issue of how much money is owed, it is admitted by Mr Etzin in exhibit P8 dated 26 October 1996 that it was the equivalent of GBP40,000. However the figure of R600,000 has also been raised in defence but unsubstantiated. According to exhibit P7, that figure of R600,000 would have been possible if the defendant were prepared to pay R50,000 per month - a sum which was not possible. Mr Etzin wrote on 1 November 1996:

When your representative, Mr Mumenthaler, was here the discussion started off with a request to sign a document to pay R50,000 per month for twelve months. Had I been able to do so, it would have been the end of the whole thing.... Mr Mumenthaler then recalculated and said that he would lower the monthly payment to R15,000 per month which lengthened the life of the agreement and took it up to R900,000 plus (emphasis mine). Signed B ETZIN

Furthermore, in the said exhibit P8 (para 6) Mr Etzin wrote:

"If you will speak with Mr Mumenthaler, he will confirm to you that the sum circa R900,000 includes interest charges till the year 2004. There is also a letter in your files in which he says: "the sooner you pay, the less the amount....."

No doubt the two letters clearly give an indication that Mr Etzin had agreed to the sum of "R900,000 plus " after calculations and discussions with Mr Mumenthaler. It is the same sum which was acknowledged in exhibit P9. Therefore it cannot be successfully denied now.

To sum up, I enter judgment in favour of the plaintiff in the sum of R930,712.147 with interest at 10% per annum from the date of filing of this suit. I also award costs in favour of the plaintiff.

Record: Civil Side No 327 of 1995