

**Public Utilities Corporation v Vista Domar Ltd
(1999) SLR 77**

John RENAUD for the plaintiff
Pesi PARDIWALLA for the defendant

Judgment delivered on 7 June 1999 by:

ALLEEAR CJ: In the present action, the plaintiff, Public Utilities Corporation, popularly known by its acronym PUC, sues the defendant, Vista do Mar Ltd, represented by Bernard Etzin, for a total sum of R183,911.80 with interest at a commercial rate from 1 January 1997 and costs.

The plaint is dated 17 August 1997 but the action was lodged on 26 August 1997 in the Registry of the Supreme Court.

The plaintiff is a public corporation, the sole provider of domestic and industrial water supply and electricity power to the whole of Seychelles. The defendant was at all material times owner of Vista Bay Club Hotel having changed its name from Vista Do Mar Ltd.

It was averred in the amended plaint that during the years 1988 and 1996 the defendant consumed water and electricity and made remittances on its accounts. On 1 May 1997 the defendant was indebted to the plaintiff in the sum of R183,911.80.

It is the plaintiff's case that despite repeated requests to pay the above outstanding sum, the defendant has failed or neglected to do so. Hence the institution of this action and claim for the amount allegedly owed to the plaintiff.

The defendant had on 2 March 1998 requested the plaintiff to provide further and better particulars.

Of paragraph 1 of the plaint the defendant sought the following clarification - "please clarify who was the consumer of water and electricity? The defendant or the hotel."

Of paragraph 2 of the plaint -

- (a) please state whether the defendant consumed water and electricity between the years 1988 to (sic) 1996 or during the years 1988 and 1996.
- (b) please state whether the defendant was invoiced monthly or yearly and in any event please provide details of either monthly or yearly invoices.
- (c) please state if and when water and electricity were disconnected by

the plaintiff.

Of paragraph 3 of the plaint - "please state in what manner the relationship between the plaintiff and the defendant was a commercial one".

The plaintiff acceding to the request for further and better particulars from the defendant filed a reply to request for further and better particulars on 27 March 1998.

- (i) Under paragraph 1 of the plaint - the hotel;
- (ii) Under paragraph 2 of the plaint -
 - (a) The defendant consumed water and electricity from about 1988 until the system (sic) were disconnected in April 1997. The defendant fell default (sic) during the years 1995 and 1996;
 - (b) Monthly;
 - (c) April 1997;
- (iii) Under paragraph 3 of the plaint - Yes.

On 15 June 1998 the defendant filed a statement of defence and raised two points in limine litis.

- (i) In answer to particulars the plaintiff identified "the hotel" as the consumer of the water and electricity. In these circumstances, there is no claim against the defendant company and the action should be struck off.
- (ii) In answer to particulars, the plaintiff stated that the defendant consumed water and electricity from 1988 to 1997, any claim prior to August 1992 is time barred and prescribed by virtue of article 2271 of the Civil Code of Seychelles and that part of the claim should be struck off.

On the merits

- (1) Save for the fact that the plaintiff was a public corporation, the defendant denies paragraph (1) of the plaint.
- (2) The defendant denies paragraph 2 of the plaint and puts the plaintiff to strict proof thereof.
- (3) The defendant denies paragraph 3 of the plaint.
- (4) The defendant denies paragraph 4 of the plaint, wherefore the defendant prays

the honourable Court to dismiss the plaintiff's claim with costs.

The pleas in limine were heard by Justice Bwana who gave his ruling with regard thereto. When this action came up for hearing on 5 May 1999, no new work was being assigned to the said judge as he was about to depart the Republic after the completion of his five year contract.

The pleas in limine litis were recanvassed before me at the Court's request.

I find no merits in the first point raised in limine litis. All that it amounts to is nit picking. It goes without saying that the owner of the hotel could not personally have consumed all the water and electricity supplied to the hotel. However the guests and employees of the hotel did consume the electricity and water supplied. The defendant, as owner of the hotel must therefore be held responsible for the payment of all bills for electricity and water supplies to the hotel. In any event the defendant or someone delegated by him must have applied to the PUC for the supply of the vital source of energy to his hotel.

The second point raised, namely that part of the claim is prescribed, is dealt with in the course of this judgment.

In support of the amount claimed in the plaint, the plaintiff called one witness, namely its Financial Controller, Wingate Mondon. The latter tried to convey to the Court that he was aware of all the accounts of consumers of PUC. He deposed that the defendant was a consumer of electricity and water supplied by the plaintiff until mid-April 1997 when water and electricity supplied to the hotel Vista Bay Club was disconnected for non-payment of sums due on its account.

Mr Mondon explained that there were two water and two electricity meters at the hotel. The first water meter bearing no. 891178628 and the second one no. 88163347. The first electricity meter bore no. 261 and the second one no. 911468. Mr Mondon stated that as at mid-April 1997, in respect of the first water meter, there was an outstanding balance of R22,368.85 owing. With respect to the second water meter there was an outstanding balance of R10,724.30. With respect to the first electricity meter no. 261, there was an outstanding balance of R100,146.85 and in respect of the second electricity meter the outstanding balance was R50,671.80. Penal interest at the rate of 2% per month was charged on the said outstanding balance until mid-April 1997 when supplies of electricity and water were disconnected to the hotel.

The evidence is clear that the defendant who was represented by Bernard Etzin made periodic but irregular payments in respect of its electricity and water bills. Mr Mondon explained that Mr Etzin had, before the said disconnection referred to above had occurred, had a meeting with the Executive Chairman of PUC in order to discuss the problem of non-payment of bills.

The cross-examination of Mr Mondon proceeded on the footing that there existed no contract between the plaintiff and Vista Do Mar for the transaction of supply and

consumption of water and electricity between the plaintiff and the defendant. This is not the case of the defendant as pleaded in his statement of defence.

Mr Mondon clarified that the claim for unpaid bills against the defendant did not go as far back as 1988. He said 1988 was the year that the hotel was connected with water and electricity by the plaintiff corporation. With regard to the claim for unpaid water supplies to the hotel, he said the claim dated back to January is in regard to consumption for water for November 1996 and the payment was received in January 1997.

In respect of the second water meter, namely no. 89178528 the outstanding unpaid amount as at 1997 was R22,368.25.

With regard to the issue of prescription, Mr Pardiwalla put the following questions in cross-examination to Mr. Mondon.

Q: Why does your claim go back to 1988.? You are claiming for electricity consumed in respect of 1988 onwards. Why is that?

A: The claim is not for 1988. What we are saying is that the supplies to the premises was (sic) connected from 1988 onwards until the date that it was disconnected. The claim is for water and electricity consumed during that period.

Q: That is my point. During 1988 and 1997 you are claiming about R150,000, which is the equivalent of four months consumption. That is my point?

A: We are claiming outstanding (amount) as at 1 May 1997, not within that period.

Q: What is this amount? It is in respect of which month and which year?

A: I have got details here, witness refers to document. Before that this witness had stated that the hotel used an average amount of R10,000 worth of water per month and the higher average for electricity was R40,000 per month and the lower average for electricity was R21,000 per month.

At the close of the case for the plaintiff, Mr Pardiwalla indicated to the Court that he would be making a submission of no case to answer. He was duly put to his election. He was advised that should he fail on his submission, he would not be entitled to call evidence. He elected to address the Court on a submission of no case to answer.

Mr Pardiwalla submitted that the present action was supposedly one grounded on contract. He said that as no contract has been specifically pleaded, the Court "should

not allow any evidence to be admitted relating to any contract." In Mr Pardiwalla's view, the plaint disclosed "more an action in the nature of unjust enrichment, i.e., quasi-contract." He said even on that basis the action of the plaintiff should fail because in an action of unjust enrichment the final paragraph of the pleading "should specifically state that one party has been enriched to the detriment of the other." Mr Pardiwalla correctly stated that when one has a cause of action in contract, one is precluded from bringing an action under unjust enrichment.

The second point raised by Mr Pardiwalla was that the plaintiff's action should fail as no documentary evidence has been produced in support of the claim of R183,911.80. Lastly, Mr Pardiwalla said he would rely on the point raised by him in limine.

Mr Renaud, replying to the third point raised by counsel for the defendant, said that the "plaint clearly links the defendant and the hotel particularly in paragraph 1 of the plaint." With regard to the issue of documentary evidence not having been produced, Mr Renaud said that "it was not essential for any documentary evidence to be produced when oral evidence has been adduced in support of the claim from books kept by the corporation." On the question that the pleadings fail to disclose a cause of action grounded on contract, Mr Renaud stated that it was too late for the point to be taken as it was neither raised as a point in limine litis nor in the defence.

Section 71 of the Seychelles Code of Civil Procedure requires the following particulars to be contained in a plaint -

- (a) the name of the Court in which the suit is brought;
- (b) the name, description and place of residence of the plaintiff. (In the present case no address for the plaintiff has been given in the plaint)
- (c) the name, description and place of residence of the defendant, so far as they could be ascertained;
- (d) a plain and concise statement of the circumstances consisting the cause of action and where and when it arose and of the material facts which are necessary to sustain the action;
- (e) a demand of the relief which the plaintiff claims;
- (f) if the plaintiff has allowed a set-off or has relinquished a portion of his claim, the amount so allowed or relinquished.

Section 72 provides as follows:

If the plaintiff seeks the recovery of money, the plaint must state the precise amount, so far as the case admits.

Section 73 states:

If the plaintiff sues, or the defendant or any of the defendants is sued in a representative character, the plaintiff must state in what capacity the plaintiff or defendant sues or is sued.

Section 74 states:

If the plaintiff sues upon a document other than a document transcribed in the Mortgage of Seychelles, he shall annex a copy thereof to his plaint. If he relies on any other documents (whether in his possession or power or not) as evidence in support of his claim, he shall annex a list thereof to his plaint and shall state where the same may be seen a reasonable time before the hearing.

Section 75 states:

The statement of defence must contain a clear and distinct statement of the material facts on which the defendant relies to meet the claim. A mere general denial of the plaintiff's claim is not sufficient. Material facts alleged in the plaint must be distinctly denied or they will be taken to be admitted.

Section 77 states:

If the defendant intends to produce any documentary evidence, he shall annex a list thereof to his statement of defence and shall state where the same may be seen a reasonable time before the hearing.

When one looks at the plaint in the present action one cannot fail to discern that it is a piece of very loose drafting. No contract either oral or written is specifically pleaded although by implication it can be said that the action is grounded on contract.

It is a procedural requirement that each party must state the whole of its case in the pleadings. The material facts on which a party intends to rely must be pleaded. If a defence is not raised in the pleadings, it may not be considered. In civil litigation each party must state its whole case and must plead all facts on which he intends to rely. Otherwise he cannot at the trial give evidence of facts not pleaded. For instance, the defence of an act by a third party in a motor vehicle collision case not having been pleaded, could not be considered: *Tirant v Banane* (1977) SLR 219.

There is a need for the plaintiff to establish his case according to the pleadings. In *Charlie v Françoise* 1995 SCAR, the facts were that the respondent had based her case against the appellant at the trial on the averment that she had a half share in the house in which they had cohabited by way of her own contribution. All that she sought was the entire property or the equivalent in money of half the share. The judge found that there was no property to share and that the respondent had no material status on which to found a claim for property settlement. He went on, however, to make the award on the

basis of an action for unjust enrichment. Held, reversing the decision that the system of civil justice does not permit the Court to formulate a case for a party after listening to the evidence and to grant relief not sought in the pleadings.

In the Mauritian case of *Ramjan v Kaudeer* 1981 MR 411, it was held -

Where the pleadings aver a "faute" and the action for damages is thus based on article 1382 Code Nap., the Court cannot go outside the pleadings and award damages under article 1384-1 Code Nap., on the ground of "responsabilité du fait de la chose."

In *Alick v Central Motors Ltd* 1981 MR 388, it was held:-

"Even if the pleadings are vague, if an issue is fully canvassed without any objection before a District Court, the parties are entitled to adjudication on that issue."

Where an allegation of material fact is not specifically denied in the statement of defence it will be taken as admitted. In a claim for damages for defamation, the appellant had averred that he was a graduate, a material fact which was not specifically denied by the respondent, the trial judge stated that the appellant was not a graduate. On appeal it was held that as the respondents in their pleadings had not denied the allegation they had put the appellant to the proof of the averment which should have been taken to be proved: *Mullery v Stevenson Delhomme* (1936-1955) SLR 283.

In the case *Bessin v Attorney-General* (1936-1955) SLR 208 the facts were that the appellant had leased an island from the respondent. During the course of the lease and with the written consent of the respondent, the appellant had developed and improved the island. At the expiry of the lease, the appellant had instituted proceedings to recover compensation for the improvements to the island. The respondent had brought an application under section 97 of the Civil Code of Procedure for the action to be dismissed on the basis that it discloses no cause of action.

The trial judge had called for the lease and basing himself on a clause in it which precluded the appellant from claiming indemnity, it dismissed the action. It was held:

The Court hearing such an application must limit itself to the allegations contained in the pleadings and no extraneous evidence was admissible to support the application. When the non-existence of a reasonable cause of action or answer was not beyond doubt ex facie the pleadings, the pleadings ought not be struck out.

The motion for striking out pleadings under section 97 of the Code of Civil Procedure has to be decided solely on the pleadings, and when the non-existence of a reasonable cause of action is not beyond doubt ex facie the pleadings, the pleadings ought not to be struck out. (See *Albest v Stravens* (1976) SLR 158 and *Oceangate Law Centre v Monchugy* (1984) SLR 111).

In the present case it cannot be said that ex facie the plaint a reasonable cause of action is not disclosed. Although as stated, the plaint is far from perfectly drafted, it however discloses a cause of action in contract.

When a technical or legal objection is taken in relation to a plaint or statement of defence, this must be pleaded specifically and raised as a preliminary point of objection and not after the case for the plaintiff or defence is closed. The statement of defence never raised the issue that the plaint disclosed no cause of action. It did not raise the point that the action is not grounded on contract. Paragraph 1 of the statement of defence consists of a general denial of paragraph 1 of the plaint save for the fact that the plaintiff was a public corporation.

Paragraphs 3 and 4 of the statement of defence are general denials of paragraph 3 and 4 of the plaint and therefore deemed to have been admitted in law on the basis of the cases cited above in the judgment.

In fairness it cannot be said that the plaint discloses no cause of action. It can reasonably be deduced from a reading of the plaint that the plaintiff supplied electricity and water to the defendant which consumed same over a period of time. The defendant failed to pay for part of the power and water consumed.

The only witness for the plaintiff was allowed to refer to the financial book of PUC. It is the duty of counsel to be more attentive and to make proper objections at the right time. Once evidence has been admitted in a civil case without objection, same cannot be ignored for the purposes of judgment unless it can be said that the said evidence is irrelevant or immaterial or not based on the pleadings.

I find there is no merit at all in the pleas in limine litis raised. It is clear that Vista Do Mar Ltd Co which owned the hotel must be responsible for water consumed by those who run the hotel for the benefit of the company. Secondly, I do not think that the debt claimed is in any way limited or prescribed by the Limitation Act. The debt dates back to 1996 and conforms with article 2271 of the Civil Code of Seychelles.

The defendant having opted, after being put to election to make a submission of no case to answer at the end of the plaintiff's case, is precluded from adducing any evidence.

On the evidence adduced by the plaintiff which was consistent with the averments in the plaint, I find that the sum of R183,911.80 is owed to the plaintiff by the defendant. Judgment is accordingly entered in favour of the plaintiff in the sum claimed with costs. This was a transaction of a commercial nature between a corporation and a company. It was not in the nature of a private transaction; therefore commercial rate of interest ought to be paid from the date of the filing of the plaint.

Record: Civil Side No 294 of 1997