

**IN THE SUPREME COURT OF SEYCHELLES**

MRS BERYL PAYET

**PLAINTIFF****VERSUS**

MR GUYNEMER CORGAT

**DEFENDANT**Civil Side No 137 of2004

Mr. P. Boulle for the Plaintiff

Mr. P. Pardiwalla for the Defendant

**JUDGMENT****Perera CJ**

The plaintiff seeks to recover Rs.145,372 as damages together with Rs.7,948 per month from the date of judgment, from the defendant, on the basis of an alleged oral agreement made between them around February 2002 to form a partnership. It is averred that the said agreement was to set up and operate a farm under the name "*Freshway Farm*", to rear pigs and poultry. It is further averred that, by virtue of the said agreement, the parties agreed that the plaintiff would be entitled to 40% and the defendant to 60% of the annual profits of the business. In the alternative, the plaintiff seeks the appointment of a Commissioner to examine the accounts of the alleged partnership, and for the payment of her share. It must initially be noted that although "*damages*" have been claimed, the plaint is based on a claim for loss of profit in a sum of Rs95,372 and moral damages in a sum of Rs50,000, making a total of Rs.145,372.

Be that as it may, it is not in dispute that the plaintiff had a farm known as “Westway Farm” while the defendant had a butchery business called “Fresh Cut”. In a letter dated 30<sup>th</sup> January 2002 to the Ministry of Agriculture & Marine Resources, the plaintiff applied for an agricultural plot of land, which was later identified as Parcels C. 4778 and C. 4779 at Val D’endore. The reasons for the proposed project given by her were –

- “(i) I want to reduce the pollution level of fattening activity presently at my operations at Grand Anse Mahe by moving that activity to the desert area;
- (ii) *I want to contribute to a reduction in the wide variation of pork prices by entering into a joint venture with a butcher”.*

Although it is stated in that letter that a project proposal for the said pig fattening activity was attached, the plaintiff in her testimony stated it was not attached, but was sent subsequently.

The letter of 30<sup>th</sup> January 2002(P1) was replied by Mr. H. Humphrey, Field Officer of the Ministry, to “Fresh Way Farm” C/O Mrs Beryl Payet & Mr Guynemer Corgat” in a letter dated 27<sup>th</sup> March 2002 (P2), recommending the lease of Parcels C. 4778 and C 4779 to them. The Ministry of Land Use and Habitat was advised to prepare the lease agreement. Mr Humphrey (Pw3) in his testimony stated that he saw the name “FreshWay Farm” on some document, but admitted that that name was registered in the business names register only on 18<sup>th</sup> October 2002, and that too under the sole name of the defendant. He further stated that Mr Daniel Payet, the

husband of the plaintiff was also working with him in the same Ministry, and that he went with him on the site visits to locate a land for this project. The plaintiff stated that her husband dealt with the progress of the project as she could not do so due to her pregnancy. The plaintiff further testified that in a letter dated 20<sup>th</sup> March 2002, the Ministry was to prepare the lease in her name, but by a subsequent letter dated 22<sup>nd</sup> April 2002 (P3) the Ministry recommended that instead of one name, Parcels C 4778 and C 4779 be leased both to her and the defendant jointly. The work on the project commenced with the construction of a road. Thereafter landscaping was done, and a broiler house was partially constructed. However she received a letter dated 24<sup>th</sup> December 2003 (P7) from the Ministry. In that letter, the Ministry informed her that the defendant had requested that the offer of the two Parcels of land to both of them be revised for the following reasons-

- “1. That the performance of Mr. D. Payet (proposed Manager) has been below standard, and that he was no longer working for Fresh Way Farm.
2. *That her financial commitment to the project has been nil.*

*That Mr Corgat, in the name of Fresh Way Farm, had been the sole investor on the farm with an investment of Rs. 1.7 million*

*That Mr Corgat had guaranteed his personal property and existing business to the D.B.S for funding the project.”*

The defendant had therefore requested that it be considered that the plaintiff no longer formed part of FreshWay Farm and that she had no rights on the land. Accordingly, the Ministry informed her that upon monitoring the development and the investment undertaken, they were satisfied with the work carried out by Mr Corgat, and as the farm was registered in the name of “*FreshWay Farm*” owned by Mr

Corgat, they had no alternative but to revoke the letter of 27<sup>th</sup> March 2002 and to prepare a lease agreement in the name of "*FreshWay Farm owned by Mr Corgat*". The Ministry however informed the plaintiff that if she wanted a plot of land for agricultural development, they would assist her. The plaintiff reacted to that letter by sending a letter (P8) through her lawyer requesting a statement of accounts up to 31<sup>st</sup> December 2003. A further letter dated 6<sup>th</sup> February 2004(P9) was sent to the Ministry challenging their right to interfere with a partnership on the basis of incorrect information supplied by one partner, and therefore requesting that the lease be in joint names as agreed earlier. By letter dated 9<sup>th</sup> March 2004 (P10) the Ministry deferred the processing of the lease until the parties settled their dispute.

The plaintiff further testified that in the project memorandum (P5) sent with the application of 27<sup>th</sup> March 2002 (P2), the name of the partnership was to be "*Fresh Way Farm*" as that was the intention of the parties, and it was for that purpose that the lease was to be in joint names. When the plaintiff sought to give oral evidence to prove a partnership, Learned Counsel for the defendant objected on the basis of Article 1834 of the Civil Code. However Counsel for the plaintiff relied on Article 1341 and contended that there was beginning of proof in writing. Upon hearing submissions of both Counsel, this Court, by order dated 20<sup>th</sup> February 2006 ruled that the issue of partnership was not foreign to both parties, and that the averments in paragraphs 5 and 8 of the defence could be considered as judicial admissions of the existence of a partnership between the parties. Consequently, the Court ruled that the plaintiff could testify on matters relating to the establishment of the partnership she was relying on and as to its terms and conditions.

In the said paragraph 5, the defendant has averred that at a meeting with Officials of the Development Bank of Seychelles, (DBS) around April 2002 regarding a loan application to finance the proposed joint venture, he became aware that the plaintiff would make *“no contribution, financial or otherwise to the proposed venture”*, and hence he realized that *“a partnership between himself and the plaintiff was not possible and decided to proceed with the livestock production project on his own”*. Further, in paragraph 8 the defendant had averred *inter alia* that Mr. Payet, the husband of the plaintiff was employed as Farm Manager at FreshWay Farm from February to September 2003 and that he left on his own accord. It is also averred that the farm was not designed by Mr. Payet, as averred by the plaintiff, but by one Mr. Jean Claude Waye Hive, on payment.

The interlocutory ruling made in the course of a hearing should be considered in the context it was made. The issue before the Court at the time of making the ruling on 20<sup>th</sup> February 2006 was the admissibility of oral evidence of the plaintiff who was seeking to establish the formation of an unwritten partnership and its terms. Such an oral agreement was pleaded in the plaint, but the defendant had denied that and averred that he and the plaintiff's husband met and discussed a joint venture of that nature, but no oral or documentary agreement was reached. Hence the Court had necessarily to make a ruling based on the pleadings, as the defendant had not denied that at least some discussions had taken place as regards the joint venture which is the basic subject matter in this case. The oral evidence adduced by the plaintiff subsequent to that ruling should therefore be considered with the subsequent evidence adduced by both parties in the case.

Continuing her evidence, the plaintiff testified that it was decided by the parties to obtain a loan from the D.B.S. to finance the project, and also decided that the defendant would have 60% of the profits of the business, and that she would get 40%. In that respect it was further agreed that the defendant would contribute 1/3 of the total capital and that the balance 2/3 was to be from the DBS loan. The plaintiff also testified that she did not have any direct or physical involvement in the project, and that she left it to her husband who was conversant in the agricultural field. He was therefore to be involved in the construction and the daily management of the farm. As regards the commencement of the project, she testified that initially the road was constructed, and thereafter a broiler until was also constructed. In the next phase, the piggery was semi constructed when the dispute arose.

On being cross examined the plaintiff stated that she learned about farming, basically from her husband. She met the defendant personally only twice to discuss matters such as the sharing of profits and the nature of the proposed project. Parcels C. 4778 and C. 4779 were first allocated to the "*FreshWay Farm*" C/O the plaintiff and the defendant, with the lease in the sole name of the plaintiff. However subsequently, the Ministry informed that the lease would be in joint names. The plaintiff testified that a portion of the building was constructed outside the allocated land. However it is the case for the defendant that whatever was built was not on Parcels C 4778 and C. 4779, but on Parcel C. 6607 which belonged solely to him. Mr. Hereley Humphrey, (PW3) the Field Officer of the Agricultural Section of the Ministry of Land Use and Natural Resources clarified that the piggery had encroached on an adjoining Government land, and hence that portion was excised and given to the plaintiff as Parcel C. 6607.

As regards the meeting at the DBS, the plaintiff stated that her husband had informed her that certain forms were required to be filled and returned. However that was not done. She stated that part of her contribution towards the partnership was the supervision of the construction work by her husband, who also would be in charge of the day to day running of the business. For those purposes however Mr. Payet was employed as Farm Manager up to February 2004 until he left the farm on his own accord. The present case was filed on 19<sup>th</sup> May 2004. She was unable to state the amount that was applied for from DBS. However she stated that the "Project Memorandum" (P5) was sent to DBS, as well as to the Ministry. This was contested by the defendant. The plaintiff also stated that after her husband ceased to be the farm Manager she did not go to the farm or contact the defendant to ascertain the position of the partnership which she relies on in this case.

Mr. Daniel Payet (Pw2), the husband of the plaintiff testified that he was a Livestock Officer at the Ministry of Agriculture for 23 years, and so he had sufficient experience in that field. He had started a pig farm about 10 years ago jointly with his wife. It was called "WestWay Farm". They supplied the defendant who carried on the business of a butcher under the business name "*Fresh Cut*". They discussed to launch a joint venture with the defendant. As he was still employed with the Ministry, he was able to find a suitable plot of land with the help of Mr. Humphreys. The plans were prepared together with the defendant, but drawn by Mr. Wayne-Hive on the basis of a Japanese System which he had introduced in a modified form to suit local conditions. He left the Government job in February 2003 to manage the farm envisaged in the joint venture. The constructions for the farm commenced in October 2002. The capital was to be financed with a loan of Rs.2.4 million from DBS. The defendant was to be the guarantor and also furnish personal guarantees.

That was the only part the defendant had to play in the partnership, and for that he was to get 60% of the profits and the plaintiff 40%. The construction of the road on the land commenced in August 2002, while he was still in Government service. Thereafter the poultry shed was constructed and the business commenced. The pig sty was partly built. He supervised the work, but the defendant paid for the constructions. He only received a salary of about Rs.4000. Materials were also purchased from abroad by the defendant. He stated that he left the job as farm Manager since he was not satisfied with the way the defendant was treating him. Mr. Payet showed aggressiveness during his cross examination. He stated that he was paid for his services as farm Manager by the "*Fresh Cut Farm*" and not by Mr. Corgat. One of the reasons why he left that job was that. Another reason was that he had not been issued a letter of employment. He left without giving notice of resignation. He clarified that the partnership was with his wife, while he was only an employee. After leaving the job he got in contact with the defendant as regards the position of the partnership. The plaintiff had however testified that no contact was made after her husband left.

As regards the initial discussions, he stated that they were to explore the possibility of a joint venture. However, the identity of "*West Way Farm*" and that business was to be maintained. That farm would continue to supply piglets to the joint venture farm. Mr. Payet admitted that the agreement was for him to help with the establishment of the farm, and to design it and also to identify a suitable land for the project, and to receive a salary for managerial duties.

The DBS wanted 1/3 of the proposed loan by personal contributions, but he refused as the agreement was that the defendant would do so. He denied that the bank

official told him that in such circumstances the DBS would not grant a loan for a joint venture. Although the plaintiff testified that her husband was given applications to fill, he denied receiving any. He also denied that having failed to obtain a loan for a joint venture, the proposed partnership ended, as it was thereafter that he was employed as farm Manager on a salary. He admitted that the DBS loan was granted in the sole name of the defendant. He stated that despite ceasing to be the Manager in October 2003, he continued to supply pigs to the defendant in November and December, but stopped when he got better price from another purchaser. Mr. Payet stated that the Government has stayed the granting of the lease of Parcels C. 4778 and C. 4779 until the Court decided the dispute between the parties.

Mr. Francis Alcindor (Pw4) a Livestock Officer of the Ministry of Agriculture, who was a colleague of Mr. Payet stated that he was aware of the proposed joint venture with Mr. Corgat. He had studied farming techniques in Japan for 5 months, and he advised Mr. Payet on how to set up the farm.

Ms. Patricia Balthide (Pw8) employed in the Land Management Section of the Ministry of Environment as a Field Officer, testified that her main duty was the registration of farmers. She stated that according to the Ministry policy nobody can register two farms under his name or under a farm name. She registered "*FreshWay Farm*". However the registration card is held by Mr. Corgat. She produced a letter dated 23<sup>rd</sup> May 2002 (D1) wherein she informed the Commissioner of Taxes that Mr. Corgat of "*Fresh Way Farm*" was registered as a farmer under registration No 2002008. The defendant was also informed on the same day, regarding the said registration (P14).

Evariste Michel (Pw6), a Co-ordinator at the Seychelles Centre and Marine Research Technology, Marine Park Authority, testified that he came to know the plaintiff in the course of his duties, when she made an application for pig breeding. When he visited the proposed site the defendant was also present. The proposed project was based on a new waste collection system.

Denis Barbe (Pw7) Land Surveyor attached to the Land Survey Department produced the cadastral plans of Parcel C. 4778 and C. 4779. (P15) and the location plan (P16).

The defendant in his testimony stated that he knew Mr. Payet more than his wife, the plaintiff. He and his son are engaged in a partnership called "*Fresh Cut*". The plaintiff and her husband told him that they were going to stop their farming business, so he agreed to buy all their products. He owns a business called "*Fresh Way Farm*" at Val D'endore, where he has broiler chicken, ducks, rabbits and also citrus fruits. He wanted a piece of land and got one from the Government. Mr. Payet discussed a joint venture with him. Mr. & Mrs. Payet met with him only once, regarding pig farming, not poultry. Subsequently he went to the DBS with his Accountant Miss Lionnet and Mr. Payet. Mr. Payet stated that he had nothing to offer as security and left. Hence the bank approved the loan in his sole name. He produced the loan agreement dated 30<sup>th</sup> December 2002 for a sum of Rs.1,700,000 for "the setting up of a livestock unit a Val D'endore, Mahe". The estimated cost of the project was Rs. 2,349,229. The borrowers contribution was Rs. 649,229. The loan was repayable in 120 equal instalments of Rs. 21,998. Security was provided by the defendant by offering a first line charge on property Parcel V. 3249, at Foret Noire which belonged to him and a similar charge on Parcel C. 4778 and C. 4779 pending approval by the Government.

Subsequently the DBS offered a loan of Rs.470,000 on 16<sup>th</sup> April 2004 on the security of a first line charge on Parcel V. 11525 and a second line charge in Parcels V. 11524 and V. 11526, and a pick up. As regards the present location of the Fresh Way Farm, the defendant stated that the farm was on a 10 acre land which was beyond Parcels C. 4778 and C. 4779. He stated that if the plaintiff wanted, he had no objections to her obtaining a lease of those properties from the Government. He denied any oral or written agreement to establish a partnership.

The defendant further testified that Mr. Payet came to the DBS meeting representing the plaintiff, but left when he was asked to offer security. He admitted that he helped in finding the two Parcels of land and constructing the road. But the costs of construction was met by him. He had a poultry farm before starting the pig farm. The project memorandum was drawn by Ms. Geneveive Lionnet. However the loan was granted on the project.

The defendant also produced the salary particulars of Mr. Payet from February 2003 to September 2003 when he was engaged as Manager of Fresh Way Farm.

(D4), The business registration under his sole name, dated 18<sup>th</sup> September 2002 (D5), the Architectural plans (D6), a receipt for Rs9560 paid as planning fees (D7), a receipt for Rs7200 paid to Mr Wayne-Hive for the plan (D8), the invoice for ZAR 84,842.34 for materials imported (D9) and a letter from the Ministry of Finance granting him a trade tax concession (D10).

### **The Law**

Mr. Pardiwalla, Learned Counsel for the defendant invited the Court to re-visit the interlocutory order of 20<sup>th</sup> February 2006 whereby the plaintiff was permitted to adduce oral evidence of the alleged partnership on the basis that the parties were engaged in a commercial transaction as “*merchants*”. Article 1-1 of the commercial code, inter alia defines “*merchants*” as “*persons who in the course of their business, habitually perform acts with the main object being the acquisition of gain*”. It is not in dispute that the plaintiff had a pig breeding farm called “*WestWay Farm*”, and in the course of business sold pigs to the butchery called “*Fresh Cut*”. They were therefore “*merchants*” for purposes of the commercial code. Article 109-1 of the Commercial Code provides 7 Rules by which a sale may be proved. However sub article (2) provides that this article shall be equally applicable to all commercial matters”. One of those Rules is “*by the evidence of witnesses admissible at the discretion of Court.*” That provision provides an exception to Article 1341 of the Civil Code which requires that any matter the value of which exceeds Rs.5000 shall be drawn up by a notary or under private signature. In this respect, Article 1834 of the Civil Code provides that” a partnership agreement must be drawn up in writing when the object exceeds the value of 5000 rupees. Oral evidence shall not be admissible against and beyond the terms of the document of partnership nor as to any terms allegedly agreed before, during or after the drawing up of the document, even if it relates to less than 5000 rupees”. Article 1872 provides that – “*the provisions of the present title shall only apply to commercial partnerships to the extent that they are not contrary to the laws and usages of commerce*”. Hence article 1834 read subject to the exception in Article 1873 of the Civil Code safeguards the provisions contained in Article 109-1 and 2 of the commercial code and permits the proof of the formation of commercial partnerships, and their terms of agreement, by oral evidence of witnesses at the discretion of Court. In these

circumstances, I do not consider it necessary to reconsider the ruling of 20<sup>th</sup> February 2006, which enabled the plaintiff to adduce oral evidence. However, it is open for the Court to now consider the totality of the evidence to determine whether there was indeed a legal partnership formed by the parties and if so, whether the plaintiff could succeed in her claim for profits of such business.

A partnership is a contract whereby two or more persons agree to make a joint contribution for the purpose of sharing any benefit that may result therefrom (*Article 1832 of the Civil Code*) The concept of profit is inherent in a commercial partnership. This is not so in a civil partnership. Article 1838 provides that, “every partner must contribute thereto either money or other property or his work. It is not in dispute that the plaintiff did not contribute any money. The defendant on the other hand was to provide 1/3 of the capital while the balance 2/3 was to be financed by a loan from DBS which had to be repaid by the proposed joint venture. However, according to the evidence in the case it is the defendant who ultimately provided the entire capital with the loan granted to him by the DBS.

The plaintiff did not provide any property as well, save in applying for the allocation of Parcels C. 4778 and C. 4779 by the Government initially in her name, and subsequently, at her request in the joint names with defendant for the proposed project, under the proposed business named “*FreshWay Farm*”. However, consequent to the dispute between the parties, the Ministry had by letter dated 9<sup>th</sup> March 2004 (P10), deferred the processing of the lease until the dispute is resolved. The defendant maintained that the structures have been erected on another Parcel of land C 6607, and that hence he had no objections to Parcels C. 4778 and C. 4779

being leased to the plaintiff. In any event the allocation of those two Parcels alone would be insufficient for the plaintiff to claim that she contributed property. According to the evidence, the proposed partnership did not benefit by that property. The remaining contribution would therefore be, her work.

The defendant testified that it was the plaintiff and her husband who initiated the idea of a joint venture to promote their products. As stated, it was the plaintiff who applied for a suitable land from the Government on lease. The husband of the plaintiff used his influence as an Officer of the Ministry of Agriculture to obtain the allocation of the two lands but the defendant also was consulted regarding the suitability of those lands. He also advised the defendant on technical aspects of the construction of the piggery although the Architectural drawings were drawn by Mr Waye-Hive. The Japanese waste collection system was taught to Mr Payet by Franky Alcindor (Pw4), although Mr. Payet sought to take credit for that. Mr. Payet also assisted in the construction of the road. However it was the defendant who paid for those works. He attended the meeting at the DBS as a representative of the plaintiff, but was not prepared to agree to the plaintiff being a joint borrower.

It is trite law that an agreement to carry on business in future is not a partnership, since to constitute a partnership, an agreement alone is insufficient. The concept of business for gain and the actual carrying of that business in common are the basic ingredients of a partnership to be eligible to claim profits. In the present case, the evidence disclosed that the plaintiff herself did not play an active role in promoting the proposed project save the making of the initial application for land. The plaintiff admitted that it was her husband who had the necessary expertise in the field of farming.

The case of ***Gonzage D'offay v. Alf Barbier (1981) S.L.R. 100*** was somewhat similar to the present case. In that case, "Port Launay Beachcomber" was registered under the business names Registration Act as the certificate of business registration was in the names of the plaintiff and the defendant. There was no written partnership agreement. As in the present case, the plaintiff sought the appointment of a Commissioner to examine the accounts and an order for payment of his share of the profits. The defendant denied the partnership and alleged that the plaintiff at no time contributed financially or otherwise to the business and that hence he was not liable to an accounting. The defendant also pleaded as a matter of law that the absence of a written partnership agreement was fatal to the plaintiff's cause of action, under Article 1834 of the Civil Code. The Court held that –

- (1) *The partnership alleged was in the nature of a commercial partnership.*
- (2) *Under the Commercial Code, a partnership could be oral or in writing, and all relevant evidence whether oral or documentary could be admitted.*
- (3) *In any event oral evidence could be admitted to prove a commercial partnership if there was writing to constitute initial proof.*
- (4) *The certificate of registration of the business name in the names of the partners, (the plaintiff and the defendant) provided initial proof.*

**Wood J**, finding that there was a partnership, stated that –

“There can be no other explanation for Mr. D’offays name appearing on the certificate of registration, and his various activities in negotiating a lease, purchasing of the generator, licencing of the hirecraft” ”fond vert”, taking out policies of insurance the business assets and working in the bar and restaurant.”

He further stated that the defendant was unable to satisfactorily explain those activities on any basis than one of a partnership.

Pursuant to Article 1347, a writing providing initial proof must emanate from a person against whom the claim is made, or from a person whom he represents. Although in the ***D’offay case*** (*supra*) the business registration certificate provided such proof, there is no such writing in the present case emanating from the defendant. The addressing of letters to both names by the Ministry or the possibility that the business name “*FreshWay Farm*” was coined by an amalgamation of the names of the separate businesses of the two parties, would be insufficient to be considered as providing initial proof. Moreover all the activities done by the plaintiff and her husband were for the formation of a partnership in the future. However that stage was not reached and the proposed partnership not materializing, the defendant established the business on his own.

The plaintiff, in paragraph 7 of the plaint has averred that the farm became operational around July 2003 when the partnership started rearing poultry. The defendant testified that discussions on a joint venture centered on pig production and not poultry. He had his own poultry business before those discussions. When the

plaintiff applied for a land on 30<sup>th</sup> January 2002 (P1), she informed the Ministry that she wanted to enter into a joint venture with a butcher to contribute to a reduction in pork prices. Poultry was therefore not part of the joint venture, and hence cannot be considered for that purpose. Further, the two lands allocated by the Government has not benefited the intended venture. Even if an oral partnership was in the course of being established, that terminated under the provisions of Article 1865 of the Civil Code. The 5<sup>th</sup> way by which such termination occurs is “*by the intention which one alone or several partners express no longer to remain in partnership*”. In that respect, the defendant registered the “*Fresh Way Farm*” in his sole name on 18<sup>th</sup> October 2002. Further by letter dated 23<sup>rd</sup> December 2003, he informed the Ministry for the reasons stated therein that the plaintiff no longer formed part of the farm and no right to the land. Hence the defendant has terminated the proposed joint venture.

In these circumstances, the plaintiff has failed to establish that she contributed any money, property or work which could be considered as adequate to establish a valid partnership under Articles 1832 and 1834 of the Civil Code. Hence, having failed to establish a partnership, she cannot claim any profits nor seek a commission to examine the accounts.

Accordingly, the plaintiff's action is dismissed with costs.

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A.R. PERERA

**CHIEF JUSTICE**

Dated this 4<sup>th</sup> day of December 2008