IN THE SUPREME COURT OF SEYCHELLES

GILBERT CHARLES ELISA **PLAINTIFF**

VERSUS

THE PUBLIC UTILITIES CORPORATION
(Water and Seawage Division)
Rep by Mr Stephen Rousseau **DEFENDANT**

Civil Side No 244 of 2005

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Mr. Anthony Derjacques for the Plaintiff
Mr W. Herminie for the Defendant

JUDGMENT

B. Renaud ACJ

The plaintiff, by a plaint entered on 15th July, 2005, is claiming from the defendant-

(a) Moral damages for – distress, inconveniences, Stress, humiliation, disappointment		SR 40,000.00
(b) Maternal damages –		
(i)	One washing machine	SR 3,500.00
(ii)	Two loads of clothes contaminated and rendered useless	SR 3,500.00
(iii)	Costs to empty and wash water tank	SR 200.00
	Total	**SR 46,700.00**

The plaintiff pleaded that on 27th March, 2005, up to and including 15th May, 2005 in breach of agreement, and contrary to the Public Health *(Water Examination)* Regulations 1994 (S.I. 44 of 1994) the defendant failed to supply plaintiff with treated water for his consumption. He also pleaded that the defendant supplied him with severely contaminated water which was not at the legally required standard, severely discoloured, odorous and contained sediments of an unknown nature. He further pleaded that by reason of those alleged pleadings he has been put to loss and damage as claimed.

The plaintiff averred that despite repeated complaints and visits to the defendant, he has not been offered redress or compensation at all.

In its amended Statement of Defence the defendant raised a plea in limine litis as follows:

> *"This plaint is wrong in law and cannot be maintained against the defendant by virtue of Section 18(2) and 18(3) of the Public Utilities Corporation Act Cap 196 of the laws of Seychelles".*

In its amended Statement of defence dated 21st February, 2008, the defendant averred that at all material times, it provided the plaintiff with water fit for human consumption and of the standard required by the Public Health and the law, and averred that if the water is found to have been unfit for consumption, the plaintiff failed to notify the defendant and the plaintiff unknowingly continued to use the said water for the stated period with no attempt or intent of rectifying the matter.

The defendant puts the plaintiff to strict proof that the defendant supplied him with severely contaminated water which was not at the legally required standard, severely discoloured, odorous and contained sediments of an unknown nature and further averred that if the water was at all discoloured it was an act of God and outside the control of the defendant.

The defendant also put the plaintiff to strict proof that by reason of those alleged pleadings he has been put to loss and damage as stated and the defendant further averred that if it is found that the defendant is liable for any loss and damage which is denied the plaintiff is put to strict proof of the quantum.

The defendant also averred that the plaintiff never complained during the period stated and that the defendant is neither liable nor compelled to offer the plaintiff any redress or compensation.

Learned Counsel for the plaintiff conceded that a formal written notice of intended proceedings was not delivered at the office of the defendant by the plaintiff, his Attorney or Agent, not less than one month before the commencement of the proceedings. He submitted, however, that the Court has discretion to allow the plaint to stand. He argued that the plaintiff has a constitutional right to proceed in an action against third parties. This, he claims, is a fundamental right which must not be easily circumvented by mere regulations. He added that the constitutional right is a priority and the end of justice must be served. Moreover, he stated, the Court is a Court of Law and Equity.

Learned Counsel for the defendant, on the other hand, submitted that a plaintiff's constitutional right to proceed with be read in conjunction with the Public Utilities Corporation Act Cap 196 which regulates the mode proceedings is to be initiated against the Corporation. He added that, failure on the part of the plaintiff to comply with Section 18(2) is fatal to this case. He contended that the plaintiff is therefore precluded him from suing the defendant. He also submitted that compliance with the provisions of Section 18(3) of the Act, is mandatory and the defendant has also failed to comply with the provisions of that section. He further submitted that the Court has no discretion to allow the plaint to stand in breach of Sections 18(2) and 18(3) of the Act. He concluded that based on these two points of law the plaintiff's case must fail for reason of incompetence.

The case of the defendant, on the merits, is that the incident arose out of an act of God and that the defendant was not negligent. The water became discoloured because of the abnormally high weather temperature which was prevailing at that time and may have caused the inner part of the pipe corroded, hence causing the brownish colour of the water. The water was drinkable provided certain procedure was followed which was frequently explaind by the defendant on television. Agreeably, the Bureau of Standards only goes on to confirm that the water was somewhat brownish in colour but conceded that it was potable water. It is therefore his submission that the defendant has not failed in its duty towards its customers. Further, he argued, there is no evidence in the slightest to impute negligence on the part of the defendant as the latter was not responsible for the brownish colour of the water nor had any control over the state of the water. He added that in fact the evidence suggests that once the defendant discovered the water was somewhat discoloured it took all necessary steps to provide its customers with clear water using bowsers.

As regards the claims for damages, the defendant's Counsel submitted that, firstly, these are unsubstantiated as no documentary evidence was adduced to support the plaintiff's claim for material damages and, secondly, the clothes alleged to have been contaminated were not produced in evidence.

With regard to moral damages, he further submitted, the plaintiff failed to adduce any evidence to who that the plaintiff in fact suffered the damages claimed, or, alternatively, the claim is grossly exaggerated.

IN LIMINE LITIS

I will now address the point of law raised by the defendant, namely that –

> *"This plaint is wrong in law and cannot be maintained against the defendant by virtue of Section 18(2) and 18(3) of the Public Utilities Corporation Act Cap 196 of the laws of Seychelles".*

Section 18(2) of the Public Utilities Corporation Act Cap 196 states that-

> *"no proceedings shall commenced against the corporation unless notice in writing of the intended proceedings has been delivered at the office of the Corporation by the party intending to commence those proceedings or by the*

Attorney or Agent not less than one month before the commencement of those proceedings".

Section 18(3) states –

"a notice under subsection (2) shall state the cause of action and the Court in which the proceedings are intended to be commenced, the name and address of the party intending to commence the proceedings and, if the notice was delivered by an attorney or agent, the name and address of the Attorney or the Agent."

In the case of **SACOS v Andre Derjacques SCA12/08** the question arose before the Seychelles Court of Appeal as to the interpretation that should be given to conditions in a Contract of Insurance worded as follows:

"Every letter, claim, writ, summons and process shall be notified and forwarded to the Corporation (SACOS) within 7 days of receipt."

"The Corporation (SACOS) shall not be liable (a) under Section 2 and 3 of this part to the indemnity any person (i) unless such person shall observe, fulfill and be subject to the terms of this Policy in so far as they apply."

The issue was whether an Insurance Company may legitimately seek to repudiate liability where the notice of an action is given otherwise than in writing. The Court proceeded to set out what type of notice that an insured is required to give his insurer to enable him to benefit from his policy, which if complied with, the insurer may legitimately repudiate its obligations under the policy. Counsel for the Appellant (SACOS) interpreted the relevant clauses cited above, that a written notice was intended by the parties and required by law, arguing that there is an obligation on an insured to give a written notice of a claim against him. The Court agreed with the interpretation given by the trial Court and held that there is no formal requirement that the insured should inform the Insurer in writing or in any specific form as such contracts are as a rule interpreted *contra proferentum and as also provided* in Article 1162 of the Civil Code of Seychelles.

The Court of Appeal went to the state that English Law provides persuasive authority for such an interpretation. In essence the notice must be of sufficient formality to be understood by a reasonable man as an intimation of legal proceedings although no formality is required, and the notice may be written or oral.

Article 1162 of the Civil Code of Seychelles states that –

> *"In case of doubt, the contract shall be interpreted against the person who has the benefit of the term and in favour of the person who is bound by the obligation."*

It is however true that in the Insurance contract no requirement for a written notice is stipulated but in the Public Utilities Corporation Act Cap 196 it is a statutory requirement that the notice is to be in writing.

It is in evidence that the Plaintiff personally visited the office of the Defendant and made verbal complaints and statement. He outlined in detail the problem and the cost and also requested for compensation. An Officer of the defendant took notes in writing thus having full knowledge of the complaints of the plaintiff to act upon. The Officer of the defendant did indeed acted on the complaint and 3 of its Technical Officers went to the premises of the plaintiff to view the problem and assess the situation. Consequently Officers of the defendant made statements on the Radio and Television to alert the public of the problem. The defendant was thus not caught out by surprise by the plaint after having refused the verbal demands for cost and damages, thus not causing only prejudice to the defendant.

On the face of it, the wording of Section 18(2) of the Act conveys the impression that it is mandatory that the Corporation be notified of any proceedings against it, at least one month in advance. Obviously, it would be unfair for the Corporation to be caught by surprise if that is not done and it is not afforded the opportunity to attend to or rectify and complaints from its customers or other claimants. If the Corporation is unaware that its customers are being made to suffer damages as a result of its inadequate services, it would then not be in a position to rectify such situation if this is not brought to its attention. It is my further view that the requirement of Section 18(2) is primarily to afford the Corporation the opportunity, to avoid being sued unnecessarily for matters that it could have settled without the necessity of any Court action. However, it is also my view that if the Corporation had been aware all along of a situation such as the one in issue, then the requirement that it should be informed

in writing is only an academic exercise. Here, the plaintiff had been in constant contact with the Corporation all along and the latter cannot claim that it was unaware of the situation the plaintiff was facing. The plaint was served on the defendant and it was opened to it to take any action to avoid Court litigation well in advance. The defendant defended the action in Court and only raised the point of law in its amended defence, almost 3 years after the receipt of the plaint.

In find that the plaintiff's has a prima facie cause of action against the defendant and as such he has the constitutional right to pursue the matter in Court. Failing to comply with Section 18(3) in my view would have been fatal if the defendant was caught totally unaware which is not the case here. I believe that the principle and the spirit enunciated by the Seychelles Court of Appeal in the case of **SACOS v Andre Derjacques SCA 12/08** is sufficient indication that a Court of Law and Equity can exercise its discretion, based on the circumstances of each particular case, to determine whether non-compliance with Section 18(2) of the Act was fatal to a case or not. Each case should be considered on its own merits. It is my considered judgment that in the present case the defendant was not unduly prejudiced by the failure of the plaintiff's non-compliance with Section 18(2) of the Act and I so ruled.

Accordingly, I dismiss the point raised by the defendant in limine litis.

ON THE MERITS

It is not in dispute that the plaintiff was a person within the scope of the Public Utilities Corporation (Owner Supply) Regulations, S.I. 26 of 1988, and a consumer of treated water,

supplied by the defendant. The defendant is a public utilities company, owned by the Government of Seychelles, and mandated to supply treated water to agreed consumers. The plaintiff was an agreed consumer, holding meter number 04206933, with the defendant, whereby the latter agreed to supply the plaintiff treated water for his consumption.

The facts in substances were not contradicted by the Managing Director of the defendant. He accepted that there was a problem with the water. It was not up to the normal standard. He admitted that personally he would not give such water to his children to drink. He however laid the blame on the weather pattern, namely, the effect of EL Nino acting on the water pipes.

I find on a balance of probabilities that the plaintiff on 27th March, 2005, up to and including 15th May, 2005, the defendant failed to supply plaintiff with treated water for his consumption. This is in breach of a contrary to the requirements of the Public Health (Water Examination) Regulation 1994 (S.I. 44 of 1994). I also find that the defendant supplied him with severely contaminated water which was not at the legally required standard, severely discoloured, odorous and contained sediments of an unknown nature.. Indeed, by reason of the failures of the defendant as found, the plaintiff has been put to loss and damage.

I believe the evidence of the plaintiff and his witnesses the evidence of whom I find to be congent, consistent despite rigorous cross-examination and truthful on the material particulars. I have no doubt as to the evidence of the expert from the Seychelles Bureau of Standards which indicate the sub-standard of the water in issue. I am satisfied on a

balance of probabilities that the water complained of was contaminated of foul odour and discoloured.

The failures or omissions of the defendant in my judgment are not of an act of God. These omissions were well within the technical competence of the defendant to rectify within a reasonable time in order not to cause or avoid any damage to the plaintiff. I find that the defendant is liable to the plaintiff in terms of Article 1382(2) of the Civil Code of Seychelles.

The claims of the plaintiff are however not fully substantiated as it ought to have been. There is no substantial evidence to sustain the plaintiff's claims in respect of his claims for washing machine and 2 loads of clothes allegedly contaminated. However, on the basis of the evidence adduced this Court is able to determine other appropriate damages which I assess as follows:

Moral damages for – distress	-	Sr15,000.00
Inconveniences, stress, humiliation, disappointment	-	Sr. 200.00
Costs to empty and wash water tank	-	**Sr.15,200.00**

I accordingly enter judgment in favour of the plaintiff as against the defendant in the sum of SR15,200.00 with interest and costs.

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B. RENAUD

ACTING CHIEF JUSTICE

Dated this 26th day of June 2009