

IN THE SUPREME COURT OF SEYCHELLES

**SEYCHELLES SAVINGS BANK**

**PLAINTIFF**

**VERSUS**

**TRAVIS CHANG PEN TIVE**

**DEFENDANT**

Civil Side No 349 of 2008

Mr. F. Ally for the Plaintiff

Mr. C. Andre for the Defendant

**JUDGMENT**

**B. Renaud J**

By plaint entered on 12<sup>th</sup> November, 2008, the Plaintiff, a Commercial Bank operating in Seychelles, prayed this Court for a judgment ordering the Defendant to pay the Plaintiff as follows:-

(i) The sum of SR170,925.42

With continuing interest thereon and charges; and

Costs.

Evidence on behalf of the Plaintiff was tendered by its authorized representative Ms. Caroline Volcere.

The loan agreement was admitted and marked as **Exhibit P2**. A pledge on vehicle S11778 belonging to the Defendant was admitted and marked as **Exhibit P3**.

Notice to the Defendant dated **27<sup>th</sup> June, 2005** was admitted and marked as **Exhibit P4** wherein the sum outstanding was stated as **SR98,847.91**. A further notice dated **19<sup>th</sup> September, 2008** was admitted and marked as **Exhibit P5**, and in that notice the sum stated was **SR170,025.42**. Both notices were served on the Defendant as evidenced by *avis the reception*.

The Statement was admitted and marked as **Exhibit P6**. That Statement shows that the balance as at 27<sup>th</sup> September, 2006 stood at **SR123,544.58** when the interest was levied at the agreed 10% per annum. The interest at 22% was levied on the balance outstanding as at 27<sup>th</sup> September 2006 and thereafter increased to 30% from 1<sup>st</sup> December, 2008.

The Statement also shows that the Plaintiff incurred Court charges of **SR350.00** in December, 2006 in connection with the Warrant to Levy. It incurred further expenses in November, 2008 in the sum of **SR1,980.00** being Court fees in respect of the present case.

An amount of **SR12,816.00** being net proceed of sale of the Defendant's car was credited to the Defendant's account on 9<sup>th</sup> January, 2007.

At the time of the hearing the Defendant is said to owe the Plaintiff the sum of **SR230,982.58**, which represents the loan and arrears of interest as detailed in a Statement of Account for the period September, 2006 to 28<sup>th</sup> September, 2009.

The Warrant to Levy executed on 31<sup>st</sup> August, 2006 is Exhibit P7. The witness also

testified that the Defendant's vehicle was seized in December 2006 and sold by Process Serves in January, 2007 for **SR15,000.00** in terms of the Security on Movable Act (Cap. 209). **Exhibit P8** is the notice of sale in the Official Gazette.

Exhibit P9 is a letter dated 28<sup>th</sup> November, 2003 from the Plaintiff to the Defendant. By that letter the Defendant acknowledged receipt of the Plaintiff's reminder of 18<sup>th</sup> November, 2003 and apologized for the delay. He explained that for the 2 previous months he could not pay the loan because he could not run his taxi due to mechanical problems and non-availability of spare parts.

The witness was duly cross-examined. According to the Plaintiff, the arrears of interest was charged at 22% per annum and as of 1<sup>st</sup> November 2008 it was increased to 30%. This is calculated on the sum due and unpaid and not on any sum that is not due. In this case since the loan was due to be paid on the **28<sup>th</sup> June, 2007**, this interest is being claimed on the totality of the sum due and unpaid.

The Plaintiff's witness admitted that there is no documentary evidence that the Plaintiff ever informed Defendant of the interest being raised from 10% to 22% and later to 30%. The witness only assumed that the Defendant must have been verbally informed. The witness added that the Defendant had always been a good customer of the Plaintiff and he repaid his loan from July 2003 to November, 2003 when he started falling in arrears. Recovery proceedings were initiated against the Defendant in June, 2005 and legal proceedings commenced in 2008 to recover the unpaid balance of the loan.

The Defendant denied Plaintiff's claim that as at the end of September, 2006 he was indebted to the Plaintiff in the sum of SR179,925.42 representing the outstanding balance of the loan and increasing interest, which he is liable to make good to the Plaintiff.

The Defendant averred that in the Warrant to Levy the outstanding debt was stated as **SR121,879.84** and he was never informed by the Process Server who was executing the Warrant to Levy, or by the Plaintiff's Lawyers regarding the price at which the vehicle would be sold.

When testifying, the Defendant admitted that he breached the loan agreement by failing to repay the said loan and interest in the manner agreed upon in the agreement. The Defendant averred that he informed the Plaintiff through its employee notably Mrs. Lorna Ally, that he was facing certain difficulties in repaying as per the agreement as he was encountering a number of problems with his vehicle S11778 at the time and added that he was verbally told that he could pay as was possible for him to do.

The averment of the Defendant that from 20<sup>th</sup> November, 2006 to 19<sup>th</sup> September, 2008, he did not receive any correspondence from the Plaintiff about how much the vehicle was sold for and what was the amount still outstanding, is supported by evidence.

As evidenced by a letter dated 19<sup>th</sup> September, 2008 (Exhibit P5) from the Plaintiff's Lawyer the vehicle was sold for SR15,000.00 and the Plaintiff received SR12,816.00. The Defendant expected that the sum to be deducted from the sum of SR121,879.84 as stated in the Warrant to Levy thereby leaving the outstanding debt would be (SR121,879.84 less SR12,816.00) SR 109,063.84, which sum the Defendant agrees willing to pay back by monthly installments of Rs1,200.00.

The Defendant denied that despite the Plaintiff's demand for him to pay the balance of the loan, more specifically by notice dated 19<sup>th</sup> September 2008, he had failed to pay all of the said balance. The Defendant averred that he contacted the Plaintiff after he received the notice dated 19<sup>th</sup> September, 2008, and that the Plaintiff told him that they will not be able

to do anything, as their Lawyer was the one dealing with the matter. This contention is neither here nor there and is of no relevance as the Defendant could have contacted the Plaintiff's Lawyer as was stated in that letter.

The Defendant prayed this Court not to grant the judgment prayed for by the Plaintiff but to grant a judgment as follows:

- (i) The Defendant to pay the sum of SR109,063.84  
No interest thereon and charges, and  
No costs.

The loan was undoubtedly taken by the Defendant for the purpose of buying a motor-car to operate a taxi business. Vehicle S11778 was the taxi that was seized and sold was the same vehicle that was pledged as security for the loan. The Defendant informed the Plaintiff that he was encountering mechanical problems with his vehicle. After the vehicle was seized in August, 2006 and eventually sold in January, 2007 the Plaintiff did not communicate with the Defendant until September, 2008.

The Defendant admitted that he signed a Warrant to Levy on 31<sup>st</sup> August, 2006 when the Process Server seized his Taxi. He had never seen on Official Gazette. The Process Server never informed him about the sale of the car. Mrs. Lorna Ally, an employee of the Plaintiff, informed him that the car was sold for SR15,000.00 and the Plaintiff received was around SR12,000.00.

Article 1134 of the Civil Code states as follows:

“Agreement lawfully concluded shall have the force of law for those who have entered into them.

They shall not be revoked except by mutual consent or for causes which the law authorizes.

They shall be performed in good faith.”

I find that the loan Agreement, Exhibit P2, is an agreement that has been lawfully concluded between the Plaintiff and the Defendant and as such has the force of law for the parties who have entered into them.

It is not in dispute that by virtue of a written loan agreement dated 20<sup>th</sup> June, 2003, Exhibit P2, between itself and the Plaintiff (the Agreement), the Plaintiff granted the Defendant a loan in the sum of **SR90,000.00** with interest at the rate of **10% per annum**, which could be subject to other charges and costs. The Agreement, inter alia, held the following terms:-

- (a) The Defendant would repay the said loan with interest in the sum of **SR19,566.36** to the Plaintiff in **48 monthly** installments of **SR2,282.73** commencing on 28<sup>th</sup> July, 2003, and that the total balance of the loan and any other charges would be paid not later than **28<sup>th</sup> June, 2007**.
- (b) The Defendant would pay each monthly installment by crediting Account No. 5149120019 on or before the 28<sup>th</sup> day of each month and the Plaintiff's is authorized to debit the Defendant's account to effect such payment.
- (c) The Defendant would pay interest on the loan at the rate of **10% per annum**, which **maybe subject to change**.

- (d) The Plaintiff shall be entitled to charge interest at any increased rate from its current rate on any overdue installments or other payment until the same is discharged by the Defendant.
- (e) That the Defendant would pay the Plaintiff **any costs or charges** reasonably incurred or expended by the Plaintiff in exercising any right arising from any default of the Defendant.
- (f) That the **Plaintiff shall be entitled to demand** from the Defendant the **unpaid balance** of the loan together with accrued interest thereon and any other moneys payable under this Agreement and may enforce any guarantee under this Agreement or the mortgage/charge/pledge on the happening of any of the event making the Defendant to be **in default of** any repayment conditions.

The original loan to the Defendant was **SR90,000.00** with interest thereon at the rate of **10%** per annum which maybe subject to change. The total amount due for repayment by 27<sup>th</sup> June, 2007 if all the 48 installments were repaid was therefore (SR2282.73x48) – **SR109,571.04.**

The Plaintiff admitted that the Defendant, who had always been a good customer of the Plaintiff, repaid his loan from July 2003 to November, 2003 when he started falling in arrears. The Defendant must have therefore repaid 5 installments at SR2,282.73 making a total repayment of **SR11,413.65** by then leaving an outstanding balance of (SR109,571.04 – SR11,413.55) **SR98,157.39.**

The Plaintiff initiated formal recovery proceeding against the Defendant in June, 2005 to

recover the unpaid balance of the loan by a notice dated **27<sup>th</sup> June, 2005**, (Exhibit P4) claiming **SR98,847.91** as the sum outstanding at that time.

The recovery action was re-activated by the Plaintiff over a year later by the issue of a **Warrant to Levy** which was executed only on **31<sup>st</sup> August, 2006** when the Process Server seized the Defendant's **Taxi S11778**.

Legal proceedings against the Defendant, for the recovery of the unpaid balance of the loan, commenced by this suit entered on 12<sup>th</sup> November, 2008 and the outstanding unpaid balance claimed by the Plaintiff was SR170,925.42 inclusive of continuing interest thereon and charges.

At the time of the hearing of the suit the Plaintiff claimed that the accrued balance outstanding stood at SR230,982.58 which sum included continuing interest thereon and charges.

The Plaintiff's witness admitted that there was no documentary evidence that the Plaintiff ever informed the Defendant that the rate of interest had been raised from the original agreed **10% to 22%** or later to **30%**.

After the sale of Defendant's vehicle, the Plaintiff thereafter did not initiate legal proceedings against the Defendant until November, 2008

The thrust of the defence of the Defendant as submitted by his lawyer is firstly, the delay by the Plaintiff in taking recovery action after the Defendant had defaulted on his loan agreement. Secondly, the Defendant was neither informed what was the proceed of sale of his car nor what balance remained outstanding after crediting any of such proceeds



towards his debt. Thirdly, the delay by the Plaintiff has caused serious prejudice and injustice to the Plaintiff in that charges and other penal interest accrued in the intervening period.

Article 1135 of the Civil Code of Seychelles states:

*“Agreements shall be binding not only in respect of what is expressed therein but also in respect of all the consequences which fairness, practice or the law imply into the obligation in accordance with its nature.”*

This claim arose out of a contract. On or around 27<sup>th</sup> June, 2005 when the Plaintiff issued a mise en demeure (Exhibit P4) on the Defendant calling upon the latter to pay the total sum due at the time, that was SR98,847.91, within 30 days hence. The Plaintiff sat on its contractual rights and did not follow up on its demand until 31<sup>st</sup> August, 2006 when it took recovery action by seizing and sale of Defendant's vehicle. By then, according to the Plaintiff, the debt of the Defendant with interest and charges had risen to SR121,879.84. After selling the seized vehicle in January, 2007, the Plaintiff knew that the proceeds of the sale were insufficient to meet the sum owed but yet chose not to inform the Defendant at all about that until September, 2008.

I do not believe that it was not unreasonable for the Defendant, after the seizure of his car and having heard nothing further from the Plaintiff regarding the debt, to rightly believe that the seizing and selling of his car must have been sufficient to clear his debt and that he did not owe the Plaintiff anything anymore.

It is indeed true that the Plaintiff did not take any legal action to recover the debt but instead allow the sum to attract interest over a period of over 2 years before suing the Defendant. In the meantime the Plaintiff had unilaterally set the interest on the unpaid

balance at 22% and further to 30% and again even without notifying the Defendant at all about that.

It is my judgment that the Plaintiff ought not to have charged the Defendant interest over and above the 10% originally agreed upon unless the Plaintiff had notified the Defendant of that variation.

In the final analysis I find that the Defendant failed to repay his loan when it became due and payable as per the loan agreement, by 28<sup>th</sup> June, 2007 and the Defendant is liable to make good the sum owed with interest, charges and costs.

Applying the principle of law set out in Article 1135 of C.C. Sey, I believe that the sum claimed by the Plaintiff ought to be revisited by this Court. When that principle was applied in the case of *Banque Francaise Commerciale v Fayon* 3 SCAR(Vol. 1) (83-87) p. 66, the Seychelles Court of Appeal held that – *“Applying Article 1135 of the Civil Code of Seychelles, the person guaranteed not only enjoys rights, including the right to demand payment by the guarantor in the event of default of the debtor; he also owes duties, among them the duty not to cause unnecessary or undue loss to the guarantor by his imprudence or negligence”*.

In the present case, I will likewise hold that the Plaintiff not only enjoys rights, including the right to demand payment by the Defendant in the event of his default; the Plaintiff also owes duties, among them the duty not to cause unnecessary or undue loss to the Plaintiff by its imprudence or negligence. The imprudence or negligence of the Plaintiff herein is that it delayed in taking recovery action; it failed to inform the Defendant about the sale of his car and the application of the proceeds thereof; it failed to inform the Defendant that the proceeds were insufficient to meet the debt owing, it failed to inform the Defendant about the penal interest from the agreed 10% to 22% and eventually 30%, resulting in the

Defendant owing **SR230,982.58** at the time of the hearing.

I find that the Defendant borrowed SR90,000.00 from the Plaintiff and he had to repay that by in 48 monthly installments of SR2282.73 per month which sum includes interest at 10% per annum and the debt should be cleared by 28<sup>th</sup> June, 2007 when he would have repaid a total of **SR109,571.04**. However, by 28<sup>th</sup> June, 2007 the Defendant had only repaid a total of **SR24,229.65** only, made up of SR11,413.65 (5 installments of SR2282.73) and the proceeds of the sale of his car in the sum of **SR12,816.00**, leaving a net unpaid balance of **SR85,341.39** as at 27<sup>th</sup> June, 2007.

I accordingly enter judgment in favour of the Plaintiff as against the Defendant in the sum of SR85,341.39 with interest at the rate of 10% per annum accruing on that balance with effect from 27<sup>th</sup> June, 2007 plus charges of SR350.00, and taxed cost of this suit.

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B. RENAUD

**JUDGE**

Dated this 10<sup>th</sup> day of December 2009