

THE REPUBLIC OF SEYCHELLES
IN THE SUPREME COURT OF SEYCHELLES HOLDEN AT VICTORIA

Civil Side No. 355 of 2009

Jimmy Zatte	Versus	Plaintiffs
Gracia Zatte		
Sanmugan Pillay		Defendant

Ms Pool for the plaintiff

Mr. Rajasunduran for the defendant

JUDGMENT

Egonda-Ntende CJ

1. The plaintiffs bring this action seeking to recover from the defendant the sum of R493,500.00 as a result of a breach of a sub lease agreement for the business known as Sandy's Take Away located on Revolution Avenue, Victoria, Mahe.

2. The plaintiffs contend that there was a sub lease agreement between the plaintiff and the defendant for a period of 13 months from January 2005. The defendant was to pay the rent for the premises directly to the Landlord at the rate of R8,500 per month and all the utilities charged to the premises together with any other charges. The defendant was to pay rent for the

business to the plaintiffs of R25,000 per month from January 2005 to March 2005 and R30,000 from April 2005 to 31 January 2006.

3. The plaintiffs contend the defendant failed to pay the said sums of money all totalling to R493,500 for which the plaintiffs seek judgment.
4. The defendant in his defence admits the existence of a sub lease but denies that any sums of money are due to the plaintiffs. He states that the sub lease lasted only 3 months which was a test period for the defendant to ascertain the profitability of the business. At the end of the third month the defendant returned the business back to the plaintiffs with their permission and consent as the business was not profitable.
5. The defendant admits that he was to pay the rent to the Landlord at R8,500 per month and that he paid this money directly to the Landlord. The defendant admits that for the first three months he was to pay the plaintiffs a sum of R25,000 per month and thereafter, R30,000 per month. He contends that he paid the rental for 3 months to the plaintiffs. The defendant denies that any sums are owing to the plaintiffs on account of rent to the landlord or rent to the plaintiffs as the defendant paid what was due for the three month period.
6. The defendant further contends that as he handed the business back to the plaintiff at the end of the 3 months after notice in the second month the defendant cannot be liable for the sums that have been claimed beyond the 3 month period he was in occupation and control. Secondly the premises were

subsequently let to a third party. The defendant cannot therefore be liable for charges including rent for the period beyond the 3 months he was in occupation. He prayed that this suit should be dismissed with costs.

7. When this case up for hearing the plaintiffs called one witness and closed their case while the defendant though represented by counsel did not adduce any evidence in the matter. I will proceed to state the evidence adduced in this case.
8. PW1 was Jimmy Zatte, Plaintiff No1, who testified on his own behalf and that of the plaintiff no.2 in respect of whom he had a power of attorney. He stated that the plaintiffs entered into a written agreement for a sub lease of Sandy's Take Away in which they let the business to the defendant for a period of about 13 months. The defendant was to pay rent of the building directly to the landlord at the rate of R8,500 per month during the sub lease. The defendant was to pay to the plaintiffs R25,000 per month for the first three months and thereafter R30,000 per month.
9. PW1 was called by the Landlord and informed that the defendant's cheque for payment of rent for the first month had bounced. The landlord told the PW1 that henceforth he would not accept any more cheques from the defendant and the plaintiffs had to pay the rent directly to the landlord. As a result the plaintiffs paid all the rent for period of the sub lease to the landlord, totalling to R110,500. The defendant failed or refused to refund the said sums to the plaintiffs. In cross examination PW1 stated that he received

receipts for such payments but he may not be able to find all of them though he could find a few receipts.

10. PW1 further testified that the defendant failed to pay the agreed rent for the business, now totalling to R375,000 for the 13 months which is owing to the plaintiffs. Sometime in April 2005 the defendant returned the keys of the premises and business to the plaintiffs' home, abandoning the business and the premises. The defendant did not give any notice to terminate the sub lease, though the agreement provided that 3 month notice shall be given in case of termination, after 1 July 2005.

11. The defendant did not pay for utilities and the plaintiffs had to pay R5,000 for utilities. The witness was unable to produce a receipt for that payment.

12. The plaintiffs let the business to one Guy Lesparance from May 2005. Mr. Lesparance agreed to purchase the said business from the plaintiffs but took a short term lease until he could raise the purchase price by way of a loan from a bank. Mr. Lesparance also defaulted and failed to pay the agreed sums of money. The plaintiffs evicted him from the business in February 2007. The plaintiffs have filed a suit in the Supreme Court to recover from Mr. Lesparance the rental for premises and the business for the period he was in occupation.

13. PW1 stated that the reason he is claiming money from the defendant while at the same time he is claiming rental from Lesparance for the same period is

that because the defendant had run down the business the rental for the business was reduced to R10,000 per month for Mr Lesparance.

14. Ms Pool, learned counsel for the plaintiffs, submitted that the defendant had admitted in his defence the existence of a sub lease between the parties. There was the evidence of the plaintiff on record showing that the defendant had not complied with the terms of the sub lease, and was therefore liable for the sums claimed. The defendant had not produced any evidence to support his case. Therefore Judgment ought to be entered in the plaintiffs' favour.

15. Mr Rajasunduran, learned counsel for the defendant, submitted that though the defence accepts that there was a sub lease between the parties that sub-lease was determined by 2 months notice to the plaintiffs, after payment of all arrears. The defendant is not liable to the plaintiffs for the sums claimed. PW1 had not produced any receipts to show that he paid the utility bills. The defendant had vacated the premises in March 2005. There was no agreement produced to show that the defendant had agreed to pay rent for one year even if he was not in possession. In the absence of an agreement a lease can be terminated by notice according to local practice.

16. Mr. Rajasunduran further submitted that the plaintiff had failed to prove that Mr. Lesparance had failed to pay him for the period he took over the premises and it must be presumed that he paid. The plaintiffs have therefore not incurred any loss or have failed to prove that they incurred a loss for which they are able to recover from the defendant. The plaintiffs' claim is without foundation.

17. PW1 failed to produce the written sub-lease agreement which is the primary evidence of the sub-lease and the terms thereof between the parties. He could not find it. There were several signed copies with the defendant having another copy and the lawyer who drew up the sub lease having another copy. It is not in dispute that there was a sub lease between the parties as this is admitted by the written statement of defence of the defendant.
18. What is in dispute are the terms of the sub lease, and in particular on the question of termination of the same. In his defence the defendant claimed that it had been agreed that there would be a review of the agreement after the initial three months to determine whether the sub lease would continue or not. This version is not supported by any evidence on record.
19. PW1 claimed that it was a written term of the sublease that termination was possible by notice of 3 months only after July 2005. He failed to produce the written document. He could have proved this by secondary evidence by producing a copy of the original. He did not do so. I am satisfied that this term is not proven.
20. Mr Rajasunduran during the cross examination of PW1 suggested that the defendant had provided 2 months notice to the plaintiffs but he failed to produce such notice that had been delivered to the plaintiffs prior to the abandonment of the business by the defendant. I am satisfied that there is no evidence to prove that the defendant provided any notice to the plaintiffs before terminating the sub lease.

21. I find that the defendant was at fault in the termination of this sub lease as he did not provide any notice either in accordance with a possible agreed term or notice that could possibly be required by local practice though I am aware that there is no evidence put forth as to what the local practice was in this regard. In the circumstances I would apply Article 1760 of the Civil Code of Seychelles which states,

‘In the case of cancellation due to the fault of the tenant, he shall be bound to pay the rent during the period reasonably necessary for reletting the premises, quite apart from any damages which may result from his wrongful act.’

22. The defendant, according to the testimony of PW1, returned the keys to the premises in April 2005. The plaintiff obtained another tenant cum buyer for the premises in May 2005. The down time would appear to have been only April and May 2005 when the business and the premises had no tenant. I would therefore hold the defendant liable to the plaintiff in rent for the month of April and May 2005 in addition to the first three months.

23. Once the plaintiff obtained a new tenant for the business the liability of the defendant would be come to an end apart from damages for his fault for which he would liable under Article 1384 of the Civil Code of Seychelles but which was not claimed in this case.

24. With regard to the claims for rental for the premises which the defendant ought to have paid the landlord and is now claimed by the plaintiffs who insist that the landlord asked them to pay as the defendant’s cheque had bounced for the first month and the landlord declined further cheques from

the defendant, PW1 was unable to produce a single receipt though he stated that he had been given the receipts. PW1's justification for failing to produce a receipt was that it was such a long time that he could not possibly find all of them! He made no effort to offer documentary proof of having incurred those expenses.

25. I am aware that it is possible to prove by secondary evidence a fact that is provable by primary evidence but there ought to be a basis for not adducing the primary evidence to prove a fact under contention. In the instant case it is clear that the plaintiffs have made no such effort. PW1 did not just look up the receipts. I would decline to grant the claim for arrears of rent or utility bills.

26. The remaining claim is for rent for the business which the defendant would be liable for from January 2005 to May 2005. The defendant claimed in its defence that it had paid rent up to March 2005. Clearly the rental for April and May 2005 is due when the business had no tenant due to the abrupt departure of the defendant. In addition PW1 testified that the defendant did not pay the rent for the first three months. The defendant has not produced any evidence that he paid this money. On record we have only the uncontroverted testimony of PW1 that the defendant did not pay this money.

27. I am inclined to believe PW1 on this item and would accordingly find that rental of the first three months, amounting to R75,000 was not paid by the defendant and it is due to the plaintiff, in addition to the period in which the plaintiffs were looking for another tenant, which is April and May 2005 for which the agreed rent was R30,000 per month. The total sum due to the

plaintiffs is therefore R135,000 only which I award to the plaintiffs plus costs of this action.

28.PW1 attempted to justify the claim for rent from the defendant even for the period when there was another tenant that had been let the premises on the ground that the new tenant was paying less rent than that which the defendant had agreed to pay. In my view this was a wrongful claim as it would amount to the plaintiff receiving rent from two people for the same premises for which the only rental due should be from the existing tenant. If the diminution in rent was the result of the fault of the defendant this should be claimed as damages from the defendant to the extent of the diminution.

Signed, dated and delivered at Victoria this 12th day of November 2010

FMS Egonda-Ntende
Chief Justice