

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

Civil Side No. 239 of 2011

Marlene Hoareau=====Plaintiff

Versus

A2B (Pty) Ltd=====Defendant

Elvis Chetty for the plaintiff

Alexia Amesbury for the defendant

JUDGMENT

Egonda-Ntende, CJ

- 1 The parties in this matter entered into a contract. The plaintiff sold her car hire business, White Sands Car Hire, to the plaintiff as a going enterprise. This included the vehicles of the business. A written agreement was executed. Both parties performed parts of the agreement and failed to perform some of their obligations. The plaintiff brought this action seeking to recover the balance of the price of the sale of the said business, being R318,000.00, a sum of R127,500.00, as unpaid rental due to the plaintiff from the defendant, with interest at the commercial rate of 12% from the date of demand, [13th July 2011] and costs of this suit.

- 2 The defendant responded in its defence that R800,000.00 was paid for the vehicles and the balance of 318,000.00 was for three working contracts which remained unpaid because the plaintiff failed to transfer the said contracts and 5 licences for the 5 vehicles. There was failure of consideration in relation to R318,000.00. The defendant counter claimed for damages for loss incurred for the failure to operate the said vehicles as no licences were transferred in a total sum of R1,097,250.00 with interest at the commercial rate of 12% from 28th April 2011 until the licences are transferred and costs.

- 3 The fact of this case are largely not in dispute save for what kind of income a car hirer was likely to make. What is largely in dispute is the consequences in terms of liability for the conduct of each party to this agreement. I will start with the facts that are largely not in dispute.
- 4 The parties hereto signed an agreement dated 27th January 2011. The agreement was between Sands Car Hire represented by the plaintiff and the defendant. I shall set out its preamble and terms in full.

‘And whereas it is agreed as follows:

The Seller is the owner of a Car Hire Business licensed to operate in Seychelles, namely White Sands Car Hire, (hereinafter called “White Car Sands”)

The Buyer is desirous of purchasing the White Sands Car by the Purchase of the Registered Business Name of White Sands Car and all of its vehicles, by way of transfer from the Seller to the Buyer.

Now therefore the parties agree as follows:

1. The parties agree to a sale of the entire business in White Sands Car by the Seller to Buyer for a total consideration of Seychelles Rupees One Million One hundred and eighteen thousand (R. 1,118,000/-) which sum shall be paid as follows:
 - a. The sum of Seychelles Rupees Eight Hundred Thousand (Sr.800,000.00) upon the signing of the transfer document.
 - b. The balance of Seychelles Rupees Three hundred and Eighteen Thousand (Sr.318,000/-) by monthly instalments in the sum of Seychelles Rupees Fifty Thousand (Sr.50,000/-) on or before the 31st July 2011 by way of cheque payments or bank transfer.
2. The Seller will execute business name transfer documents in favour of the Buyer I the proportions requested by the Buyer and have provided the buyer with valid realistic documents for registration purposes.
3. The seller agree to hand over al statutory documents relating to the business including licensing, tax and social security documents required for the continuation of the said business and for keeping the goo standing of the Business.
4. The Seller confirms that she has revealed all liabilities and assets of the business to the Buyer and the Buyer only inspected the accounts till 2010 filed and the vehicles of White Sands Car.
5. All revenues, assets and liabilities shall from be the responsibility of the buyer. The Seller shall be responsible for all liabilities and responsibilities which have arisen on or before..... 2011 and this includes all existing statutory obligations to file accounts and returns with the relevant authorities and to pay any outstanding taxes fees and tariffs to the authorities now due and outstanding.

6. The Seller agrees that, for the sake of good will, to cooperate and provide any reasonable information and knowhow to the Buyers in relation to the business for a period of 3 months hereafter.'

5 There was a delay in making the first payment and this was not until 21st April 2011. The seller condoned the delay and accepted the sum of R800,000.00 only. She transferred the business name to the defendants, and handed over the vehicles as well. The transfer of the licences was somewhat problematic. Initially the licensing authorities required the defendant to do a number of things before this could be done, which took about six weeks. After the six weeks when the defendant sought to have the licenses transferred, the plaintiff declined on the ground that she was not being paid the balance of the purchase price as stipulated by way of monthly instalments. The defendant did not pay the balance and the plaintiff refused to transfer the licences of the vehicles.

6 Though the defendant had the vehicles he could not use them for car hire business, the intended purpose for the purchase, without the licences. It took the stance that it would not pay the balance of the purchase price unless the licences were transferred. The result was a dead lock and this resultant suit and counter claim.

7 The Civil Code of Seychelles, herein after referred to as CCS, has clear provisions on the obligations of those who enter into agreements. Article 1134 states,

'Agreements 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 authorises. They shall be performed in good faith.'

8 Article 1135 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.'

9 The parties to this agreement were under an obligation to perform this agreement in good faith without introducing pre conditions. The plaintiff was liable to transfer the licences of the said vehicles upon receipt of the first payment in accordance with clause 3 of their agreement. Likewise the defendant was obliged to pay the balance in

accordance with the agreement. A breach of one of the terms or conditions by the other party did not entitle the other party to withhold performance of its own obligations. Non performance of clear obligations will give rise to a claim for damages. Article 1142 of the CCS makes this clear. It states,

‘Every obligation to or to refrain from doing something shall give rise to damages if the debtor fails to perform it.’

- 10 The plaintiff is entitled to receive the balance of the purchase price of R318,000.00 for the failure of the defendant to pay the same at the agreed time. I enter judgment for the plaintiff in the sum of R318,000.00 only.
- 11 The claim for the alleged rental due to the plaintiff fails as this must surely remain part of the assets of the firm that was sold as a going concern to the defendant. Though the agreement is silent on which date revenues, assets and liabilities were to be the responsibility of the buyer I take it that this must run from the date of the first payment was made and the vehicles were handed over to the defendant. The seller was under an obligation to deliver accounts as well, which she did not. This would have been reflected in the accounts as outstanding payments due to the business which is an asset.
- 12 The defendant was entitled to have the licences transferred by the plaintiff to the defendant so as to make the cars in question able to operate for car hire, and the defendant is entitled for as long as the plaintiff fails to effect the said transfer, to damages until this term of the agreement is complied with. This should have been complied with on 21st April 2011 when the first payment was effected or six weeks later after the defendant had satisfied the other conditions that the Licensing Authority had demanded which would be with effect from at least the beginning of July 2011.
- 13 Surprisingly the defendant’s witness did not testify significantly to prove the amount of damages that the defendant should be entitled to in light of the plaintiff’s breach. He just claimed a block amount without setting out how his figure arises. However questions were put to the plaintiff as to whether, in light of her experience of running a car hire business the defendant’s claim of R20,000 per vehicle per month is reasonable. She conceded that the defendant could have earned that sum of money. In

re examination she reduced it to about R16200 per month and added that it would not be possible to earn it everyday as there were days when there was no business.

14 In the circumstances I am left with only the figures of the plaintiff with which to work out the damages that the defendant suffered. I am prepared to accept vehicles are not hired every day in the month and that there will be down time for different reasons, including service and repair of vehicles. I shall assume that it would be reasonable for the vehicle to work two thirds of the days in a month which would be about 20 days instead of 30 days. On average every month therefore one vehicle would earn [€30 x 20 x 18] R 10800.00. 5 vehicles would earn R54,000.00 per month. And from July 2011 to the date of Judgment (November 2012) the amount would come up to R918,000.00.

15 I therefore award the defendant damages of R918,000.00 as of the date of this judgment and the same shall continue to run at that rate until the plaintiff transfers the licences of the said vehicles to the defendant. I order the plaintiff to forthwith cause the transfer of the licences of the 5 vehicles to the defendant, failing which this judgment, shall form sufficient authority for the defendant to present the same to the Seychelles Licensing Authority for transfer of these vehicles into its names.

16 Each party hereto has claimed interest at the commercial rate of 12% per annum. None of the counsel has pointed me to any authority for this claim. I shall in the circumstances direct that the each sum awarded shall bear interest at the legal rate from the date of this judgment till payment in full.

17 I award the plaintiff one half of its costs on its claim and the defendant two thirds of its costs on the counter claim.

Signed, dated and delivered at Victoria this 23rd day of November 2012

FMS Egonda-Ntende
Chief Justice