

THE REPUBLIC OF SEYCHELLES

IN THE SUPREME COURT OF SEYCHELLES HELD AT VICTORIA

Civil Side No 151 of 2010

Varick Limited=====Plaintiff No1

Matityahu Potash=====Plaintiff No2

Yoel Toledano=====Plaintiff No3

Amoz Yafe=====Plaintiff No4

Versus

Atunsa Incooperated=====Defendant

Mr Anthony Derjacques for the Plaintiffs

Mr Bernard Georges for the Defendant

JUDGMENT

Egonda-Ntende, CJ

1. The plaintiff No1 is stated to be a locally registered company engaged in the provision of security and security personnel for ships. Plaintiffs No2, 3 and 4 are Israeli citizens and security officers in the employment of the plaintiff No1. The defendant is a Spanish registered company engaged in parsena fishing for Tuna in Seychelles. It is contended for the plaintiffs that by a verbal agreement made on the 10th March 2010 the plaintiff provided security personnel for the defendant on the defendant's ship Artxanda for the period between 10th March 2010 to 9th April 2010.

2. The plaintiffs contend that the agreement included the following eight terms. Firstly that two security officers would be provided to provide security against pirates on board the ship Artxanda. Secondly, that the fee for the said service would be a monthly sum of €27,000 or €450 per day per security officer. Thirdly that two flight tickets in the sum of €3600 would be included in the fees for the service. Fourthly the fishing for Tuna would be carried on only within the Seychelles economic zone except as expressly previously agreed between the parties. Fifthly that the Port of embarkation and disembarkation would be Port Victoria, Victoria, Mahé, Seychelles. Sixthly the agreement would be automatically renewable every 60days within 14days notification by the defendant's company if necessary. Seventhly the defendant would fully support and cooperate with the security team on board and deliver information and facilities on its ship's bridge on a 24 hour basis without delay. And lastly that the defendant would provide hotels, maintenance, meals and flights to and from Israel to the security officers at the expiration of each contract.

3. The plaintiff no1 contents that it provided to the defendant's ship plaintiffs no 2, 3 and 4 as security officers. The plaintiff further contents that in breach of the said agreement the defendant failed to do nine things.
 - a. The defendant failed to fully support and cooperate with the two security officers namely plaintiffs no 2 to no 4.
 - b. That the defendant denied the said security officers information facilities including e-mail and telephone access.
 - c. That the defendant denied the said security officers access to the ship's bridge.
 - d. That the defendant entered the exclusive economic zone of Somalia.
 - e. That the defendant entered into dangerous waters of the coast of Somalia causing the two security officer to protect and expel pirates from the ship.
 - f. The defendant ignored all advice and warning on security matters by the security officers.
 - g. That the defendant disembarked security officers in the French Colony of Mayotte.

- h. That the defendant failed to pay the plaintiff its' monthly fee airline tickets, hotel accommodation and maintenance including food, bills and transportation.
 - i. That the defendant failed to renew this contract.
- 4. By reason of that breach the plaintiffs contend that they have suffered loss and damage and particularise it under the following seven sub-heads.
 - a. Monthly fee of €27,000 for the period between 10th March 2010 to 9th April 2010.
 - b. Airline tickets of €3,600.
 - c. Hotel accommodation and is of €2000
 - d. Economic loss for one month of €27,000
 - e. Moral damages for plaintiffs No 2, 3 and 4 of €30,000
 - f. Special economic loss of €2000
 - g. Interest on the said sums all totalling to €91,600 at the rate of 10% per annum as from 9th April 2010.
- 5. The defendant vigorously opposed this action. In its written statement of defence it does admit that there was a relationship between the defendant and the plaintiff No1. The defendant denies that there was an agreement for the supply of security personnel on the vessel Artxanda. The defendant avers that the agreement was for the supplier of personnel to the vessel Arene but that the vessel Artxanda was substituted for that vessel. The defendant denies that the monthly payment for security person would be €27,000. On the contrary the agreement was for the payment of €450 per day per officer for a minimum commitment of 60 days with a 2 month extra option.
- 6. The defendant specifically denies that there was any agreement on any excluded areas of operation. The defendant admits paragraph 4(g) of the plaint but avers that it restricted the use of the computer on the bridge by the plaintiffs no1 officers because they only wished to play with the same during the night. The defendant asserts that the security officers were able to use the Imarsat service of the defendant on the ship bridge for telephone calls and e-mails. The defendant further asserts that it was obliged to disembark one security officer at Mayotte as the officer had a disagreement with his contractor and Mayotte was the nearest port.

7. Otherwise the defendant denies each and every allegation in the plaint unless it is specifically admitted. The defendant set up a counter claim against the plaintiff. Firstly, the defendant claims €58,228 in respect of running cost of the vessel Artxanda for 9 days; for security services invoiced by the plaintiff no.1 for 16 days when they were not supplied and for other incidental costs. The defendant states that it has withheld the payment of €30,600 to the plaintiff no.1 leaving a sum of €27,628 due to the defendant.
8. The particulars of the defendant's claim against the plaintiff are particularised as follows;
 - a. Running cost for 9 days deviation at €4187 per day totalling to €37,683.
 - b. Security services invoiced a note provided for 16days at 900 per day from 24th March 2010 to 9th April 2010 totalling to €14,400.
 - c. The call at Mayotte port the Smart Ship Agent invoice of €3,145
 - d. The call at Mahé port Hunt Deltel Ship Agent invoice forecast at €3000, totalling to €58,228.
9. The defendant prays for the plaintiffs' action to be dismissed and judgement be given in its favour for the sum of €27,628 with costs.
10. At the hearing of this application the plaintiff called two witnesses Mr. Daniel Shaul Lam and Mr. Matityahu Potash. The defendant likewise called two witnesses which were Mr. Jon Zulueta who was an assistant Manager and Director of the defendant and the 2nd witness was the captain of the ship Artxanda Mr. Josu Larrocea Bilboa.
11. The facts of this case are largely not in dispute save for the crucial area as to what was the cause of the breakdown of the relationship between the plaintiff no1 and the defendant. Briefly, in 2009 the plaintiff No 1 and defendant entered a written agreement for the provision of security services. It was for 2 months extendable for another 2 months. That contract was performed without a problem. Each party met its obligation. Subsequently, security services apparently continued to be provided as there were negotiations for a new contract. Eventually no agreement was reached on a new written contract.

12. In the meantime Artxanda had set out to sea with two security officers provided by the plaintiff no.1 on roughly the same terms as previously contained in their written contract. It was expected that the ship would be at sea for a period of about 60 days. It was expected to report back into port, at Port Victoria, Mahe on or about the 9th April 2010. This was the first time the ship was having security officers on board and the security officers that were assigned to this ship were entering for the first time service of this kind in the Indian Ocean. The ship Artxanda was not a fishing vessel. It was a supply ship and I assume it was servicing the other vessels belonging to the defendant.

13. While at sea at a location upon which the parties are not agreed both the plaintiff no.1's managing director who at the time was in Israel and the management of the defendant in Spain were simultaneously informed of some disagreements. The security officers complained that the Captain and his team were denying the security officers access to the phone to call Israel or to speak with their families or the use of e-mail. Secondly that they were denied access to the bridge and access to the ship's radar to be able to monitor the security situation of the ship.

14. The defendant's captain DW2 refuted the claims that the security officers were denied access to the bridge and stated that they had access to the bridge. He stated that e-mail and telephone calls were available but had to be restricted by nature of the satellite communication. It could only be available at certain periods and that the same rules applied to the rest of his crew. DW2 further stated that the team leader Amoz of the plaintiff no1 got rattled when he was informed they were in the Tanzanian EEZ. He complained that they shouldn't be there and eventually following contacts between the managing director of plaintiff no.1 in Israel and the management of the defendant in Spain instructions were provided to the captain to disembark the team leader at the port Mayotte and pick up a new security officer.

15. The vessel Artxanda then proceeded to Mayotte and arrived there a day later. The journey took one day. While in port at Mayotte they disembarked the officer in question Amoz

and took on a new officer and they went back to sea. The security team complained that they were not being given information in relation to security including the Atlanta Naval Mission reports and briefings to the ships in the area. Mr. Potash who was on board the vessel Artxanda testified that at one point he sighted pirates and when the ship's captain was informed the captain went into shock. In order to save the ship Mr Potash had to shout at him and give him directions to steer the ship in the opposite direction.

16. The ship's captain denies that that was the case. He testified that in fact it was one of his officers that spied a skiff after they had located on the radar a mother ship and that he consequently steered the ship speeding in the opposite direction. They were never in any immediate danger. Anyhow, Mr. Potash testifies that they could not trust the Captain to provide them with useful information for security matters and decided to inform their company in Israel which they did and PW1 decided to terminate the contract and order that his men be disembarked in Mahé. The management of the defendant based in Spain complied with that instruction and ordered the ship to proceed to port in Mahé where the two men were disembarked and the relationship between the plaintiff no.1 and defendant came to an end.

17. The plaintiff sent his invoice and the defendant sent an invoice to the plaintiff demanding payment of sums it had incurred as a result of what it claimed was the plaintiff's unlawful/premature termination of contract.

18. Prior to discussing the issues in this case and resolving them it is important that I summarise the evidential rules that must be applied. Firstly the burden to prove a fact lies upon the person who asserts the same to be the case. And in order to discharge this burden the standard of proof is on a balance of probability. See Gaetan Renaud v Richard Ernestine and another [1979] SLR 121.

19. In order for the plaintiff to succeed on it's claim it/he must establish, on a balance of probability, the facts upon which it relies, and which give rise to the cause of action. Likewise so must the defendant on its counter-claim. In this case an agreement between the parties must be established and the terms thereof. Each party has an obligation to

prove the term or terms of the said agreement that have been violated or not performed and the loss and damages arising from such breach. This must be consistent with the claim or defence set forth in the pleadings, that is the plaint, defence, counter claim and answer to the counter-claim.

20. It must also be noted that parties that enter into agreements have an obligation to perform them in good faith and the terms thereof shall be binding upon them. This is clearly set out in Article 1134 of the Civil Code of Seychelles [CCS], which 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.’

21. The first issue for determination is who was in breach of their obligations that led to the premature termination of this contract? To do so it would be important to look at the particulars of breaches of agreement that the plaintiff has alleged against the defendant. In order to succeed the plaintiffs must be able to prove on a balance of probability that the alleged breaches were committed by the defendant or defendant’s servants.

22. Firstly it is claimed that the defendant failed to support and cooperate with the said security officers assigned to the ship. In my view it was in everybody’s interest to cooperate for a common purpose and that was the safety of both the ship and crew. It would therefore be logical that given the amount of money the defendant were paying plaintiff no1 that they would want to get their money’s worth by fully cooperating with the plaintiff’s officers.

23. The points of disagreement may appear minor to a person looking on from the outside. The disagreements centred around basically access to the phone and e-mail as well as access to the bridge. Plaintiffs’ witness no.2 explained what was annoying about telephone calls was that he was required to pay prior to making a phone call but when he talked to an African member of the crew the African member had told him he did not

have to pay upfront but the money was deducted from his salary. The plaintiffs' witness felt that he was being mistreated as a result and made much of this. The ship's captain explained that all of them have to pay for the telephone service and they use cards.

24. It appears to me that the plaintiff's security officers had expectations that were not met. Those expectations were not obligations set out in the agreement. PW2 claimed that he needed to call the Plaintiff No.1's headquarters in Israel in order to be apprised of the latest intelligence with regard to the region the ship was in. Not only was this not provided for under the agreement but it appears to me entirely unrealistic. DW2 explained that the ship was in touch with the Atlanta Naval Task Force which was engaged in anti piracy operations in the region and the Coast Guard of Seychelles. The Atlanta Naval Task force provided them with information from time to time. There is no evidence whatsoever that the plaintiff no.1 was engaged in intelligence gathering in Israel and had to keep its officers informed. I must conclude that Mr Potash, PW2, was not a credible witness.
25. I'm unable on the basis of the evidence available on record to conclude as the plaintiffs pressed upon me to do that the defendant failed to fully support and cooperate with the plaintiffs' security officers. In my view this was just a misunderstanding, a question of unmet and unrealistic expectations.
26. I'm unable to agree again that the defendant denied security officers information or facilities including e-mail and telephone access. I'm satisfied that these were provided but at controlled times as must happen in the circumstances both parties were in. Likewise I do not accept that the plaintiff's security officers were denied access to the bridge. In fact PW 2 states that he determined the fact that they were approaching the Somali EEZ from being on the bridge and looking at the radar and GPS to note the position of the ship. So obviously they were allowed and they found their way to the bridge. It is clear they worked in 6 hour shifts. One had to be asleep while one was working. And there was a look out position which the one not asleep would have to occupy.

27. The plaintiffs' claimed that the ship entered the exclusive economic zone of Somalia. No evidence was brought to that effect. In fact contrary to this allegation the evidence by the plaintiff's PW2 is that the ship came within 30-40miles of the Somali EEZ. There is therefore no evidence to support this allegation that it entered the EEZ of Somalia. Neither was it established that this was specifically a term of their agreement.
28. The plaintiff has claimed that the ship entered into dangerous waters off the coast of Somalia causing the two security officers to protect and expel pirates from the ship. There has been no evidence to show that any pirates were expelled from the ship or any pirates had entered or tried to board the ship. Hence there could be no question of the expulsion. Neither is there evidence to show that the ship had entered into the dangerous waters off the coast of Somalia. This is clearly a false allegation.
29. It is claimed that the defendants ignored all advice and warning on security matters by the security officers. Again no evidence has been brought to show the advice and the warning tendered to the defendant by the security officers which was ignored.
30. With regard to whether, in breach of the agreement, the defendant disembarked the security officers in the French Colony of Mayotte it is clear that this officer was disembarked on the instructions of the plaintiff no1. So the disembarkation cannot be a breach committed by the defendant. The security officer clearly wanted to leave the ship and in fact the plaintiff no1 made arrangements for a replacement. The ship had to proceed to Mayotte, though initially the plaintiff no.1, had suggested Dar es Salaam, Tanzania, to disembark the retiring officer and take on board the officer replacing him.
31. It is further claimed that the defendant failed to pay the plaintiff its monthly fee, the airline ticket, hotel accommodation and maintenance including food bills and transportation. These charges were due at the end of the contract and now form part of the relief claimed in this action which includes a counter claim against the plaintiff. I shall deal with that item while considering the relief claimed by each party hereunder.

32. Lastly it is alleged that the defendant failed to renew the contract. There was no obligation to renew any contract unless one took the view, entirely unsupported by evidence, that this contract was perpetual. The negotiations for a new contract were not successful. This cannot be the basis for an action or the basis for alleged breach of a contract. There was no contract to be renewed. It had in any case been prematurely terminated by the plaintiff no1 when he instructed that its security officers be disembarked at Port Victoria, Mahe, prior to the due date for the ship to dock at Port Victoria.
33. All in all I'm forced to come to the conclusion that the breach of the agreement between the plaintiff and the defendant was not committed by the defendant as claimed by the plaintiffs. On the contrary it was committed by the plaintiff no1 and its servants. Clearly the instruction to disembark the two officers prematurely well before the time this ship was due to dock in Port Victoria, Victoria, Mahé, was a breach of the plaintiff no.1's undertaking to provide security until the due date to Port Victoria. There was no conduct on the part of the defendant in my view that justified the plaintiff's actions and as a result I would find that it is the plaintiff that was in breach of this contract and not the defendant.
34. I would now move on to the respective claims for relief of each party. Given my finding that it was the plaintiff responsible for breach I have no alternative but to dismiss the claims for economic loss for one month of €27,000; and the special economic loss of €2000. The plaintiff no.1 has no right to these claims.
35. The object of the agreement between the plaintiff no1 and the defendant was to protect the ship and its crew against pirates. It is surprising, in my view, that there can be a claim for 'exposing the plaintiffs to the unnecessary danger and harm in protecting and repelling pirates from the ship' given that the object of the agreement was exactly to counter such danger as it was known to exist. Notwithstanding the foregoing the evidence that has been adduced in this case clearly establishes that no situation arose whereby the

plaintiffs no 2, 3 and 4 had to expel or repel pirates from the ship Artxanda. I would dismiss the claim by the plaintiffs no 2, 3 and 4 in this regard.

36. The plaintiff no1 claimed a monthly charge of €27,000 for the period 10th March to 9th April 2010. The ship Artxanda arrived in port on the 24th March 2010 and not on its due date of 9th April 2010. The services that the plaintiff provided could only have continued up to 24th March 2010. And that would be only for the period between 10th March to 24th March which would entitle the plaintiff to only 15 days at the rate of €900 per day for two officers rather than the monthly fee of €27,000. The monthly fee of €27,000 was calculated at the rate of €450 per day per officer. The plaintiff can only be entitled to what it had earned and not what it ought to have earned had it performed its obligations. I would allow payment between 10th March to 24th March, a period of 15 days, or approximately half of what has been claimed, totalling to the €13,500.00.

37. I would allow the claim for air tickets for the two officers back to Israel in the sum of €3,600.00. I would allow hotel accommodation and lunches in the sum of €2,000.00. These claims were due at the end of the contract without the need for further proof.

38. With regard to the counter claim for the defendant it has claimed running cost for 9 days deviation at €4187 per day. In the evidence before me this has not been fully explained. What was the 9 days deviation? Where did they have to travel? From what point to what point? I know the ship had to travel to Mayotte but the ship's captain testified that from the time they received the instruction it took them only one day and I would assume it would take them one day to come back to the position they were at before the instruction was given. So without this claim being fully explained or substantiated and evidence adduced to support it's justification I'm unable to allow it.

39. Secondly they have claimed for the period security services were not provided. That is 16 days from 24th March to 9th April 2010. Given that I have not accepted the plaintiff no1's claim beyond the period that they actually provided the service this claim does not arise. I would allow the charges incurred at Mayotte Port, as these were occasioned by the

plaintiff no1's need to change security officers in the course of the voyage. I decline to award the charges incurred at Mahé Port which was the port of final disembarkation. Had evidence been adduced to show that the ship had to put to sea immediately after disembarkation of the two security officers until its known return date of 9th April 2010 I would have been obliged to allow this sum. In the event no such evidence was adduced.

40. In the result I allow a portion of the plaintiff no1's claim to the extent of €19,100.00 and dismiss the bulk of it as set out above. Similarly I allow a portion of the counter claim to the extent of €3,145.00 as set out above while dismissing the bulk of it.

41. With regard to costs I note the action by the plaintiffs no2, 3, and 4 have totally failed. I award the defendant costs for defending those actions against plaintiffs no 2, 3 and 4. The action for the plaintiff no.1 and the counter-claim of the defendant have succeeded only in part. I will allow the plaintiff no.1 one quarter of its costs in this regard. I will award the defendant three quarters of its costs.

Signed dated and delivered at Victoria this 11th day of May 2012

F.M.S EGONDA-NTENDE
CHIEF JUSTICE