

**IN THE SUPREME COURT OF SEYCHELLES**

Commercial Cause No. 25 of 2012

[2013]SCSC

**Platte Island Resort and Villas Limited**

**Plaintiff**

Versus

**EME Management Services Limited**

**Defendant**

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Filed:	10 October 2012
Heard:	18 February 2013
Counsel:	Frank Elizabeth for the Plaintiff Basil Hoareau for the Defendant
Delivered:	27 March 2013

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**JUDGMENT**

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**Egonda-Ntende CJ**

- [ 1] The facts in this case are not in dispute. The plaintiff and defendant entered into an agreement on 23 May 2011. In consideration of an obligation undertaken by the defendant the plaintiff agreed to pay to the defendant the sum of US\$400,000.00 by the 15<sup>th</sup> August 2011. In event that the plaintiff failed to pay the said sum on the due date the plaintiff undertook to pay interest at the rate of 2% per cent per month on any outstanding amount. This works out as 24% per cent per annum.
- [ 2] The plaintiff contends that this clause is penal in nature and is manifestly excessive in the particular circumstances of this contract and ought to be reduced by this court. The plaintiff seeks that it be reduced to 15% per cent per annum or such other rate as the court may find fit. The plaintiff also seeks costs of this suit.
- [ 3] The defendant denies that this rate of interest is manifestly excessive, given the facts of this case. It states that the defendant agreed to withdraw claims amounting to

US\$2,551,024.60 against Island Development Corporation which it had instituted in court. It prayed that the plaintiff's action should be dismissed.

[ 4] The parties filed a statement of agreed facts and then addressed court as to the law.

[ 5] Mr Frank Elizabeth, learned counsel for the plaintiff, submitted that if one took a loan from a bank the interest would be 15% per annum. The annual percentage rate of return which credit cards charge is 17.5% per cent per annum. Therefore an interest rate of 24% per annum was manifestly excessive. Mr Elizabeth pointed to Articles 1152, 1153, 1226 and 1229 of the Civil Code of Seychelles hereinafter referred to as CCS and submitted that this court had the power to reduce the interest rate in a penalty clause that was excessive. He invited this court to reduce the interest rate to 10% per annum.

[ 6] Mr Basil Hoareau, learned counsel for the defendant, submitted firstly that what the law provided could be interfered with was an interest rate that was manifestly excessive and not necessarily interest rate that may be viewed as excessive only. Secondly he submitted that a court had to consider the whether the plaintiff was acting in good or bad faith. He referred to the case of Vallet v Mauritius Southern Sun Hotels Ltd in support of that submission. He stated that he had been unable to find a Seychelles case on the point. Lastly he submitted that the plaintiff having already performed part of the contract with regard to the payment of interest was now prevented by the equitable doctrine of estoppel from complying with the penal clause.

[ 7] Article 1152 of the CCS states,

‘When the agreement provides that failure to perform the contract shall make the debtor liable to a certain sum by way of damages, no larger or lesser sum may be awarded to the other party. This provision shall not apply if the failure to perform is due to fraud or gross negligence. In any case, the court may reduce the sum agreed upon if it is manifestly excessive in the particular circumstances of the contract.’

[ 8] Article 1231 of the CCS states,

‘The penalty may be reduced by the Judge when the principal obligation has been partly performed.’

[ 9] It is clear from the foregoing the court must have regard to a number of factors before

it can interfere with a penal clause to which the parties had committed themselves. Firstly the debtor must have partly performed part of the principal obligation. This is satisfied in this particular case as it is agreed that the debtor/plaintiff has already paid US\$100,000.00 towards the principal sum. He has also paid US\$16,000.00 towards the outstanding interest vide the penal clause.

[ 10] Secondly the debtor has to show that the penalty clause in the circumstances of the contract is manifestly excessive. It is not enough to suggest that it is excessive but it must be manifestly excessive in the circumstances of the contract. Has the plaintiff cleared this threshold?

[ 11] I think not. The plaintiff/ debtor has not adduced any evidence that suggests that the interest rate of 24% is manifestly excessive in the circumstances of this contract. Mr Elizabeth suggested in his address from the Bar of this court that banks in Seychelles and credit card companies charge lesser sums of interest. In the plaint he prayed that the interest rate be reduced to 15% per cent annum. All this is not evidence or proof that the penal rate in the contract is manifestly excessive and so in terms of the contract between the parties. Mr Elizabeth was an attorney in the case and not a witness, needless to say. He could not testify or give evidence in the matter at all or in any case not from the Bar of the Court.

[ 12] It is the duty of the party who asserts to prove. This obligation of a claimant was discussed in Ebrahim Suleman and others v Marie-Therese Joubert and others SCA No.27 of 2010 in which Twomey, JA, stated,

‘12. In such circumstances applying evidentiary rules we need to find that the Respondents discharged both their evidentiary or burden of proof as is required by law. The maxim “he who avers must prove” obtains and prove he must on a balance of probabilities. In Re B [2008] UKHL 35, Lord Hoffman using a mathematical analogy explaining the burden of proof stated:

“If a legal rule requires a fact to be proved (a fact in issue), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates on a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party

who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened.”

- [ 13] The only issue agreed upon at the hearing is whether clause 3 of the said agreement providing for a penal interest of 24% per annum is manifestly excessive in the particular circumstances of the contract and whether the same ought to be reduced in law.
- [ 14] The only evidence before me is the statement of agreed facts by the parties. None of the agreed facts touch on the subject of what interest rates may or may not be manifestly or otherwise excessive, generally, or in the circumstances touching upon the agreement of the parties. I can only conclude that the plaintiff has failed to discharge the evidential burden of proof to show on a balance of probabilities that the penal clause in this case was manifestly excessive in the circumstances of the contract between the parties.
- [ 15] This suit is dismissed with costs.

Signed, dated and delivered at Victoria this 27<sup>th</sup> day of March 2013

FMS Egonda-Ntende  
**Chief Justice**