

**IN THE SUPREME COURT OF SEYCHELLES**

**Civil Side: CC05/2015**

[2016] SCSC 909

---

**DEVELOPMENT BANK OF SEYCHELLES**  
Plaintiff

versus

**KELVIN MOISE**  
First Defendant

**CORINNE DELPECHE**  
Second Defendant

---

Heard:

Counsel: Miss Benoiton for plaintiff

Mr Gabriel for defendants

Delivered: 16 November 2016

---

**JUDGMENT**

---

**Robinson J**

[1] Introduction

[2] By this suit, Plaintiff claims from First and Second Defendants, jointly and severally, a sum of Seychelles rupees 411, 402.00/- with continuing interest as per an agreement entered into by and between Plaintiff and First Defendant dated 16 September, 2010,

(hereinafter referred to as the "Loan Agreement") (i.e. 13.5 per cent on the sum that is in arrears) and charges as from 14 December, 2014. Second Defendant as surety bound herself jointly and severally with First Defendant as co-debtors under renunciation of the benefits of division and discussion in connection with the said obligations.

[3] First Defendant admits that Plaintiff advanced a total sum of Seychelles rupees 324, 000.00/- (hereinafter referred to as the "Principal Sum") to First Defendant, in terms of the Loan Agreement. First Defendant denies that he is liable to Plaintiff in the sum of Seychelles rupees 411, 402.00/- with continuing interest and charges as claimed.

[4] The suit proceeded *ex parte* against Second Defendant.

[5] The admitted facts

[6] The following facts are not in dispute.

[7] Plaintiff is, and at the material time was, a body corporate established under the Development Bank of Seychelles Decree and operates a development bank in Seychelles. In terms of the Loan Agreement Plaintiff advanced the Principal Sum to First Defendant for the "*purchase of a boat and engines for the hire-craft business*" (exhibit P3). The Loan Agreement, inter alia, held the following terms —

- (a) First Defendant would repay the Principal Sum together with interest at the rate of 10 % per annum (as the rate of interest was subsequently varied) in sixty (60) equal instalments of Seychelles rupees 7, 057.00/- which commenced on 1 January 2011, to be paid on the first day of each month;
- (b) Plaintiff reserves the right to vary the interest rates and charges in respect of the facility or any outstanding balance, and/or to vary the basis on which interest shall be computed if the Plaintiff's profitability is adversely affected due to changes in market conditions or any changes in regulations;
- (c) if any amount of the Principal Sum and/or interest due is not received on or before the date due a penalty interest at such rate as may be determined by Plaintiff will be charged on the total amount in arrears from the date on which it becomes due.

Any such interests incurred will be debited at the end of the month to First Defendant's loan account and be subject to the interest charges applicable to the loan. Interest on arrears shall be calculated on the basis of a year of 365 days and the actual number of days elapsed; and

- (d) any expense, including lawyer's fees up to an amount of 15 % of the outstanding debt plus Seychelles rupees 2, 000.00/-, incurred by Plaintiff in recovering all monies outstanding and interest as agreed, will be charged to First Defendant.

[8] By virtue of a written agreement dated 16 September, 2010, (hereinafter referred to as the "Guarantee") and duly delivered to Plaintiff, Second Defendant bound herself jointly and severally towards the Plaintiff and agreed to pay and satisfy to Plaintiff the Principal Sum plus any interest accruing thereon in the event that First Defendant is in default or in breach of its obligations to Plaintiff under the Loan Agreement and as surety bound herself jointly and severally with First Defendant as co-debtors under renunciation of the benefits of division and discussion in connection with the said obligations (exhibit P2).

[9] The evidence for Plaintiff

[10] For Plaintiff the court heard evidence from Plaintiff's representative, Mr. Johny Bastienne, (hereinafter referred to as "Witness").

[11] Witness' evidence includes the admitted facts.

[12] Witness a senior legal officer of Plaintiff, for 2 over years, testifies that under the Loan Agreement, as further security for the repayment of the loan and interest, First Defendant gave to Plaintiff "[p]ledge on the boat and engines", "[p]ersonal [g]uarantee for Ms. Corrinne DELPECHE", and "[m]arine [h]ull insurance assigned to DBS".

[13] In terms of the Loan Agreement the liability of Second Defendant is limited to the Principal Sum with interest thereon including any interest accruing and expense from the date of demand of the Principal Sum from Second Defendant.

[14] According to exhibit P5 the sum of Seychelles rupees 411, 402.00/- was due as of 14 December, 2014, with continuing interest.

- [15] Witness testified that First Defendant has acted in breach of the Loan Agreement in that First Defendant has failed to pay the instalments as agreed in the Loan Agreement. According to a print out of a Development Bank of Seychelles Statement of Accounts (account number 002103000030), in the name of First Defendant, produced as exhibit P5, Seychelles rupees 2, 000.00/- was paid to Plaintiff on 3 February, 2014. By reason of First Defendant's breach of the Loan Agreement, Plaintiff demanded payment of First Defendant's outstanding indebtedness to Plaintiff from First and Second Defendants.
- [16] In breach of First and Second Defendants obligations to Plaintiff under the Guarantee, First and Second Defendants, on Plaintiff's demand failed, refused and neglected to pay First Defendant's outstanding indebtedness under the Loan Agreement to Plaintiff. First and Second Defendants as of 14 December, 2014, are indebted to Plaintiff in the sum of Seychelles rupees 411, 402.00/- with continuing interest as per the Loan Agreement and charges as from 14 December, 2014 with costs.
- [17] Plaintiff is praying the court for a judgment ordering First and Second Defendants, jointly and severally, to pay Plaintiff the sum of Seychelles rupees 411, 402.00/- with continuing interest as per the Loan Agreement and charges as from 14 December, 2014 with costs.
- [18] In cross-examination Witness confirms his evidence in chief.
- [19] Additionally, Witness is unaware about whether or not First Defendant had received the notices of "*mise en demeure*" (collectively exhibits P4). The argument put forward in cross-examination was that First Defendant had never received the notices of "*mise en demeure*".
- [20] Witness was cross-examined about the boat, which was sold at auction, on 19 January, 2012, for Seychelles rupees 50, 000.00/-. Witness states that the proceeds of the sale of the boat were paid in the loan account of First Defendant. That evidence was not disputed by First Defendant. The argument put forward was that First Defendant did not receive any of the proceeds of the sale of the boat.
- [21] The court states at this juncture that evidence about whether or not the correct legal procedures were followed with regards to the sale of the boat at auction falls outside of

the defence. Section 75 of the Seychelles Code of Civil Procedure, reads: *"The statement of defence must contain a clear and distinct statement of the material facts on which the defendants rely to meet the claims"*. In the case of Gallante v Hoareau [1988] SLR 122, G.G.D de Silva Ag. J, stated thus, *"the function of pleading is to give fair notice of the case which has to be met and to define the issues on which the Court will have to adjudicate in order to determine the matters in dispute between the parties"*. In the case of Marie-Ange Pirame v/s Armano Peri SCA 16 of 2005, the Court of Appeal at paragraph 8 of the judgment held thus, *"this Court did state (in CA8/87) inter alia that evidence outside the pleadings although not objected to and the relief not pleaded for, cannot and does not have the effect of translating the said issues into the pleadings or evidence. Indeed we should reiterate here that the above quoted views of this Court are still remain to be good law"*.

- [22] Witness was cross-examined about the status of the marine hull insurance. Learned counsel was concerned about whether or not any insurance payment had been made. The court is of the opinion that the evidence falls outside of the defence.
- [23] The evidence for Defence
- [24] For First Defendant, the court heard evidence from First Defendant.
- [25] The evidence of First Defendant is as follows.
- [26] First Defendant is 29 years old. First Defendant was arrested in 2011. First Defendant could not recall whether or not Plaintiff was aware about his arrest. First Defendant is serving a sentence of eight years imprisonment on Marie-Louise.
- [27] First Defendant borrowed Seychelles rupees 300, 000.00/- from Plaintiff in 2010. First Defendant bought a boat (Ringo) with the money borrowed from Plaintiff.
- [28] First Defendant could not pay the loan because he had problems with the boat. The court states that the evidence is outside of the defence.
- [29] With regards to the notices of *"mise en demeure"*, First Defendant states that the prison authority, where he was serving his sentence of imprisonment at the time, showed him

one of the notices. First Defendant could not recall which of the notices was showed to him.

[30] Second Defendant is a friend of his. Second Defendant is his guarantor.

[31] First Defendant could not pay the loan because he has been in prison since March, 2011. First Defendant is not in a position to pay the loan plus any interest accruing thereon.

[32] In cross-examination First defendant confirms his evidence in chief. Additionally, he states that he had stopped paying the loan before he was arrested. Second Defendant should pay the loan.

[33] Submission and discussion

[34] Learned counsel for Plaintiff and First Defendant made written submissions. The court has considered the evidence on record in light of the submissions of counsel.

[35] It is not in dispute that Plaintiff advanced the Principal Sum to First Defendant for the "*purchase of a boat and engines for the hire-craft business*" in terms of the Loan Agreement. It is also not in dispute that Second Defendant in terms of the Guarantee bound herself jointly and severally towards the Plaintiff and agreed to pay and satisfy to Plaintiff the Principal Sum plus any interest accruing thereon in the event that First Defendant is in default or in breach of its obligations to Plaintiff under the Loan Agreement and as surety bound herself jointly and severally with First Defendant as co-debtors under renunciation of the benefits of division and discussion in connection with the said obligations.


[36] First Defendant disputes liability under the Loan Agreement. The argument on his behalf is that he did not receive any of the notices of "*mise en demeure*". First Defendant states in chief that the prison authority showed him one of the notices of "*mise en demeure*". However, First Defendant could not recollect which of the notices he was showed. Having considered the evidence on that point the court is satisfied that First Defendant had received the notices of "*mise-en demeure*".

[37] Learned counsel for First Defendant questions the rate of the penalty interest under the Loan Agreement on the ground that that rate is too onerous on First Defendant. That issue has been raised only at the stage of submissions. The court has not considered it.

[38] Decision

[39] In light of the above, the court is satisfied that Plaintiff has proven its case against First and Second Defendants on a balance of probabilities. The court enters judgment for Plaintiff against First and Second Defendants, ordering First and Second Defendants jointly and severally, to pay Plaintiff the sum of Seychelles rupees 411, 402/- with continuing interest as per the Loan Agreement (i.e. 13.5 % on the sum that is in arrears) and charges as from the 14 December, 2014, with costs.

Signed, dated and delivered at Ile du Port on 16 November 2016

  
F Robinson  
Judge of the Supreme Court

