

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: MA 156/2016

(arising in CS 190/2003)

[2017] SCSC 150

EXPARTE

In the Matter of

VIRGO CAR RENTAL (Pty) Ltd
Applicant

and

In the Matter of

GERARD BORDMAN
Respondent

Heard: 29th September, 2016
Counsel: Mr. J. Renaud for Applicant
Absent/ Unrepresented for Respondent
Delivered: 10th February, 2017

ORDER ON MOTION

Carolus Master

[1] The Applicant has filed a notice of motion to vacate or set aside a Court order dated 17th July, 2003, made in the main case of Gerard Bordman v Virgo Car Rental (Pty) Ltd, CS

No. 190 of 2003. The notice of motion is supported by an Affidavit sworn by William Joubert who is averred in paragraph 1 of the said affidavit to be the managing director of Virgo Car Rental (Pty) Ltd, the Applicant in this motion.

- [2] The main case CS No. 190 of 2003, was commenced by way of a Plaint dated 15th July, 2003. The Plaintiff Gerard Bordmann claimed that he had entered into an agreement with the Defendant on 11th July, 2002 in terms of which he had loaned the Defendant SCR108,000 to be repaid by monthly instalments of SCR6000 beginning on 31st August, 2002 and ending upon payment of the full amount plus 10% interest. The Defendant had failed to make any payment to the Plaintiff as a result of which the latter claimed the sum of SCR72,000 in loss and damages.
- [3] A notice of motion also dated 15th July, 2003, was filed by the Plaintiff for an urgent hearing of the motion. Briefly, it was averred in the Affidavit in support of the motion that the Plaintiff had lent money to the Defendant to acquire a fleet of vehicles to set up a car hire business which the Defendant in breach of their agreement failed to repay. It was also averred that it was necessary and in the interest of justice that the court make an order of provisional seizure against the vehicles in order to protect the financial interest of the Plaintiff. The Plaintiff therefore prayed the Court to grant him an *ex parte* hearing of the motion urgently in order to prevent the Defendant from disposing of the said motor vehicles as he feared that if the Defendant had notice of the Application he would dispose of the vehicles and deprive him of his funds.
- [4] An Order dated 17th July, 2003 was made by N. Judoo Judge as follows "Given the urgency of the matter and taking into account that the applicant has a bona fide claim fixed against the Respondent, I direct the Director of Licensing Authorities not to register any change of ownership or charge as the vehicles S13267, S12368, S13269, S13271 and S13310 pending the determination of this motion and until further notified." It is this order that the Defendant in the main case who is also the Applicant in the present proceedings seeks to have set aside.
- [5] In order to properly consider and determine the motion before the Court, I consider it appropriate to set out the order of proceedings in the main case.

[6] The main case was called for the first time before the Court on **28th October, 2003**, before Karunakaran Judge. The Plaintiff was represented by Mr. Elizabeth and the Defendant by Mr. Renaud. Mr. Renaud requested for time to file a defence and the case was fixed for **3rd February, 2004**. There are no proceedings on file for 3rd February, 2004. On **9th March, 2004**, Mr. Herminie standing in for Mr. Renaud requested for an extension of time which was granted for 1st June, 2004. The defence dated 15th March, 2004, was filed on 17th March, 2004, and on **1st June, 2004**, the case was set for hearing on 23rd February, 2005. On **23rd February, 2005**, The Defendant was present but unrepresented and Mr. Juliette stood in for Mr. Elizabeth. The hearing was adjourned and the Defendant ordered to pay costs to the Plaintiff. Although the reasons for the adjournment are not on record, since the Defendant was ordered to pay costs, such reasons can safely be attributed to the Defendant and/or his Counsel. The case was fixed for mention on 31st May, 2005, with notice to Mr. Renaud for the Defendant. On **31st May, 2005**, Mr. Juliette again stood in for Mr. Elizabeth and Mr. Renaud for the Defendant requested that the matter be mentioned on 4th October, 2005, and the request was granted. On **4th October, 2005**, Mr. Juliette again stood in for Mr. Elizabeth and Mr. Renaud for the Defendant once more requested for another mention date which was granted and the case fixed for mention on 24th January, 2006. On **24th January, 2006**, Mr. Elizabeth for the Plaintiff was present and Ms Chetty stood in for Mr. Renaud for the Defendant. The case was mentioned before the Master M. Vidot. Mr. Elizabeth stated to the Court that the defence had not been filed for the past two years and the Court granted a final mention date on 14th February, 2006, for defence to be filed. I note that the defence was filed on 17th March, 2004. A further defence dated 16th March, 2004 (which is identical in all respects other than the date, to the Defence dated 15th March, 2004, and previously filed on 17th March, 2004) was filed on 6th February, 2006. On **14th February, 2006**, (date omitted from file cover) both Mr. Elizabeth for the Plaintiff and Mr. Renaud for the Defendant were present and Judge Karunakaran fixed the case to be heard on 6th October, 2006 (date omitted from file cover). The next proceedings on file after that of 14th February, 2006, is dated **20th February, 2007** (date omitted from file cover) according to which the case was called before Master M. Vidot. Mr. Elizabeth for the Plaintiff was present and Mr. C. Lucas was standing in for Mr. Renaud for the Defendant.

It appears from the proceedings that Mr. Lucas stated that Mr. Renaud was indisposed and had to leave the Court room but did not leave his diary. The case was fixed for 31st October, 2007. These are the last proceedings on file. The following dates are recorded on the file cover **31st October, 2007**, and **15th December, 2007**, so presumably the case was called on those dates but there are no proceedings on file for those dates. The last entry on the file cover is “no date”.

[7] On 4th April, 2016, MA 106 of 2016 was filed by the Defendent in the main case for the Order dated 17th July, 2016, referred to at paragraph 5 above, to be vacated or set aside. The motion was dismissed on 25th May, 2016, because of defects in the motion and affidavit in support thereof.

[8] The present motion MA 156 OF 2016 was filed on the same date 25th May, 2016. In terms of the notice of motion, the Applicant (Defendant in the main case) seeks to have the Order dated 17th July, 2016, referred to at paragraph 5 above, directing the Director of Licensing Authorities not to register any change of ownership or charge on the vehicles S13267, S12368, S13269, S13271 and S13310, vacated or set aside. The grounds on which the motion is made are contained in the Affidavit in support of the motion, the relevant paragraphs of which are reproduced below.

- “4. That on 20th February 2007 the Supreme Court held its last sitting in CS No. 190 of 2003.
5. That the Plaintiff in this case has not been heard from since 2004 and I presume that he has passed away.
6. That there have been no further proceedings against the Company in respect of the matters which gave rise to CS No.190 of 2003.
7. That in any event the matter is now time barred by prescription whereby there is no justification for maintaining the restriction on the said vehicles.
8. That the Company wishes to sell the said vehicles but the court imposed restriction prohibits them from doing so.

9. That justice requires the order to be removed.”

- [9] Mr. Elizabeth who is Counsel on record for the Plaintiff in the main case (Respondent in the present Application) was notified of the present proceedings and served with a copy of the Notice of Motion and affidavit in support thereof. He appeared in Court and informed the Court that he does not have any instruction from the Respondent (Plaintiff in the main case) to represent him in this matter and in fact has not had any instruction from him for the past ten years and does not whether he is still alive or dead.
- [10] Mr. Renaud for the Applicant (Defendant in the main case) also informed the Court that despite attempts to do so, he had not been able to ascertain the whereabouts of the Respondent (Plaintiff in the main).
- [11] Since it was impossible to ascertain the whereabouts of the Respondent (Plaintiff in the main) the Court was unable to notify him personally of the proceedings. Further, in view of his Counsel’s inability to act on his behalf because of lack of instructions, the Respondent (Plaintiff in the main) was therefore unrepresented in these proceedings and no evidence was adduced on his behalf.
- [12] Mr. Renaud, Counsel for the Applicant (Defendant in the main case) relied on the affidavit evidence of the Applicant. He also produced to court, Certificates of Vehicle Registration for the following vehicles registered in the name of Virgo Car Rental: Vehicle Registration Nos. S13267, S13268, 13269, S13271, S13310. Motor Vehicle Valuation Reports dated 30th November, 2016, of the vehicles subject matter of these proceedings, made by H. Savy Insurance Co. Ltd., were also produced. Their contents are as follows:
- Vehicle Registration No. S13267. Recommended Present Value: R300 – 500. The vehicle has been in an accident. All essential parts have been removed. There is not much to salvage on the vehicle.
 - Vehicle Registration No. S13268. Recommended Present Value: R5,000 – 6,000. The vehicle is in a state of abandon and would require a great deal of repairs to put it back on the road and it is not economical to repair.

- Vehicle Registration No. S13271. Recommended Present Value: R6,500 – 7,000. The vehicle is in an abandoned state which has resulted in severe deterioration during the past years. It is not economical to repair, only fit for parts that can be salvaged.
- Vehicle Registration No. S13310 and 13269. Recommended Present Value: No value – scrap. All essential parts have been removed and the structure left unattended which has resulted in severe distortions. Both vehicles are scrap. The vehicle is in an abandoned state which has resulted in severe deterioration during the past years. It is not economical to repair, only fit for parts that can be salvaged.

- [13] I take particular note of the averments contained in the Affidavit of the Applicant (Defendant in the main case) in support of the motion, reproduced at paragraph 8 above namely that the last sitting in the main case was on 20th February 2007, that the Plaintiff in this case has not been heard from since 2004, and that there have been no further proceedings against the Company in respect of the matters which gave rise to CS No.190 of 2003. The Applicant (Defendant in the main case) has however been unable to substantiate the averment that the Plaintiff had passed away. I also fail to understand his averment that the matter is now time barred by prescription whereby there is no justification for maintaining the restriction on the said vehicles and find no merit in such argument.
- [14] I note that the documentation produced in this case makes reference to Vehicle Registration Numbers S13267, **S13268**, 13269, S13271, S13310 whereas the Order sought to be set aside refers to vehicles S13267, **S12368**, S13269, S13271 and S13310. It appears from the evidence on record that reference in the Order to vehicle number **S12368** was erroneously made and the correct number should have been **S13268**.
- [15] I take into account the current value of the vehicles as shown by the valuation report provided by the Applicant. The vehicles altogether amount to a maximum of R13,000. The reason for the Order prohibiting the transfer of ownership of the vehicles was to prevent the Defendant from disposing of them thereby depriving him of the funds which

he had loaned to the Defendant and which had been used to purchase the said vehicles. The amount claimed by the Plaintiff is SCR72,000. In view of the deteriorated condition of the vehicles and the loss in their value, it is in my view that maintaining the prohibition against their change of ownership serves no useful purpose especially bearing in mind that neither the Respondent (Plaintiff in the main case) nor his Counsel has shown any diligence in prosecuting the main case. I note in that respect that this case was filed in 2003, and has been going to and fro before the Courts since then until December, 2007, when for some reason no date was set for the next sitting. The case was only reinstated to the causelist upon the filing of MA106 of 2016, on 17th July, 2016. I also take note of Mr. Elisabeth's statement that he has had no instruction from the Respondent (Plaintiff in the main case) for the past ten years and does not know whether he is still alive or dead.

[16] In view of the circumstances I grant the motion and order that the Order dated 17th July, 2003, made in the case of Gerard Bordman v Virgo Car Rental (Pty) Ltd, CS No. 190 of 2003 be set aside.

[17] I further Order that a copy of this Order be served on the Chief Executive Officer of the Seychelles Licensing Authority.

Signed, dated and delivered at Ile du Port on 10th February, 2017.



E. Carolus

Master of the Supreme Court