IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CS 111/2014

[2017] SCSC

BERTA (PROPRIETARY) LIMITED
REPRESENTED BY MR OLDERICK ESPARON, A DIRECTOR
BEAU VALLON MAHE

Plaintiff

versus

FRANK PANAGARY OF BEAU VALLON MAHE

1st Defendant

WINNIE PANAGARY OF BEAU VALLON MAHE

2nd Defendant

Heard: 23rd January 2017

Counsel: Mr. Daniel Belle for the Plaintiff
Ms. Lucy Pool for the Defendants

Delivered: 3rd day of November 2017

JUDGMENT

Govinden-J

[1] This Judgement arises out of a Plaint filed by the Plaintiff of the 3rd of November 2014 against the first and second Defendants (hereinafter collectively called as the "Defendants"), claiming for loss and damages in the sum of S.R. 900,000/- resulting from

an alleged breach of contract by the Defendants. The Plaintiff further filed a reply to the counterclaim of the Defendants (illustrated below) "*in toto*" and moving the Court to dismiss same with costs.

[2] The Defendants in their statement of Defence of the 3rd day of February 2016 has denied the Plaintiff's claim and sought dismissal of the Plaint. Besides, in their Statement of Defence, the Defendants have also included a counterclaim against the Plaintiff. In the counter-claim, it has sought for loss and damages in the sum of S.R. 750,000/- arising out of an alleged breach of contract by the Plaintiff.

[3] For the purpose of this Judgement, the following is the relevant factual and procedural background to the pleadings.

[4] The Plaintiff is a company incorporated on the 20th of November 2012 and formed amongst a Seychellois, his Italian wife and her sister for the purpose of investing in the business of a restaurant and ice cream shop in a new building situated in Beau-Vallon, Mahe (hereinafter referred to as "the leased premises"). The Defendants are the owners and lessors of the leased premises.

[5] The Plaintiff entered into a five (5) year lease of the leased premises with the Defendants on the 1st November 2013 which lease agreement was duly registered on the 18th December 2013.

[6] The Plaintiff aver that it has spent substantial amounts of money and time to make the necessary preparations to begin operation of the restaurant and ice cream shop.

[7] Plaintiff further avers that it was a term of the lease agreement that the Defendants were leasing the leased premises to the Plaintiff as a restaurant and ice-cream shop and the agreed deposit in favour of the Defendants was expressly guaranteed.

[8] The Plaintiff further aver that the Defendants concealed from the Plaintiff the fact that the Defendants had not obtained the indispensable approval of the Planning Authority to operate the leased premises.

[9] Moreover, the Plaintiff avers that it was shortly after the signing of the lease agreement that it was revealed that the Defendants did not have Certificate of Occupancy from the Planning Authority permitting them to rent the commercial premises, that the Plaintiff wrote to the Defendants, giving them notice by registered letter of the 1st December 2013 to fulfil their obligations. The Defendants responded by locking the Plaintiff out of the leased premises and confiscating their furniture and equipment.

[10] Plaintiff maintains that in breach of the lease agreement and albeit repeated

requests the Defendants have failed, refused or neglected to perform specifically so that the Plaintiff can start operations.

[11] The Plaintiff further maintains that the Defendants' behaviour has caused considerable damage and loss to the Plaintiff which damage and loss amounts to SR. 900, 000/-.

[12] The Plaintiff prays this Honourable Court to give Judgment in favour of the Plaintiff with interest and cost and any measure which the Court may deem appropriate as follows: Loss and damages in the sum of SR 750, 000/- and moral damages in the sum of SR. 150, 000/-.

[13] The Defendants in their Statement of Defence aver that they were not in breach of the lease agreement with the Plaintiff. They aver further that the Plaintiff for reasons best known to themselves choose not to commence operations of the leased premises.

[14] It is further, the contention of the Defendants that they neither refused access to the Plaintiff of the leased premises nor confiscated any of the Plaintiffs furniture, fitting and or equipment. They aver further, that by a letter of the 23rd January 2014, the Defendants invited the Plaintiff to remove all its movables found on the leased premises

[15] Moreover, the Defendants also aver that it was the Plaintiff's responsibility to seek the necessary approval from the Planning Authority to operate the leased premises for the purpose of a restaurant and an ice cream shop. As such they aver that they are not liable to the Plaintiff for the sums claimed or at all.

[16] The Defendants in the latter regards has further filed a counterclaim of the 3rd February 2016 alleging that the Defendants entered into the lease agreement with the Plaintiff for the purpose of operating a restaurant and ice-cream shop for a period of five years at a monthly rent of SR 50, 000 per month.

[17] Further, the Defendants maintain that it was a term of the lease agreement that Plaintiff would pay a deposit of SR. 100, 000/-upon the signing of the lease agreement on the 1st November 2013 and SR. 50, 000/- at the end of every month thereafter.

[18] The Defendants further aver that Plaintiff is in arrears of rent for approximately two (2) years and despite repeated requests it has failed to pay the said arrears of rent and vacate the leased premises.

[19] As a result of the matters aforementioned, the Defendants have suffered loss and damage in the form of: unpaid deposit in the sum of SR. 100, 000/-; arrears of rent at SR. 50, 000 per month hence a total of SR. 600, 000.00/-and Moral damages for distress and inconvenience in the sum of SR. 50, 000/- and all amounting to a total claim of SR. 750, 000/-.

[20] Both Learned Counsels as above-referred filed written submissions for and against the respective claims as referred and I have carefully considered the said submissions for

the purpose of this Judgement.

[21] Mr. Olderick Esparon, a shareholder and director of the Plaintiff testified on oath in support of the Plaint and his evidence was corroborated by two other shareholders of the Plaintiff namely Luigina Vivaldeli Esparon and Alice Vivaldeli.

[22] Mr. Olderick Esparon testified in a gist, that once he learnt about the need to have the Certificate of Occupancy issued only by the Seychelles Planning Authority for commercial developments and a valid, he wrote to the Defendants, giving them notice to fulfil their obligation by registered letter of the 1st December 2013. However, there was no positive response from the Defendants.

[23] Mr. Esparon further testified that instead of finding a solution to the problem to give effect to the purpose of the lease agreement, the Defendants chose to lock the Plaintiff out of the leased premises occasioning another breach of its terms and confiscated most of the furniture and equipment of the Plaintiff.

[24] The Defendants on the other hand testified in cross examination that they were co-owners/developers and lessors of other commercial buildings inclusive of a discotheque for many years. Hence they are not strangers to Rules and Regulations that required them to obtain a certificate of occupation before leasing of commercial premises. Planning Authority *"Rules and Regulations"(As per contents of Exhibits P 9 and P 12)*, provide clearly that a lease that lacks a mandatory requirement such as a Certificate of Occupancy issued only by the Seychelles Planning Authority for commercial developments and a valid license from the Seychelles Licensing Authority, it shall be illegal to carry out a commercial business on any premise including accommodating or accepting paying guests clients *"as it infringes on public policy"*.

[25] It is borne from the Plaint and during the hearing, that the Defendants did not inform the Plaintiff of this material fact at the time of the signing of the lease agreement and to that matter even prior to the signing of the lease agreement albeit their knowledge of this *"irregularity"* and this throughout their regular presence on the leased premises since April 2013 till the Plaintiff signed the lease agreement. The plaintiff it is clear from evidence, was unaware of the Defendants "*deceit*".

[26] It was not until the Plaintiff applied for a loan with the Mauritius Commercial Bank (hereinafter referred to as "MCB") that MCB asked for certain documents that the Plaintiff discovered that certain documentation was amiss. *(Exhibits P 5 and P6 refers)*. Despite the realization that Plaintiff realized then that it had been deceived by the Defendants, the Plaintiff testified and produced (contents of *Exhibits P8 and P9 refer),*in evidence to prove that Plaintiff sought to obtain an understanding with the Planning Authority but alas it proved futile as it was not the owner. (*Exhibit 8),*attests to a letter in which the Chief Executive Officer of the Planning Authority Mr. Gerard Hoareau, wrote to the Plaintiff and indicated therein that the Defendants were well aware that their building project was not completed for want of the implementation of the access.

[27] It was further testified by Mr. Olderick Esparon on Plaintiff's behalf that instead of finding a solution with the Plaintiff to try and keep the lease agreement on track, the Defendants choose to lock the Plaintiff out of the premises occasioning another breach of the terms of the lease agreement and confiscated most of the furniture and equipment of the Plaintiff.

[28] The Plaintiff did avail the letter to the Defendants in which they were requested by the Planning Authority to implement an access and they did not comply.

[29] As to the voire-dire, regarding the objections of the Defendants to the signature of the Defendants on the written permission, it is clear that both Defendants admitted on cross-examination that they both implicitly and overtly gave their consent and permission to the Plaintiff to carry out works on the leased premises prior to the signing of the lease agreement.

[30] I will now address the legal standards and its analysis thereto based on the above-depicted salient evidence specific to the Plaint and counterclaim.

[31] The main issues to be determined in this matter are four-fold namely; firstly, as to whether the Defendants caused a breach of the lease agreement by not applying for and obtaining a Certificate of Occupancy issued only by the Seychelles Planning Authority for commercial developments; secondly, as to whether the Plaintiff made the necessary improvements to the leased premises as averred at its own cost; thirdly, as to whether the Plaintiff was ready to commence business at the signing of the lease agreement and fourthly, as to whether the Plaintiff is entitled to moral damages.

[32] The relevant provisions of the Civil Code (Cap 33) (hereinafter referred to as "the Code") and relevant to analysis of the cause of action arising is firstly, out of the provisions of Article 1133 of the Code which provides that: *"the object of an agreement is unlawful when it is prohibited by law or when it infringes public policy"*.

[33] Secondly, Article 1146 of the Code which further provides that: *"Damages are not only due when the debtor is under notice to fulfil his obligation, provided , nevertheless, that the thing that the debtor has bound himself to give or do could only be given or done within a fixed time which he has allowed to elapse."*

[34] Based on the evidence illustrated as background, it is evident that the Defendants were unable to prove that their failure to have the leased premises in conformity with Planning Rules and Regulations was due to a cause which could not be imputed to them. Evidence adduced in Court by Mr. Olderick Esparon on Plaintiff's behalf in support of the Plaint revealed that the Planning Authority had requested the Defendants to carry out the implementation of the access of their development project since 2011*(as per contents of Exhibit P8)*. However, the Defendants in cross examination testified their ignorance of the Law and Regulations with regards to the Planning Authority's Certificate of Occupation. In that regards it is trite that ignorance of the law is no defence especially noting that the first Defendant is a *"well-seasoned businessmen as admitted owing other*

leased commercial premises"

[35] Thus, having given notice to the Defendants to perform their obligation and the Defendants having failed to perform accordingly, the Plaintiff is therefore entitled to damages under Article 1147 of the Code which provides that:

"*The debtor shall be ordered to pay for damages, if any, either by reason of his failure to perform the obligation or by reason of his delay in the performance, provided that he is unable to prove that his failure to perform is due to a cause, which cannot be imputed to him and that in this respect he was not in bad faith*"

[36] It is also evident by the evidence led and analysed thus, that the Defendants had acted in bad faith as they intentionally failed to inform the Plaintiff from the very beginning of the lack of the "Certificate of Occupancy issued only by the Seychelles Planning Authority for commercial developments and valid for the leased premises".

[37] It also has to be noted that the Defendants did not seek mutual consent but choose to unilaterally revoke the lease agreement for no legal cause, an infringement of Article 1134 of the Code which provides that:"*Agreements lawfully concluded shall have the force of law for those who have entered into them. As a result, they shall not be revoked except by mutual consent or for causes which the law authorises. They shall be performed in good faith"*.

[38] In that light, the Plaintiff testified and it is admitted by the Defendants themselves by the evidence on records, that the Defendants had taken possession of the leased premises in which all the assets of the Plaintiff were kept. In late December 2013, the Plaintiff had to obtain the permission of the Defendants to remove, in the presence of the 2nd Defendant, some chairs and tables, which the Plaintiff admitted he did not bring back to avoid confrontations. Contents of all the possession of the Plaintiff left on the leased premises were inspected by the Court on the locus on the 1st December 2016.

[39] Vis-à-vis the allegation of the Defendants that the Plaintiff had taken other equipment and furniture those have not been proven by the Defendants. The key of the entrance door was always with the Defendants and same was confirmed on the locus and in evidence. From their nearby home which was observed by Court on locus, the Defendants could easily monitor everything at the leased premises.

[40] The Defendants had taken possession of the leased premises in mid-December 2013 with police intervention after quarrelling with shareholders of the Plaintiff as revealed in the course of the hearing and this through the evidence of witnesses for the Plaintiff and the Defendants themselves. The 2nd Defendant admitted under cross examination that complete equipment and furniture were in place for the opening of the restaurant. The Plaintiff denied having taken anything other than chairs and tables in the presence of the Defendants.

[41] With direct reference to the counter claim of the Defendants, the leased premises being

the object of the lease agreement was legally non-existent, the use of it been illegal. *(Contents of Exhibit P12 refers)*. There is thus no ground for the Defendants' counterclaim given those circumstances. The Defendants were in breach of the lease agreement which they revoked unilaterally and took possession of as early as mid-December 2013.

[42] With regards to the allegation of non-payment of the deposit made by the Defendant, the Plaintiff were able to show that they had done the necessary transactions with MCB as adduced in evidence *(Exhibits P5 and P6 refer)*.

[43] The Plaintiff adduced evidence of their application for a Loan Agreement with MCB in manifestation of its intention to pay the deposit, only SCR 30, 000 from the loan was released by MCB into the Plaintiff's account as testified by Mr. Olderick Esparon for the purchase of a fridge and other materials.

[44] The balance of the money for the deposit and 1st month's rent (December 2013) was NOT accessible to the Plaintiff; the MCB required the Certificate of Occupancy issued only by the Seychelles Planning Authority for commercial developments and valid before disbursement. This had not been forthcoming as the Defendants did not perform their contractual obligation to do so. They then turned hostile and took possession of the leased premises by force. The purpose of the deposit was, as stipulated in Clause 3 of the lease agreement '*to be used in the event of any damages caused to the premises by the tenant'*.

[45] It took the Defendants nearly two years to finally obtain the indispensable Certificate of Occupancy issued only by the Seychelles Planning Authority for commercial developments and valid *(as exhibited in Exhibit D5 of the 30th January 2015)*, and this almost two years after the signing of the lease agreement. One begs the question as to what hardship the Plaintiff would have had to endure if the bank's due diligence was not vigorous. Defendants would have obtained valued added premises while the Plaintiff without their legitimately expected commercial activity would have had to reimburse the loan.

[46] The claim for moral damages by the Defendants who acted throughout in bad faith cannot be measured against the plight and claim of the Plaintiff given the circumstances of this case. It follows therefore, that the counterclaim of the Defendants cannot for all intents and purposes be entertained.

[47] For over nine months the Defendants had the shareholders of the Plaintiff and their employees work to improve the leased premises knowing fully well that the expectation of the Plaintiff would never be met in those circumstances. The Defendants failed intentionally to inform the Plaintiff of the status quo of the leased premises which they were aware of since April of 2011.

[48] Consequently, I dismiss the counter-claim as the Defendants have failed to adduce evidence as to how they are entitled in law to payment for unpaid deposit, arrears of rent for two years and moral damages for distress and inconvenience.

[49] The Defendants loss if any is as result of their own doing and bad faith, the Plaintiff cannot therefore be held liable. In the case of (***Fisherman's Cove Ltd v Petit & Dumbelton Ltd)(1979) SLR***, it was held that: *"all reasonable steps must be taken to mitigate loss". Therefore, one cannot claim damages for loss which he ought reasonably to have avoided. The Defendants decided to rent out leased premised with knowledge of lack of a certificate of occupancy for its operation towards the leased purpose.*

[50] In respect of damages as claimed by the Plaintiff, the list of items with costs and receipts related to furniture, equipment and accessories necessary for the commencement of the restaurant business was produced *(as Exhibit P7 to which the Defendants did not object to in Court (except for some chairs and tables which the representative of the Plaintiff had to remove from the restaurant with the Defendants permission)),* but later at the locus in quo, many of the other equipment and furniture listed were allegedly found missing.

[51] The Plaintiff and his members worked to improve, at the Plaintiff's cost, the leased premises of the Defendants. The 2nd Defendant admitted in cross-examination that all was in place and the restaurant was ready to start operations when the lease agreement was signed on 1st November 2013.

[52] It is clear that the Plaintiff had invested its money on the premises in improving the leased premises of the Defendants adding value to the relevant property which is now available for leasing to a third party as the Defendants have admitted that they have now obtained the required certificate of occupancy.

[53] It was Mr. Olderick Esparon's testimony, that, by not being allowed by the Defendants to enjoy the leased premises due to the lack of a certificate of occupancy, it as a consequence shattered their expectation and subsequently causing the shareholders tremendous hardship.

[54] In the circumstances, I find that the moral damages being claimed is justified and recoverable under Article 1149 of the Code, even if it is for breach of contract and that in line with the Ruling in (***Kopel v Attorney General (1995) SLR 315)*** wherein it was made clear that *"even if moral damages may not as a rule be awarded for breach of contract, in certain circumstances, the Court may do so"*.

[55] After analysing the facts before me and the law applicable to this case, I find that the odds lie in favour of the Plaintiff. They have proved their case on a balance of probabilities. It has been proven that the Defendants contracted in bad faith and have breached the lease agreement which caused the Plaintiff loss and hardship.

[56] In my considered view, I find that the amounts claimed by the Plaintiff however for loss and damages appear to be on the high side and finds that a more reasonable and appropriate sum should be considered by the Court given the circumstances of this case. After taking all the relevant factors into account, I find and make the following awards in favour of the Plaintiff:

(i) Loss and damages in the sum of S.R. 526, 884.31/- (*as per contents Exhibit P7)*;

(ii) Moral damages in the sum of S.R. 75,000/-

(iii) The Defendants are to further allow the Plaintiff through its shareholders and agents to retrieve from the leased premises all of its possession in the *(as detailed in the form of Exhibit P3, namely furniture and equipment),* still found on the leased premises.

All with interests and costs

Dated this …… day of ……. 2017.

Govinden J
Judge of the Supreme Court