

**IN THE SUPREME COURT OF SEYCHELLES**

**Civil Side: CS97/2011**

**[2018] SCSC**

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**UNIVERSITY OF SEYCHELLES A. I OF MED INC LTD**

Plaintiff

versus

**GOVERNMENT OF SEYCHELLES**

Defendant

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Heard:

Counsel: Mr. A. Derjacquesfor plaintiff

Mr. J. Chinnasamyfor defendant

Delivered: 29 January 2018

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**JUDGMENT**

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Renaud J

**[1]** This matter is before the Court on USAIM’s (“Plaintiff”) Amended Plaint filed on 18 October 2011 against the Government of Seychelles (“Defendant”), wherein it seeks damages for Defendant’s alleged breach of contract. Plaintiff, a private medical university incorporated in the Seychelles on 11 January 2001, alleges that (1) Defendant unlawfully and without reasonable cause terminated the contract between the parties; and (2) alternatively, the Plaintiff alleges that the Defendant breached its statutory duties and

obligations under the Education Act 2004 in unilaterally and unlawfully terminating the certification and/or contract between the parties.

[2] Plaintiff avers that it suffered loss and damages in the amount of SR 250,212,500.00 for which the Defendant is liable in law.

1. **RELEVANT PROCEDURAL AND FACTUAL BACKGROUND**

**A. Procedural Background**

[3] The Court observes that the matter was initially heard and dismissed by Chief Justice Egonda-Ntende (as he then was), where he held that the Plaintiff had contracted prior to incorporating in the Seychelles and therefore lacked the ability to enter in such a contract. However, the dismissal was overturned on 17 April 2015 by the Seychelles Court of Appeal, which found that a subsequent agreement between the parties signed after Plaintiff's incorporation, namely a 2004 Memorandum of Understanding ("MOU"), "implicitly cured, confirmed and ratified the precedence of transactions."

**B. Factual Background**

[4] On 23 June 2000, Plaintiff was granted a Presidential Charter ("the Charter") ratified by the President of the Republic. This Charter granted Plaintiff the "approval to establish a School of Medicine in the Republic of Seychelles and the right to confer the degree of Doctor of Medicine including the eligibility for licensure for the graduates."

[5] On 23 June 2000, an agreement ("the Agreement") was signed between the Plaintiff and the Defendant, represented by the Minister for Education and the Minister of Health. Clause 1 of the Agreement indicated inter alia that it was agreed that the Defendant would sponsor a Charter for the Plaintiff "to establish a private medical university in the Republic."

[6] The pertinent provision of the one page Agreement provided that the Plaintiff "shall establish and operate a medical school known as University of Seychelles – American Institute of Medicine" (clause 9); "the medical graduates of [the Plaintiff] shall have the eligibility for licensure in the Republic" (clause 7); "the Republic shall request the World

Health Organization to publish the existence of USAIM as an accredited medical institution authorized to confer medical degree” (clause 3); the “[Agreement] shall be in effect as long as USAIM operates a university in the Republic” (clause 12); and “[e]ither party may terminate [the Agreement] by giving one year’s notice of its intention to do so. This notice shall be in writing” (clause 13).

[7] On 8 July 2004, the Plaintiff also signed a MOU with the Ministry of Health that clarified the arrangements between the parties. It specified that Plaintiff would send undergraduate medical students for practicals and clinical rotations to the District Clinics and Victoria Hospital and following successful postgraduate examination, grant postgraduate medical degrees. The MOU stated inter alia that the Ministry of Health would provide “facilities for the University’s postgraduate education.”

[8] Furthermore, the MOU provided that: “Even in the case of termination of this contract, for any reason, it should be ensured that students already in the program will finish the course and will get the above stated graduate and/or postgraduate degree in medicine.” The MOU stated that it shall be governed by Seychelles law and it “shall continue unless previously terminated pursuant to the provisions hereinafter contained. USAIM Advisory Board can review this contract once a year.”

[9] Though the parties have submitted voluminous amounts of evidence, I have only summarized the pertinent facts relevant to the (a) contract and alleged breach and (b) termination:

a. **The Contract**

[10] In February 2006, after obtaining a Charter, signing the Agreement and MOU, the Ministry of Education granted the Plaintiff a Certificate of Operation of a Private Educational and Training Institution. This Certificate recognized the right of the institution to provide tertiary education in the Health Sciences until February 2011 subject to compliance with the provisions laid out therein.

[11] On 26 May 2006, the Principal Secretary for the Ministry of Land Use and Habitat, acting on behalf of the Defendant, signed a seventy-five year lease with the Plaintiff for premises on which the Plaintiff would develop its campus. The Plaintiff testified that it

planned to build a state-of-the-art medical facility on that land, and attract significant investment to Seychelles. It began paying the lease, hired an architect from Germany and commenced planning the facility.

- [12] In 2007, the Seychelles Medical and Dental Council (“SMDC”) refused to register the first graduates from the Plaintiff as medical practitioners in Seychelles. The Plaintiff testified that this was not for any good reason as the degree was recognized in other developed countries, including the USA, UK and Mauritius.
- [13] On this point, the Chief Executive Officer of the Seychelles Qualification Authority (“SQA”) at that time, who is now the CEO of the Tertiary Education Commission, testified on cross examination that once a graduate becomes a medical doctor they should be eligible for license and to be admitted by the professional body to practice.
- [14] On 12 February 2007, Plaintiff sent a letter to the President requesting his intervention. Plaintiff requested that the first batch of graduates be made eligible for a temporary licence from SMDC. Plaintiff’s request, however, was not fulfilled.
- [15] On 14 February 2008, the SQA granted a 2-year provisional accreditation to Plaintiff having conducted an audit of its teaching facilities in collaboration with a South African expert consultant. The results of the audit included certain recommendations which needed to be met before the Plaintiff would be granted full accreditation. These mainly related to external moderators of the assessment procedures. The Plaintiff had worked with the SQA to ensure that it met those standards. The follow-up audit was due to take place in September 2009, but it was postponed to February 2010 due to the unavailability of the external consultant.
- [16] Then the SQA “was told to put [the audit] on hold” and it was eventually cancelled when the Agreement was terminated, despite the fact that the Plaintiff was ready and prepared for the final audit and confident of meeting the requirements. Plaintiff testified that following the termination of the Agreement, the SQA was unwilling to entertain the possibility of the Plaintiff achieving full accreditation.

[17] On 21 January 2009, Plaintiff wrote to the Vice President, Mr. Joseph Belmont, to raise the matter of licensure again, as this was a requirement of the Agreement. In the letter, Plaintiff stated that:

“USAIM graduates have not been able to register with the SMDC till this time. We have asked SMDC to give us the registration procedure several times but all our letters went unanswered.”

[18] In her testimony, Plaintiff’s President testified that, around that time, the second cohort of graduates were graduating and she had still not been able to ensure that they would be registered and licensed by the SMDC. She stated that the SMDC “were refusing to answer our letters, if I go and meet the chairman, he would refuse to meet me, if I call he would refuse to take the call.”

**b. Termination of the Contract**

[19] On 14 January 2010, the Attorney-General, acting on behalf of Defendant, wrote to the Plaintiff to notify it of the termination of Agreement pursuant to Clause 13. The letter stated that the Defendant was willing to enter into an agreement for the continuation of the studies of already enrolled undergraduate students whose studies would run for more than one year in order to be completed.

[20] The letter further called on Plaintiff to terminate any post-graduate courses that may have been initiated as these were not provided for in the Charter. It would appear from this letter that the Attorney-General was either unaware of the MOU which specifically referred to and authorized the granting of post-graduate degrees or believed that even this was outside of the remit of the Charter.

[21] On 18 January 2010, the Plaintiff wrote a letter to the Ministers of Health and Education (the signatories on the Agreement) in an effort to gain further clarification for the sudden termination. Under the impression that part of the reason for the termination had to do with potential confusion between the to-be-created University of Seychelles and the Plaintiff, the Plaintiff informed these ministries that it had begun a name change exercise to become the University of Sciences, American Institute of Medicine.

- [22] The Plaintiff, in this same letter, indicated that during a recent conversation it had been led to understand that it would be able to exist and operate under the Education Act when it was passed and the Plaintiff therefore requested that it be permitted to operate in Seychelles for the extra time in order to be incorporated under the new Act.
- [23] In a letter dated 3 February 2010, Defendant undertook to allow the undergraduates students who were already registered in January 2010 to continue with their studies up to April 2013. The letter stated that the Plaintiff should not seek to enroll any further students. The letter also stated that: “We re-emphasise the fact that all post-graduate courses has [sic] to be terminated by you immediately as post graduate courses are not provided in the Charter” and that the “Government position on the above points are not negotiable.” [Exhibit P22]. Plaintiff testified that this period of time was not sufficient for the enrolled graduates to finish their studies. For medical students, the course was 4-5 years for an average student, and 5-6 years if a student required any extra time for completion. With pre-medical students who were already enrolled, there was an additional 2-year programme.
- [24] The situation for these students would be that those students who had not yet finished their education would have to transfer to another university, a matter which was frustrated by the failure to provide final accreditation coupled with the non-licensure of graduates, or the student had to accept that they would not be able to graduate despite having potentially completed one to three years of school.
- [25] On 8 February 2010, the SQA extended the Plaintiff’s provisional accreditation to 14 February 2011. Given the fact that Plaintiff had been prepared for its final audit for full accreditation, but that this had been cancelled by the Government, and due to the fact that it was becoming apparent that the Plaintiff would not be able to continue to function in Seychelles, Plaintiff requested that it be given full accreditation by the SQA, which would enable it to take its business elsewhere.
- [26] On 14 July 2010, the SQA denied Plaintiff’s request, writing that: “We regret that it is not possible for the SQA to accord USAIM full accreditation on the basis that is outlined in your letter, that is, as a formality to facilitate entry into another country. Such an act

would go against both the letter and spirit on which the National Qualification Framework is based.”

[27] Testifying on behalf of the SQA, Mr. Domingue indicated that had the Plaintiff asked for another extension of the provisional accreditation it might have been granted. He also admitted that it would have been possible, hypothetically, for the SQA to have granted the Plaintiff full accreditation between 2008 and 2011 had the audit taken place.

[28] The Plaintiff testified that both the President of USAIM and their lawyer attempted to negotiate with the Defendant (as represented by the SQA, the Ministry for Education, the Ministry for Health, the President’s office and the Attorney General) to ensure that the interests of their students were protected by enabling a transition. These attempts at negotiation, however, were rebuffed.

[29] Thereafter, in a letter dated 11 March 2010, the Attorney General refused a request that students be permitted to enroll with the Plaintiff in May and September 2010, at which point students would transfer to Mauritius. The Plaintiff therefore began looking to relocate to Mauritius.

[30] On 5 April 2010, after being contacted by the Tertiary Education Commission of Mauritius regarding Plaintiff’s accreditation status, Mr. Domingue confirmed to Mauritius that the Plaintiff had provisional accreditation until 14 February 2011. Plaintiff was later informed that Mauritius could not approve the establishment of the institution in Mauritius unless Plaintiff was fully accredited. Plaintiff testified that this was the situation in all countries: “We were in no-man’s land – we were not in Seychelles and we couldn’t go anywhere else.”

[31] On 28 July 2010, the Attorney General wrote again to Plaintiff stating that the Government will not grant them any further grace period; and indicating that the Agreement between the Government of Seychelles and Plaintiff will terminate, as notified, at the end of January 2011. This was followed by a grace period up to April 2011 to allow currently enrolled students to complete their studies.

[32] Plaintiff testified that in 2010 the Plaintiff was dealing with 400 students who would be affected by this termination, either those who had graduated and could not be registered,

or those who would simply not be able to complete their education in the one year mentioned in the Attorney General's letter. The Attorney General later wrote to correct this to April 2013.

- [33] Plaintiff testified that it appeared to her from her correspondence with the various stakeholders that the discrepancy between the date of the extension of the provisional accreditation (February 2011) and the 'grace period up to April 2013' meant that any students graduating after February 2011 would not be allowed to practice medicine as they would be graduating from an unaccredited institution. Moreover, the refusal to allow the enrolment of further students threatened the financial viability of the institution.
- [34] On 9 August 2010, the SQA responded to further queries from the Mauritian authorities regarding the status of the Plaintiff in Seychelles. In this letter, the SQA admitted that the Plaintiff was prepared for the audit for accreditation and that this had been cancelled at the last minute, however, that the Plaintiff had adequately prepared itself for the final audit and was actively negotiating with the SQA regarding logistics of the audit when it was cancelled by the Defendant.
- [35] The Plaintiff testified further that the Ministry of Home Affairs informed the Plaintiff that from 18 August 2010 it would not allow visas to any student to enter Seychelles for their studies at the Plaintiff. It was described to the Plaintiff that if the enrolled students were to leave the jurisdiction, even temporarily, they would not be granted re-entry to the jurisdiction.
- [36] In December 2010, the Plaintiff relocated its operations to Mauritius but it faced difficulties as a result of its non-accreditation and the non-licensing of its students. In a formal communication with the Republic of Mauritius, the Seychelles' Ministry of Foreign Affairs stated that the Plaintiff had ceased operation in Seychelles in December 2010. Plaintiff testified that this was erroneous and the Plaintiff had been required therefore to send a correction of the date to Mauritius stating that the Plaintiff had a grace period up to April 2013 and would therefore remain operational in Seychelles until 2013. All the registered students had completed their pre-clinical program by that stage and were pursuing clinical programmes overseas, however, the Plaintiff was still strictly speaking operating, as this was the final cohort of students who were enrolled in



Seychelles and therefore would graduate from Seychelles before the legal entity was wound down.

[37] In March 2012, the SQA refused to register graduating students who graduated after USAIM left Seychelles (but who had enrolled prior to 2010 as “both the registration and provisional accreditation of USAIM lapsed when USAIM relocated”). This affected their ability to be registered elsewhere, including with the Medical Council of India.

[38] However, the Plaintiff managed to negotiate with the Medical Council of India for permission to set up a temporary campus in Kochi in order to facilitate teaching the remaining students to the completion of their studies from 2012 onwards and would be closed down when the final students graduated (it should be noted that this occurred after the plaint was filed and no amendments to the plaint have been made in terms of section 146 of the Seychelles Code of Civil Procedure to include the costs of this relocation, or to plead additional damages as a result of the relocation to Kochi.) Therefore, the Court will not entertain the damage claims related to this relocation (Exhibits P75-P118).

[39] The Plaintiff testified that the approach of the Defendant completely undermined the granting of the extension of the Agreement to April 2013 and prejudiced the students involved as well as the Plaintiff.

## **II. LEGAL ISSUES**

[40] The following issues are to be decided by this court: whether Defendant (A) breached the Education Act and whether the (B) contract between the parties was breached and lawfully terminated:

### **A. Breach of Education Act**

[41] The Plaintiff raised a general allegation of a breach by the Defendant of the provisions of the Education Act. This claim, however, was vaguely pleaded and lacked the requisite specificity. Section 71(d) of the Seychelles Code of Civil Procedure requires that the pleading contains “a plain and concise statement of the circumstances constituting the cause of action and where and when it arose and of the material facts which are necessary to sustain the action.” The Plaintiff’s pleading in this regard amounts to a bald statement

and cannot even point the court in the direction of which provisions are relied on. This does not meet the required standard for pleadings. Furthermore, no submissions were received on this point and therefore it appears that this ground has been abandoned.

### **B. Alleged Breach and Unlawful Termination of the Contract**

[42] What remains for this Court to determine is whether the contract was breached and/or unlawfully terminated and whether this caused the Plaintiff any losses or damages which the Defendant is obliged to compensate under the law.

[43] In order to determine the first issue, I will determine: (a) what is the contract between the Plaintiff and the Defendant; (b) whether the Defendant breached any of the terms of the contract by cancelling the accreditation process of the Plaintiff and by refusing entry permits for students, and/or (c) whether the Defendant's termination of the contract was in conformity with the terms of the contract and the law.

#### *A. Contract between the Plaintiff and the Defendant*

[44] In the Seychelles Court of Appeal's ruling, the court identified that there was a valid "contract" between the parties and made reference, in the Judgment of Domah JA, to the Charter, the Agreement and an arbitration clause, (which only appears in the MOU). See [2015] SCCA 16 This suggests that in the eyes of the Seychelles Court of Appeal, the 'contract' between the Parties consists of the MOU, the Charter and the Agreement. See [2015] SCCA 16. I agree that these three documents must be read together to collectively form the contract (the "Contract") between the parties as each stipulate provisions for the behaviour of the parties with regard to the operation of the university.

[45] In light of this finding, I find that when the Defendant purported to cancel the Agreement, it neglected to consider the MOU. This is of particular significance given the fact that the Plaintiff was a duly incorporated company at the time of adopting the MOU and registered as an educational institution at the time of the termination. The pleadings take for granted that the termination of the Agreement is tantamount to termination of the Contract, and therefore I will proceed on that basis.

B. Cancellation of Plaintiff's Accreditation Process and Denial of Entry Permits for Students by Immigration Officials

[46] In the pleadings and the submissions, Plaintiff maintains that the cancellation of the accreditation process by the SQA and the denial of entry permits for students by the relevant immigration officials caused it loss for which it is entitled to damages.

[47] Article 1134 of the Civil Code of Seychelles is relied on by both parties and is pertinent, but not determinative of the matter. It provides as follows:

*“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.”*

[48] Though pursuant to Article 1134 of the Civil Code all contracts include an implicit duty to act in good faith, little jurisprudence has been developed regarding this duty and the parties have submitted scant authorities on the matter in their written submission. During a contract, the parties owe each other a duty of good faith regarding performance of the obligations that form the basis of the contract. This duty of good faith has its roots in French jurisprudence and implicates a duty to cooperate – which can be more or less accentuated depending on the nature of the contract between the parties. See commentary and cases cited in F. Terré, P. Simler & Y. Lequette *Droit civil: Les obligations* (10th ed., Dalloz 2009), at pp. 458-461.

[49] This duty of cooperation implies a duty for a contracting party to facilitate or at very least not to frustrate the execution of the contract of his co-contractor. See *id.* at p. 461. This suggest that if one party modifies the balance of the contract in such a way as to affect or frustrate the other party's ability to perform its obligations, such an action would be in violation of the duty of good faith and the duty to cooperate that derives from it. Indeed, parties to a contract, particularly like the one at issue, owe to each other a collaboration that allows the contract to produce its full effect or risk not fulfilling their obligations under the contract. See *id.*

- [50] With regard to the cancellation of the accreditation process, the CEO of the SQA testified that he was instructed by the Chairperson of the Board to cease the full accreditation of the Plaintiff which was due to be reviewed in September 2009. The Chairperson of the Board testified that he was instructed by the Attorney-General to halt the accreditation process and gave instructions to the CEO accordingly. This instruction had the effect of cancelling the process during the running of the contract and it happened during the notice period prior to the actual termination of the contract.
- [51] Instead, the SQA offered to grant (and did grant) an extension of the provisional accreditation. The distinction between provisional and full accreditation is significant, and affected the ability of the Plaintiff to transfer its campus elsewhere. The refusal to progress the accreditation (despite the contract running for a further two years (from January 2011 to April 2013) continued into time during which the Plaintiff was to continue providing medical schooling in terms of its mandate and Charter.
- [52] It is the Defendant's position that the Plaintiff willingly relocated in December 2010 before the audit for accreditation could take place, abdicating a reasonable and gratuitous offer that they could stay in Seychelles until April 2013. However, the evidence suggests that the Defendant's decision to terminate the accreditation process (and therefore to prevent the audit from happening) was taken prior to the Plaintiff's decision to leave the jurisdiction.
- [53] At the initial hearing before the Supreme Court, the question was raised as to whether the cancellation of the accreditation by the SQA, a statutory body, can be accredited to the Defendant. For completeness I deal with it here: The SQA is set up as a statutory body in terms of section 3 of the Seychelles Qualifications Authority Act, 2005 ("SQA Act") to develop, regulate and enforce a national qualifications framework in Seychelles. The SQA, albeit having corporate status under section 3 of the SQA Act, still performs executive functions (see sections 4 and 5 of the SQA Act). The members are appointed by the Minister for Education (section 6), accountable to the Minister (section 20), subject to the Minister's directions and regulation (sections 21 and 26) and financed primarily by an Appropriation Act (section 22).

- [54] The former CEO of the SQA testified that it is an independent authority, however, this is not express nor implicit in the legislative structure of the SQA Act. For all intents and purposes, the SQA is exercising administrative authority, and falls under the purview and control of a Minister of the Government and therefore I find that its actions are attributable to the Defendant.
- [55] With regard to the denial of granting of re-entry visas, the Plaintiff brought evidence that the Defendant had informed it that students would not be permitted to re-enter the country upon departure, even for seasonal holidays. Students would be required to stay in the country for the full time from January 2010 to April 2013 if they wanted their visas to remain viable. This is not a reasonable expectation on a mainly foreign student body who would potentially not be able to return to Seychelles if they travelled abroad.
- [56] This would no doubt have affected the goodwill of the Plaintiff and the decisions of the students, particularly when faced with such uncertainty about the accreditation of the university. This further destabilized the Plaintiff's ability to run a viable business and is further proof of bad faith by a Ministry of the Government vis-à-vis the Plaintiff. The Plaintiff explained that students were deterred by this additional burden attached to their education.
- [57] As explained above, the nature of this contract is one which gives rise to a duty of cooperation. Both parties to the contract had responsibilities to each other. These obligations would be ongoing for the Plaintiff, and continue to exist for the Defendant for the duration of the 'extension period' as granted by the Defendant. The MOU stated that "[e]ven in the case of termination of this contract, for any reason, it should be ensured that students already in the program will finish the course and will get the above stated graduate and/or postgraduate degree in medicine."
- [58] It was also a requirement under the Agreement that the Defendant ensure that graduates of the Plaintiff were entitled to licensure; this accreditation is an essential aspect of licensure in Seychelles and abroad. The Defendant gave the Plaintiff one year's notice of its intention to terminate, however, it then also indicated that it would consider an extension of some time if the Plaintiff entered into an agreement to this effect.

- [59] However, the record shows that the Defendant was resolutely unwilling to enter into any negotiations with regard to the terms of any such agreement for extension, including how long this extension should run. The Defendant unilaterally resolved to enable the Plaintiff to have as two years after the termination of the contract (despite evidence from the Plaintiff that such an amount of time was insufficient for their graduation).
- [60] The actions of the Defendant frustrated the ability of the Plaintiff to continue to function, either inside or outside of Seychelles and to mitigate its losses as a result of the termination.
- [61] The hardship caused by the cancellation of the accreditation had ripple effects on the ability of the Plaintiff to effectively perform its duties under its contracts with its students and at the same time wind down its Seychelles operations. This constitutes a breach of good faith by the Defendant in the performance of the contract. This accreditation audit process if it had been permitted to progress could have resulted in the Plaintiff receiving full accreditation and would have greatly alleviated the expenses to the Plaintiff of lost income, refunded student fees and the relocation to Kochi.
- [62] Furthermore, the granting merely of provisional accreditation coupled with the non-licensing of the students by the SMDC (another government agency), tarnished the university's reputation and good will in the early years of its development. The evidence of the SQA officials and the Plaintiff suggest that the Plaintiff was on track to achieve full accreditation and had that been received at any point during the following year up to the end of 2013 that would have made a significant difference to Plaintiff's situation.
- [63] This exacerbated its difficulty in making the arrangements for the termination of the contract and grossly increased its expenses as the university was delayed in its ability to set up and make operations work and ultimately was forced to relocate from Mauritius to India. At the time of giving testimony (in 2012 during the 'extension period' granted by the Defendant), the Plaintiff was still in the process of trying to relocate. The Plaintiff had been required to set up a full faculty in Mauritius (offices, lecturers, service contract etc.) in order to get approval there, and it only lacked formal accreditation or some other form of assistance from the Defendant. However, the Defendant further frustrated the Plaintiff's attempts by informing the Mauritian government that the Plaintiff's

provisional accreditation had lapsed on its relocation from the country. This meant that no seamless transition could take place.

[64] I therefore find that the Defendant breached its obligation of good faith when it frustrated Plaintiff's ability to perform the contract by cancelling the accreditation process; similarly, I find that the Defendant breached its obligation of good faith and the terms of the contract by denying re-entry visas to students, as the Defendant was under an obligation under the MOU to ensure students already in the program would finish the course and receive the appropriate degrees. In denying re-entry to students, Defendant did not fulfil its obligation under the Contract.

c. Lawfulness of the Termination of the Contract

i. *Brief Summary of Arguments Presented*

[65] In its submissions, the Plaintiff submits that the Contract between the parties could be terminated but only for reasonable cause being breach by one party. Counsel for the Plaintiff has argued that because clause 12 anticipated a perpetual Charter, a fundamental breach by the Plaintiff was required in order for the Defendant to act and issue a termination notice in terms of clause 13. Relying on *Vijay v Ailee Recreations Ltd.* (1983) SLR 91, Plaintiff argued that all contracts are governed by an implied principle of fairness and duty of good faith.

[66] Moreover, Counsel for the Plaintiff argued that clause 12 of the Agreement and the nature of a Presidential Charter is proof of the intention of the parties that the Agreement would last for a significant amount of time. The Plaintiff points to the fact that no explanation was given for the unilateral decision to terminate the Agreement and stated that "if I knew that this clause meant that it is going to be terminable without breach of contract neither me nor any other business person would be coming to Seychelles to invest in such a project." This evidence was given as proof of the intention of the parties.

[67] Counsel for the Plaintiff submits that interpreting the clauses as a whole, the termination clause 13 is subject to the perpetuity clause, clause 12. Invoking Article 1134 of the Civil Code, Plaintiff argues that the force of law should be given to these clauses taken together and no undue reliance should be placed on the words of clause 13.

[68] The Defendant agrees with the Plaintiff that the terms of the Agreement cannot be read independent of one another. Defendant, however, goes on to state that clause 12 and clause 13 must inform each other to show that the Agreement was not intended to be permanent. The Defendant submits that whilst clause 13 makes arrangements for termination, clause 12 stipulates that the Agreement is also subject to the ability of the Plaintiff to be capable of operating itself as a university (and therefore would terminate if the Plaintiff went bankrupt or ceased to operate). Therefore, Defendant argues that clause 12 cannot be interpreted as a grant in perpetuity purely because of the existence of clause 13.

[69] The Defendant pointed to the evidence of Dr. Alkhairy (for the Plaintiff) who stated that clause 13 was an exit clause for both parties “in case things do not work out.” The Defendant submits that the witness accepted that the common intention of the parties was that either party could terminate the contract, therefore there is no requirement of an interpretation of permanency.

[70] With regard to the grounds for terminating, the Defendant submits that either party had a unilateral right to terminate in terms of clause 13 as long as the termination complied with the express provisions of the Agreement (in writing and with one year’s notice). It submitted that the letter of the Attorney General dated 14 January 2010 complied with the provisions of the Agreement and therefore is a lawfully valid termination of the Agreement.

[71] The Defendant submits that there can be no implicit requirement for any reason, given the explicit inclusion of other requirements in clause 13.

*ii. Discussion and Findings*

[72] Article 1156 assists with the interpretation of the contract and provides that “the common intention of the contracting parties shall be sought rather than the literal meaning of the words.” However, it is important to not overlook the second half of the article, which provides that “in the absence of clear evidence, the Court shall be entitled to assume that the parties have used the words in the sense in which they are reasonably understood.”



- [73] Moreover, Article 1161 provides that: “All the terms of the contract shall be used to interpret one another by giving to each the meaning which derives from the whole.” Counsel have also relied on Article 1160 which provides that “usual clauses shall be implied in the contract even if they are not expressly stated.”
- [74] The significance of the so-called ‘perpetuity clause’ (Clause 12) should not be given more emphasis than is due. Whether the parties have included or omitted a termination clause is not dispositive as to the interpretation of a perpetuity clause because no party can require another to perform obligations forever – that would be tantamount to slavery. Therefore, where parties include a perpetuity clause into their contract, both parties will always have an implicit right to unilaterally terminate such a contract. However, where parties include a terminations clause, this clause will set the requirements as to how that termination may properly be effectuated.
- [75] Here, given that clause 13 has been included in the Agreement militates against interpreting clause 12 in the sense desired by the Plaintiff. The better interpretation of these clauses is that the contract is intended to be perpetual unless it is terminated by a party under clause 13. This interpretation is the best interpretation in the light of the relevant quoted articles of the Civil Code of Seychelles.
- [76] The termination clause in the Agreement specified the grounds on which a valid termination of the Agreement could be made. The termination required notice in writing and one year’s notice of the intention to terminate. Whether a year’s notice is too short or whether termination ought to have only been invocable for breach is a matter to be determined during contract negotiations; these are not matters for the Court to determine. In so finding, I am minded of the Roman law maxim *caveat subscriptor* – let the signatory beware.
- [77] Where the provisions of the contract are clear, the Court will not perform acrobatics to make provisions more favourable for the Plaintiff who admitted to having had a role in drafting. The plain words of the contract are *prima facie* proof of the intentions of the parties and will be upheld except where legally justifiable reasons exist for enlarging or avoiding the plain meaning. The starting point of contractual interpretation is the

requirement under law for this Court to give the contract the force of law having been validly made (Article 1134).

[78] The Plaintiff was represented by a lawyer who could advise it on the legal implications of the words of the termination clause. There were no other express terms included at the time of the negotiating and drafting of the Agreement. Given the size of the anticipated investment and the difficulty of setting up and winding down a company of the nature of a University, it is surprising that the termination clause, or the whole agreement for that matter, is so sparsely drafted – one page with thirteen clauses determining millions of rupees of investment

[79] Nevertheless, though the Defendant appears to have effectuated the notice and termination in conformity with the written terms of the Agreement, the Court reminds the parties that the duty of good faith extends to all aspects of the contract, including the exercise of a termination clause drafted in the manner here presented. Indeed, French contract law provides that: “si les clauses résolutoires s’imposent aux juges, leur application reste néanmoins subordonnée aux exigences de la bonne foi, par application de l’article 1134 du Code civil. » In other words, though Judges are bound to apply the terms of a terminations clause, the exercise of such a clause is subordinated to the requirements of good faith. See commentary and cases cited in F. Terré, P. Simler & Y. Lequette *Droit civil: Les obligations* (10th ed., Dalloz 2009), at pp. 675-76.

[80] Based on the evidence presented, I find that the termination was not exercised in good faith. Although Defendant was not required to give a reason for the termination, the duty of good faith also extends to the invocation of the terminations clause. As the party conferring or influencing the license to operate, the thinly drafted contract and its termination clause would tend to work to the benefit of the Government. The sparsely drafted contract interpreted in the light of this implied duty of good faith, however, operates to constrain the Government from terminating a contract in an abusive manner. Defendant’s (1) decision to halt the audit with the SQA, which if I find to be attributable to the Defendant; (2) SMDC’s failure to provide a reason for the refusal to register – which I find to be attributable to the Defendant; (3) Defendant’s decision to deny re-entry visas – had the effect of compounding Plaintiff’s expenses and damages. Having created

a no man's land for the Plaintiff, I find that Defendant's decision to terminate amounts to bad faith.

[81] These findings, however, do not dispose of the case. Plaintiff still must demonstrate what damages it is entitled to and prove such damages in accordance with the established evidentiary standards in Seychelles law.

[82] In this regard, Plaintiff contends that due to Defendant's breach of the contract, it should be compensated for its (A) direct expenses, (B) loss of revenue, and (C) loss of reputation and goodwill as a university.

[83] In reviewing the Plaintiff's damage claims, the Court notes that despite claiming a significant amount of damages, the Plaintiff has not provided much case law and guidance that would assist the Court in the technical and difficult task of reviewing its damage claims. Moreover, it has been incredibly difficult to make sense of the sums claimed, sometime exhibited in dollars or Seychellois rupees, and the various and scattered sets of exhibits presented.

[84] Though I have made finding as to the breach of contract claims and am prepared to finalize the ruling regarding the issue of damages, I am concerned as to whether such a decision is most consistent with Justice. The Government, in my opinion, has clearly committed a wrong for which they should have to compensate the Plaintiff, however, the Plaintiff has failed to prove all its damage claims.

[85] I intend to issue a finalized judgment, which will include an award for reasonable damages against the Defendant. This ruling may not necessarily be pleasing to the Defendant, but neither the Plaintiff. However, given the well-known difficulty of assessing damages in our small jurisdiction, in a case as important as this one, in the spirit of Articles 21 and 128 of the French civil procedure code -- which provides that part of a Judge's mission is to conciliate the parties -- I am prepared to wait 60 days times in order to issue my finalized judgment on damages.

[86] Though this proposed solution is admittedly novel and the parties have had several opportunities to reach an agreement outside of Court, I believe that given the findings herein, the circumstances for reaching an out of court solution appropriate for both parties

have presented themselves and may encourage the parties to reconsider their position as to settlement.

[87] Against my finding that the Defendant has breached the contract, but mindful that there were several evidentiary issues with respect to the proof of damages, I am therefore willing to accord the parties one final opportunity to find a conciliatory resolution as to damages and/or possible restoration of licensing and rights to operate in the Seychelles.

[88] In so doing, I acknowledge that the parties are under no obligation to pursue such an option and that failure or unwillingness to negotiate or attempt to negotiate will not be reflected in the final judgment, as no further submission will be entertained by the Court.

[89] Should the parties failed to reach an agreement within 60 days, I will proceed to issue my final judgment as to damages as soon as possible thereafter.

Delivered in open Court by ..... on 29 January 2018

Sign and dated at Ile Du Port on 29 January 2018

B Renaud  
Judge of the Supreme Court