

IN THE SUPREME COURT OF SEYCHELLES

Commercial Cause Side: CC 02/2017

[2018] SCSC

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- 1. LEON BUILDERS (PTY) LTD**
 - 2. ANTOINE LEON**

Plaintiff

versus

MUA (SEYCHELLES) INSURANCE

Defendant

Heard: 4 July 2017, 5 July 2017, 21 September 2017, 3 October 2017, 24 October 2017.
Submissions 15 November 2017.

Counsel: Mr. S. Rajasundaram for plaintiff
Mr. S. Durup for defendant

Delivered: 5 February 2017

JUDGMENT

M. TWOMEY, CJ

[1] The First and Second Plaintiffs, a construction company and the director of the First Plaintiff respectively, sue the Defendant, an insurance company, for breach of the terms of insurance contracts taken by them with the Defendant.

- [2] The insurance agreements provided cover for the Plaintiffs' properties from all risks except as excluded in the policy.
- [3] On 9 April 2015, a theft took place at the First Plaintiff's store at Copolia, Mahe and at the residential home of the Second Plaintiff in which machinery and tools amounting to SR223, 700 was taken from the First Plaintiff and personal effects amounting to SR8420 from the Second Plaintiff.
- [4] They lodged claims with the Defendant and despite repeated requests, the same remains unpaid.
- [5] The First Plaintiff further claims that it has been unable to carry out its construction business because of the loss of its tools and machinery and has made a loss of SR 500,000.
- [6] The Second Plaintiff further claims that he has lost the use and convenient enjoyment of his property that has been stolen and the loss of amenities, income and deprivation of legitimate interest which he estimates at SR10, 000.
- [7] In its defence the Defendant puts the Plaintiffs to strict proof of their allegations and avers that the Plaintiffs' claims are not genuine.
- [8] The Second Plaintiff testified at the trial. He came home at 12.30 in the afternoon of the 9 April 2015 to find louver blades missing from a bedroom window and several personal items gone. He called his family and the police.
- [9] When his son arrived home he checked the site and reported that several items were missing from the First Plaintiff's store. He gave a statement to the police to that effect. The Second Plaintiff subsequently communicated with the Defendant and filed claim forms together with the list of missing items and their respective values. More details of the claims were demanded by the Defendant. It was intimated that the claims were not genuine or inflated and they remain unpaid to date.
- [10] The Second Plaintiff further testified that the First Plaintiff had to rent or purchase new equipment to continue its construction business.

- [11] The Second Plaintiff's son, Alain Baker, corroborated his father's evidence. He had worked with the First Plaintiff as a mason for over 17 years. He had returned to the house from work after being informed of the break-in by his father. He had gone to the store to get louver blades to replace the ones missing in the house when he noticed that the store had also been broken into and all the tools gone. The police was called and he gave them a statement. Despite their investigations, the tools were never recovered.
- [12] Mr. Peter Roselie, the First Plaintiff's tax agent also testified. He produced the financial statements of the First Plaintiff for the years 2013, 2014 and 2015. In 2013 the company made a taxable profit of SR351, 907. In 2014 it made a taxable loss of SR460, 238 and for 2015 another taxable loss of SR654 621. The company's original assets cost SR121, 676 and after depreciation were valued in 2013 at SR2, 500. He explained that the value of depreciation does not necessarily reflect the actual value of the asset. In this regard he stated that the replacement value of the asset is calculated by comparing its actual cost to the cost of replacing it on the market.
- [13] In cross-examination he stated that had been no changes from 2015 in the asset inventory of the company's financial statement in 2016. When questioned by the court he stated that the term "disposal" in the financial statement would include a theft.
- [14] Inspector Marcus Jean who is in charge of Mont Fleuri police station also testified. He said he had been attached to Mont Fleuri Police Station from 2015 and that there had been several complaints pertaining to thefts at the Plaintiffs' store and house at Copolia from Antoine Leon and his son Alain Baker. A police report was done on 9 April 2015 by his subordinate Constable Faure about the theft and the details of properties stolen from the buildings. He spoke about the thief breaking into other houses in the area but that he could not be apprehended. He said that in his opinion the complaint was genuine because on another occasion the suspected intruder was caught behind the First Defendant's store and the matter was now before the Magistrates Court. He said that altogether there were four police cases involving the same person for thefts in the area.
- [15] Sergeant Robin Legaie produced the statement of Alain Baker, the Second Plaintiff's son about the incident. It reiterates much of what he said in court.

[16] Patricia Albert, a senior customer officer of the Defendant also testified. The claims forms from the Plaintiffs had been dealt with by another officer of the company but she had completed it. The Plaintiffs had stated the loss and the details including damaged electrical equipment and there was a list of equipment supporting the claims. The Defendant had refused to pay the claim. Not all receipts for the stolen items were handed over by the Plaintiffs.

[17] The Defendant was also suspicious of the claim after a report submitted from the site visit carried out by their then branch manager, David Vidot. His findings were not objected to and read out in court:

“I am of the opinion that the above claim is grossly exaggerated and fraudulent.

Key to this conclusion is that the son state that he notice tools had disappeared from the store and informed his father the same day. Yet in the father’s statement on the same day nothing is mentioned of the stolen tools until 2 days later. Following the above discrepancy I did a site visit. The driveway to the property is so steep and narrow that I had to leave my car on the main road and walk to the site. I will forward the photos, which you have some separately. Of the general condition of the site and store tools are all over the place. Visible is a mixer (not a bigger one is reported stolen) plus another portable tool. I was informed by Leon’s son that they have cameras but it was not working at the time of the burglary took place. Based on my observation I do not believe that the burglary resulted in such a major loss of tools and only tools on the insurance list. Furthermore items on the list are heavy and cumbersome to move.” (sic)

[18] Ms. Albert stated that receipts were necessary in order to establish the original price of the items claimed and then to calculate the depreciation to arrive at the value of the item stolen. She admitted that there was nothing on file to show that the receipts were requested from the Plaintiffs. An ex gratia offer was made to the Plaintiff in the sum of SR55, 925.

[19] Mr. David Vidot, the manager of the Defendant at the time of the incident, also testified. The Plaintiffs had taken out policies of ‘asset all risks’ insurance for their properties. When assessing the Plaintiffs’ claim he felt there was something amiss. He paid a site

visit some time later - it could have been more than a week but not months. The road to the site was steep and he could not drive up it. The First Plaintiff's claims was for every single item that was insured. He also noticed two fairly new concrete mixers, a compactor and a generator on site. He concluded that if the mixer that was stolen was bigger than the one he saw together with other heavy items, a pickup truck would have been necessary to load and take away the items. It is also a policy that the receipts for stolen items be produced for the claim to be successful.

- [20] In cross examination, he maintained his statement that some of the items claimed like the concrete mixer, compactor, generator and ladders were on site. It was put to him that those had been hired by the Plaintiffs and in response stated that he did not know.
- [21] In their written submissions the Plaintiffs aver that the Defendants have failed to bring evidence of their refusal to pay the Plaintiffs' claims based on fraud and gross exaggeration. Such refusal, they submit, cannot be just based on the Defendant's opinion. They aver, relying on *Govinden v General Insurance Company of Seychelles* (1995) SLR 89, that where insurers raise a defence of fraud for non-payment under a policy of insurance, the burden of proof lies on them to a standard of a high degree of probability.
- [22] In response the Defendant raised a point of procedural law that the plaint is brought wrongly against a trading name rather than a person and therefore is not maintainable.
- [23] It also submitted that although police statements were made by the Plaintiffs, the accounts of the theft are contradictory and no specifics were given about the items stolen and their location on site. The site visit carried out by the Defendant's manager and his subsequent report showed that the claims were not genuine. This is supported by the inventory in the First Plaintiff's financial statements, which showed a consistent list of items belonging to the company from 2013 to 2016.
- [24] I have considered the evidence and the submissions of the parties and find, first of all, that the point of procedural law regarding the action being wrongly brought against a business name rather than the Defendant holds no water.
- [25] The procedural point made by Counsel for the Defendant is not elaborated on. In any case, the plaint is brought against MUA (Seychelles) Insurance represented by its CEO

and the second paragraph of the plaint clearly states that the Defendant is an insurance company duly licensed to carry out an insurance business in the Republic of Seychelles. The Defendant appeared and defended the suit. There was never any misunderstanding as to who was being sued. I therefore reject this line of defence.

[26] As concerns the burdens and standards of proof in this case, since this is a civil claim the burden of proof would generally lie on the Plaintiffs who must prove their case on a balance of probability (see Article 1315 of the Civil Code of Seychelles, *Suleman v Joubert* SCA 27/2010, *Gopal & Anor v Barclays Bank* (2013) Vol II SLR 553 and *SBC v Beaufond* (unreported) SCA 29/2013).

[27] The insurance law of Seychelles is neither based on French law or English common law. Since the Insurance Act of 1994, later repealed and updated by the modern Insurance Act of 2008, these provisions regulate both domestic and non-domestic insurance business. There is however scant local jurisprudence on the subject. Further, the Insurance Act of 2008 now qualifies any previous local jurisprudence on insurance law. The provisions of this Act does not exclude the general regime applicable to contracts under the Civil Code of Seychelles unless there are specific provisions to this effect.

[28] The issue in the present case is whether a claim under a policy of insurance is payable where a claim is deemed fraudulent.

[29] In terms of the particular type of insurance in the present case, the First Schedule of the Insurance Act made pursuant to sections 2 and 4 of the Act defines the class of a property policy as follows:

“A contract in terms of which a person, in return for a premium, undertakes to provide policy benefits where an event contemplated in the contract as a risk other than a risk more specifically contemplated in another definition in this section, relating to the use, ownership, loss of or damage to movable or immovable property occurs.”

[30] The contracts entered into by the parties are those contained in the policies admitted in court in Exhibits P1 and P2. This documentary evidence sadly is limited by the lack of production of the policy handbook, which may have been attached to the original policy

but not to the policies issued in 2014 as these were only reinstatements of previous policies. The court cannot guess what is contained in the policy handbook relating to the policy cover. I can only rely on the terms of the contract as detailed in the documents produced.

[31] Insofar as the First Plaintiff is concerned its property is insured against “all risks miscellaneous”. The property insured is equipment contained in a list submitted to the company in 2012. This has not been produced. However, a letter from the Defendant to the First Plaintiff dated 13 July 2015 (Exhibit P4) contains the following statement:

“Re: List of Stolen items

*As per the attached list, we notice that there are three items that have been
crossed out.*

*Grateful if you could confirm that the items are still with you as it is (sic) also
covered under your policy”*

[32] The list of items totalling SR223, 700 is provided together with their value and their serial numbers (Exhibit P11). The First Plaintiff explained in a letter (Exhibit P7) that the items claimed under a different policy for an incident at Anse aux Pins previously (a black and decker drill, a step ladder and 2 spades) were taken off the list of items for which he was claiming under the policies in issue.

[33] With regard to the Second Plaintiff, his residence and the contents therein are insured against “householder’s multirisk (burglary)”. That policy does have a list of items appended to it. Of particular application is clause PS124, which excludes loss, or damage in which the principal is concerned. A similar exclusion is also contained in the First Plaintiff’s policy under clause PGM04 where loss or damage resulting from the dishonesty of any principal, director or employee to the company is excluded.

[34] Since there are allegations of fraud on the part of the Defendant in this case, potentially capable of invalidating their claims, it is important to bring to light the legal provisions relating to fraud in the Civil Code, namely Article 1116 which provide:

*“Fraud shall be a cause of nullity of the agreement when the contrivances
practised on one of the parties are such that it is evident that, without these*

contrivances, the other party would not have entered into the contract. It must be intentional but need not emanate from the contracting party.

It shall not be presumed and it must be proved.”(Emphasis added)

[35] The courts have on countless occasions reiterated the fact that where fraud is alleged in a suit, it must be pleaded with particularity (See *Hornal v. Nenbayer Products Ltd* (1957) 1 QB 247; *General Insurance Company of Seychelles Limited v. SayBake (Seychelles) Limited* 3 SCAR (Vol. 1) 1983-1987 p. 250 and *Jacqueline Labonte & Anor v/s Robert Bason* SCA No. 13 of 1996). The only oblique averment to this effect in this case is paragraph 6 of the statement of defence which states:

“...Defendant avers that the Plaintiffs have failed to prove that their claims are genuine.”

[36] I do not therefore find that the provisions of the Civil Code have been complied with either in the statement of defence or in the manner in which evidence was adduced by the Defendant. Further, I have, on the one hand, the evidence of the Plaintiffs and their witnesses which to all intents and purposes is strongly corroborated by the evidence of Inspector Marcus Jean. On the other hand, I have the evidence of the Defendant’s witness, David Vidot, who visited the site some two weeks after the incident occasioning the claim. Whilst I believe him to be truthful, he has not been able to rebut the possibility that the items he found on site were not those claimed as lost but rather hired in replacement of those stolen. As it is the Defendant claiming fraud it has to discharge its burden of proof as established under Article 1116 of the Civil Code.

[37] The serial numbers of most of the items claimed were in its possession. It would have been easy to check them against the serial numbers of the items it found on site to confirm whether they were the same. This was not done. Moreover the police report dated 3 June 2015 confirms the list of stolen items. I am therefore not of the view that the Defendant has discharged its burden of proof. That defence therefore fails. I am also not convinced that the financial statements produced show that the items were still in the possession of the Plaintiffs when the claim was made or thereafter. The tax agent, in my view explains this fully.

- [38] I am satisfied on the evidence adduced by the Plaintiffs that they have each proved their claims with regard to the stolen items. The lack of production of the receipts to support a claim may be policy but are not terms of the agreement and are not enforceable.
- [39] I am however not satisfied that the claim of SR 500, 000 by the First Plaintiff for loss of business is made out. This is not supported by any of its documentary evidence, least in its financial statement for the year ending 2015. In cross-examination he stated that he purchased and or rented substitute equipment to do his work. He does not state that he was unable to carry out work or lost business. In re-examination he stated that since the theft, he has not been able to carry out regular business. This is not sufficient to support a claim for SR500, 000 or any amount for that matter. I so find.
- [40] The Second Plaintiff's claim is not seriously disputed and I find in his favour for the full amount claimed.
- [41] Interest is not specifically claimed but there is a general prayer for "any other relief" and I grant interest on the awards on this basis.
- [42] I therefore enter judgment as follows:

SR223, 700 with interests at the commercial rate and costs in favour of the First Plaintiff.

SR 18,420 with interest at the legal rate and costs in favour of the Second Plaintiff.

Signed, dated and delivered at Ile du Port on 5 February 2018.

M. TWOMEY
Chief Justice