IN THE SUPREME COURT OF SEYCHELLES

Commercial Cause: CC09/2016

[2018] SCSC 699

LUKAS RAIDA
Plaintiff

versus

MONTEGO BAY FINANCIAL LIMITED
Defendant

Heard: 14th May 2018 and 15th May 2018

Counsel: Mr. Rene Durup Attorney at Law for plaintiff

Mr. Elvis Chetty Attorney at Law for defendant

Delivered: 20 July 2018

JUDGMENT

Burhan J

[1] The plaintiff filed plaint against the defendant seeking the following relief:

a) that judgment be entered in favour of the plaintiff and against the defendant in a sum of Czech Koruna 25,881,058 with interests and costs.

[2] The plaintiff Mr. Lukas Raida is an insolvency administrator for Union Bank in the Czech Republic while the defendant Montego Bay Financial Ltd represented by its

Director Intershore Consult (Seychelles) Ltd is a Seychelles International Business Company.

[3] It is averred in the plaint that ~~that~~ the defendant brought a claim against the plaintiff before the Regional Court in Ostrava in the Czech Republic, for the recovery of a sum of Czech Koruna (CK) 25,881,058 and the said claim was dismissed by the Regional Court in its judgment dated 18th November 2010. Being aggrieved by the said judgment, the defendant appealed to the High Court in Olomouc in the Czech Republic. The High Court reversed the judgment of the Regional Court and made order in its judgment dated 6th October 2011, that Mr. Lukas Raida pay the said sum CK 25,881,058 to Montego Bay Financial Ltd.

[4] Accordingly on the 22nd of December 2011, the plaintiff in this case Mr. Lukas Raida, paid the said sum by transferring the sum to the defendant pursuant to the said judgment dated 6th October 2011.

[5] Meanwhile Mr. Lukas Raida even though having made payment of the said sum, appealed the judgment of the High Court in Olomouc to the Supreme Court of the Czech Republic which annulled the judgment of the High Court in Olomouc.

[6] Thereafter the plaintiff made several requests to the defendant to pay back the said sum CK 25,881,058 paid in pursuance of the High Court order, but the defendant failed and neglected to pay back same. The plaintiff avers in paragraph 7 of his plaint that by failing to pay back the said sum, the defendant has been unjustly enriched and a cause of action has arisen for the plaintiff to sue the defendant for the said sum.

[7] In the defence filed by the defendant, the series of aforementioned cases filed in the Czech Republic in the Regional Court, High Court and Supreme Court and the said decisions referred to by the plaintiff were admitted. The defendant admits the payment of the said sum by the plaintiff but denies that the defendant is liable to return the said sum on the basis of an action based on unjust enrichment.

[8] It appears from the evidence of Mr. Dusan Sedlaeck an Attorney at Law giving evidence on behalf of the plaintiff ~~stated~~ that the plaintiff Mr. Lukas Raida was an insolvency

trustee of Union Bank. According to the evidence of the plaintiff, the main legal question that arose in the proceedings in the Czech Republic, was whether the claim was based on co-ownership and thus entitled to preferential treatment in the bankruptcy proceedings, or whether it constituted a normal contractual claim, which would then have to be registered within the normal bankruptcy proceedings and await settlement after the conclusion of the bankruptcy proceedings.

[9] It was also borne out in the evidence of the plaintiff, that while the Regional Court had dismissed the claim of Montego Bay Financial Ltd, the High Court of Olomouc reversed the said decision and ordered Mr. Raida to pay the said sum which was paid on the 22nd of December 2011 to the defendant in this case. However on appeal to the Czech Supreme Court, the Supreme Court annulled the said decision and referred the matter back to the High Court for a renewed decision. It is to be noted the Supreme Court did not order the return of the said sum to Mr. Raida. Thereafter on the 14th of November 2013, the High Court affirmed the Regional Court of Ostrava's decision to dismiss the case. On the 29th of April 2014, Mr. Raida sent a letter requesting the return of the said sum and the additional sum of CK 13,264 that had been paid as reimbursement for costs in the proceedings of the High Court.

[10] It appears from the evidence of Mr. Dusan Sedlaeck that subsequent to the proceedings referred to in the previous paragraph herein, Mr. Lukas Raida had initiated proceedings against the Czech Republic on a civil claim for damages, resulting from the High Court of Olomouc's decision being overturned. These proceedings were commenced in the District Court of Prague, which rejected the said claim on the basis that it was premature. However the Appellate Court, the Municipal Court of Prague, reversed the decision and ordered the Czech Republic to pay the plaintiff damages, amounting to Czech Koruna 25,881,058. It appears from the evidence of Mr. Sedlaeck that the said decision has been appealed from to the Supreme Court by the Attorneys for the Czech Republic who have argued that the state is only liable in damages, if the collection of the sum claimed from the primary debtor is not possible. It is apparent that it was this that initiated this action against the defendant in the Seychelles and Mr. Sedlaeck further stated that if this action was to be successful, he would be withdrawing the action against the Czech Republic. It

is apparent from his evidence that if this action was to be unsuccessful, it would be proof of the fact that recovery from the debtor Montego Bay Financial Ltd was not possible and therefore the claim against the Czech Republic was a "last resort" claim.

[11] Mr. Sedlaeck in his evidence confirmed that the cause of action had arisen in the Czech Republic as the money had been transferred from one bank to another in the Czech Republic but stated that the Czech Courts' could only exercise jurisdiction over a foreign defendant, if the defendant had assets in the Czech Republic. The account to which the money had been transferred had been closed. They were unable to trace any assets of the defendant in the Czech Republic and were unaware whether the defendant had a registered office in the Czech Republic. Although he stated that the claim of the plaintiff was not time barred according to the law in the Czech Republic as the time limitation for enforcement of judgments was 10 years, he admitted that the general statutory limitation for an action based on unjust enrichment was 3 years.

[12] The plaintiff also called as witness an expert on the Czech Republic law Mr. Petr Breza. His expertise was not challenged. He corroborated the fact that the issue before the various Courts in the Czech Republic, was the issue of whether Montego Bay Financial Ltd had preferential treatment in the bankruptcy proceedings. Regarding the possibility of the plaintiff to bring an action in the Czech Republic, he stated the Czech Courts had jurisdiction over foreign corporations only if they had assets in the Czech Republic or if they voluntarily submit to the jurisdiction of the said Court.

[13] It is also to be borne in mind that both Mr. Sedleack and Mr. Breza in their evidence informed Court, they were unaware that there was a registered office of the defendant company in the Czech Republic. In regard to whether the defendant had been unjustly enriched, Mr. Breza stated that the defendant did have a claim to the sum of money but the issue was whether the said claim should be given preferential treatment over the usual claim as they were co-owners. He confirmed that the law in Czech Republic fixed the period of limitation for claims filed under unjust enrichment to 3 years from the time the plaintiff became aware of the defendant being unjustly enriched.

[14] The evidence of the defendant was based on the evidence of Lagislav Rehar an Attorney at Law, who confirmed the history of litigation between the parties in the Czech Republic as mentioned by the plaintiff's witnesses. It was the opinion of this witness, that the reason why the plaintiff could not bring an action on the basis of unjust enrichment in the Czech Republic was because the action was time barred as a period of three years had passed since the date of judgment of the Supreme Court which was given on the 26th of September 2012. He was unable to clarify whether the defendant could be currently sued in the Czech Republic as he appeared to be unaware of the prerequisites necessary to sue an international company like the defendant in the Czech Republic. He further stated that it was not unjust enrichment, as the payment was made on an effective judgment awarding the said sum to the defendant and the appeal did not influence the effectiveness of the judgment. He further stated that the reason why the defendant had not paid back the said sum was because the Supreme Court judgment did not impose any obligation of repayment.

[15] It would be pertinent to mention at this stage and it is to be observed from the evidence of the plaintiff and the defendant as set out in the preceding paragraph, that the Czech Supreme Court only ruled that the defendant did not have preferential treatment and did not make further order that the said sum (CK 25,881,058) already paid to the defendant be returned. This was because the defendant was in fact a creditor in the insolvency proceedings and there was no dispute in regard to their claim of CK 25,881,058 as the dispute was only in respect of whether the defendant were entitled to preferential treatment as a co- owner. Therefore in actual fact, Mr. Lukas Raida as insolvency trustee to Union Bank, would eventually, if the assets of Union Bank suffice, have had to pay the said sum to the defendant at the conclusion of the insolvency proceedings. If this was the case in such a situation, any payment by the Czech Republic to Mr. Lukas Raida in the ongoing case referred to in paragraph 10 herein, would in the view of this Court not be necessary.

[16] It is also relevant to mention at this stage that learned counsel for the plaintiff, having based his plaint specifically on unjust enrichment, moved to have the plaint amended under the procedural law of the lex fori which is the Seychelles Code of Civil Procedure.

However this application to amend the plaint was rejected by the predecessor judge in this case, on the basis that the plaintiff was attempting to change the suit to another, which was substantially different in nature and character.

[17] Having thus analysed the evidence and the background facts before this Court, the first issue to decide on, is whether the Supreme Court of the Seychelles has jurisdiction to adjudicate on this matter. Article 125(1) (b) (d) of the Constitution of the Republic of Seychelles gives the Supreme Court original jurisdiction in respect of civil and criminal matters and any other original and appellate and other jurisdiction conferred on it by or under an Act. Section 11 of the Courts Act, clarifies that the Supreme Court's jurisdiction can extend to matters and persons outside the Seychelles. Based on the findings in the case of **Intelvision Network Ltd & ors v Multichoice Africa Ltd (SCA 31/2014),** this Court is satisfied that the fact that the defendant was present in the Seychelles when served with summons, suffices to found, originate and initiate the Supreme Court's jurisdiction in an action in personam. The action before this Court is an action in personam and the summons have been served on the defendant who has a registered office in the Seychelles. The defendant has accepted the summons and thus submitted to the jurisdiction of the Supreme Court, as he has appeared before Court to contest the claim and not chosen to contest the jurisdiction of this Court.

[18] On deciding the issue of whether the Seychelles is a forum non conveniens, one should decide whether there is a more appropriate forum for the determination of this dispute other than the Seychelles. If there is, this Court could issue a stay of the proceedings. The burden of proof for showing that another forum is available lies on the defendant. Once the defendant has shown that another forum exists, it is up to the Claimant in this case the plaintiff, to establish that Seychelles is the most appropriate forum to hear the case. The plaintiff in the evidence led, established through the evidence of an expert witness Mr. Breza that an action against the defendants was not possible for the recovery of the said sum of money in the Czech Republic as the law in the Czech Republic, required as a prerequisite to an action being filed, that the defendant should have assets within the Czech Republic which the defendant did not have. Hence Seychelles was the only available forum for the said claim to be filed, as the defendant was registered as an

international business company in the Seychelles and doing business in the Seychelles. It is to be borne in mind that the defendant in this instant case, has not sought to seek for a stay of the proceedings, on the basis there is another forum having competent jurisdiction which is more appropriate than that of the Seychelles i.e. where the case could be tried more suitably for the interests of all the parties and the ends of justice but the defendant has instead voluntarily submitted to the jurisdiction of this Court, refer case of **Spiliada Maritime Corporation v Consulex Ltd [1987] A.C 460.** Therefore the fact that the cause of action arose in the Czech Republic is irrelevant.

[19] Having thus come to a finding that the Seychelles Supreme Court is entitled and obliged to exercise jurisdiction in this matter, the next issue to be decided would be the substantive law to be applied to the case pursuant to private international law. It is apparent that the parties have not made any choice of law. Therefore under general private international law principles, the law which the matter has the closest connection with, is to be applied, refer judgment of **Sauzier J in Biancardi v Tabberer Travel Agency Ltd (1975) SLR 9.** The evidence indicates that the cause of action namely unjust enrichment occurred in the Czech Republic and is closely connected to the judicial proceedings that took place in the Czech Republic and therefore on the facts before Court the law that has the closest connection to the case is the Czech law. The next question is how the foreign law is to be applied in the Seychelles Courts. In the case of **Intelvision v Multichoice Africa** (supra) it was held that the foreign law is a question of fact that has to be pleaded and proved by the party relying on it. The onus of proof of foreign law thus lies on the party relying on it. Unless there is proof to the contrary, it is presumed that the foreign law is the same as the law of the Seychelles.

[20] When one considers the evidence of the expert witness on the relevant law pertaining to this case i.e. the Czech Republic law the said expert Mr. Petr Breza called by the plaintiff, testified to the fact that the statute of limitation that applies to claims of unjust enrichment in the Czech Republic is three years, commencing from the moment the plaintiff learns about the unjust enrichment. I observe that even though the Czech Supreme Court gave its judgment on 26th September 2012, the final judgment by the High Court in Olomouc (P7) was only rendered on 14th November 2013. It is apparent

form the documents before Court on the 29th April 2014, Mr. Raida by document P6 sent a letter to the defendant requesting the return of the sum CK 25,881,058. Even though it could be gathered from the testimony of Mr. Breza that the general period of prescription for claims of unjust enrichment in Czech law is three years commencing at the point in time when the plaintiff learned of the unjust enrichment, I am of the view that the date pertinent is not the Czech Supreme Court judgment but the final High Court judgment as the claim for the return of the money dated 29 April 2014 (P6) was sent only after the final judgment of the High Court in Olomouc (P7) was given. Therefore it cannot be claimed that the period of limitation had elapsed at the time when proceedings were brought here in the Seychelles on 19th February 2016.

[21] This Court must thus address the question of whether the plaintiff has a claim to said sum of CK 25,881,058 under the law of unjust enrichment. As referred to above, this question ought to be addressed by reference to the Czech law of unjust enrichment. However as the content of the Czech law on unjust enrichment was neither pleaded nor proven by the plaintiff, it is assumed to be the same as the lex fori, i.e. the Seychelles law on unjust enrichment.

[22] According to **Antonio Fostel v Magdalena Ah-Tave and another (1985) SLR 113** Seaton CJ set out five criteria that must be fulfilled for a claim of unjust enrichment to arise under Art. 1381-1 of the Seychelles Civil Code, namely there must have been (1) an enrichment, (2) an impoverishment, (3) a connection between the enrichment and impoverishment and (4) an absence of lawful cause or justification, and (5) an absence of another remedy. I am satisfied that the first three criteria have been met in the present case, however I am not convinced that the other criteria are met, in particular that there is no other available cause of action.

[23] It would be pertinent at this stage to refer to Article 1376 of the Civil Code that reads as follows:

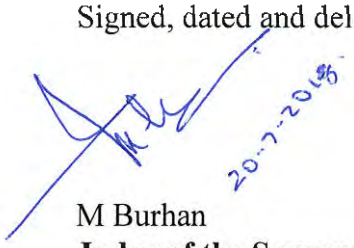
"A person who, in error or knowingly, receives what is due to him, shall be bound to make restitution to the person from whom he has improperly received it."

[24] Therefore pursuant to the aforementioned Article 1376 of the Seychelles Civil Code, it is the view of this Court that an undue payment of a sum from one person to another gives rise to a quasi-contract between the parties. Mr. Raida voluntarily transferred the money to the defendant Montego Bay. In light of the fact that Montego Bay was not entitled to preferential treatment in the insolvency proceedings, this payment was not yet due to the defendant. The requirements of Art. 1376 of the Seychelles Civil Code are thus met.

[25] Therefore, it is the finding of this Court that the plaintiff could have brought an action under quasi-contract against the defendant. It must be noted that the plaintiff had without success tried to amend the cause of action to an action based on quasi contract. As the action of unjust enrichment is possible only when no other action is available, the present claim under unjust enrichment must thus fail, regardless of what effects the annulment of the High Court's judgment has on the presence or absence of a lawful cause or justification, the other element in an action for unjust enrichment. Pursuant to **Tree Sword (Pty) Ltd v Puciani [2016] SCCA 19,** it is the plaintiff who should choose which type of action to bring, the court is not permitted to find a case for the plaintiff based on one cause of action where the plaintiff has chosen to bring the claim under another.

[26] For the aforementioned reasons, I am satisfied the cause of action on unjust enrichment must fail and I therefore proceed to dismiss the plaint of the plaintiff with costs.

Signed, dated and delivered at Ile du Port on 20 July 2018



M Burhan
Judge of the Supreme Court