

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CS 5/2011

[2018] SCSC 864

STEFANIA BALDINI & NICOLO GRASSO

Plaintiff

versus

STATE ASSURANCE COMPANY OF SEYCHELLES (SACOS)

Defendant

Heard:

Counsel: Mr. Pessi Padiwalla for plaintiffs

Mr. Kieran Shah for defendant

Delivered: 26th September 2018

RULING

Nunkoo J

[1] The case at hand revolves around a road traffic accident that occurred in Seychelles on the 18th May 1993, during which one of the passengers, an Italian national, was killed. The dependents of the deceased (the plaintiffs in the present case) commenced proceedings against the driver of the vehicle (a rental car), another Italian national, and the State Assurance Company of Seychelles, the insurer of the vehicle and the defendant in the present case, in the Court of Messina in Italy. Said Court awarded the plaintiffs damages for pecuniary and non-pecuniary losses amounting to over 600 000 Euros in its judgment from the 14th February 2007.

- [2] The judgment was declared enforceable on the 24th of April 2007, and a writ of execution was issued on the 7th January 2008, whereby the defendants were ordered to pay the plaintiffs 651,052.42 Euros in total (consisting of damages and costs). The plaintiffs are now seeking to enforce the judgment against SACOS in the Seychelles.
- [3] As the application of the Foreign Judgments (Reciprocal Enforcement) Act has not been extended to Italy, the prerequisites for enforcing judgments from Italian courts are to be derived from section 227 of the Seychelles Code of Civil Procedure and the ensuing jurisprudence, cf. *Privatbanken Aktieselskab v Bantele* (1978) SLR 226, *Dhanjee v Dhanjee* (2000) SCSC 9 and *Bank of Credit and Commerce v Berlouis* (2001) SLR 284.
- [4] As per the above cases, foreign judgments can only be enforced in Seychelles if they are declared executory by the Supreme Court of Seychelles, unless an act or a treaty provides otherwise. The conditions for a foreign judgment to be declared executory are that:
- (a) “It must be capable of execution in the country where it was delivered;
 - (b) The foreign Court must have had jurisdiction to deal with the matter submitted to it;
 - (c) The foreign Court must have applied the correct law, in accordance with the rules of the Seychelles private international law;
 - (d) The rights of the defence must have been respected;
 - (e) The foreign judgment must not be contrary to any fundamental rules of public policy; and
 - (f) There must be absence of fraud.” (emphasis added)
- [5] With respect to the question of whether the foreign court had jurisdiction to deal with the matter the court in *Privatbanken Aktieselskab v Bantel* (1978) SLR 226 held that “[t]he trial court must have jurisdiction in the international sense and also local jurisdiction. The first must be determined in the light of the Seychelles private international law whereas the second in the light of the law of the country of the trial court”. The judgment by the Court of Messina referred to above does not fulfill this requirement as the Italian courts did not have jurisdiction over claims brought by the plaintiffs against SACOS under the rules of Seychelles private international law.

- [6] Pursuant to *Privatbanken Aktieselskab v Bantele* (1978) SLR 226 jurisdiction over an *actio in personam* can only exist under the Seychelles rules of private international law, where one of the following criteria is fulfilled: “residence or presence in the foreign country, or submission or agreement to submit to the foreign jurisdiction”.
- [7] As per the facts agreed between the parties, SACOS at no material time had a presence, place of business or an appointed representative or agent in Italy. The international jurisdiction of the Italian courts could therefore only have arisen if SACOS by virtue of its conduct submitted to their jurisdiction or had agreed to do so prior to the commencement of the proceedings.
- [8] It is undisputed that SACOS did not in any way appear before the Italian court, participate in the proceedings or undertake any steps to satisfy the judgment or appeal against it. In *Dhiman & Sons v Bette* (1970) SLR 49 the Supreme Court of the Seychelles held that a party that has not entered an appearance has not submitted to the jurisdiction of the Court. The mere fact that it was served with summons to appear does not amount to submission to jurisdiction.
- [9] Counsel for the plaintiff however argued in the hearing on 13th of July 2018 that SACOS had agreed to submit itself to the jurisdiction of the Italian courts prior to the commencement of the proceedings by virtue of “having stepped into the shoes of the insured”. Counsel for Plaintiff averred that SACOS had “agreed to take on the defence of the insured” and that as the tortfeasor had submitted to the jurisdiction of the Italian courts, SACOS had by “having taken over the claim as previously mentioned, also agreed to submit to the jurisdiction”. As evidence for its submission Counsel for plaintiff cited a letter written by the Plaintiffs’ lawyers on the 25th of June 1996 to Mr. Bernard Georges rejecting a settlement offer made by Mr. Georges on behalf of SACOS, who, as the plaintiffs argues, had been acting on behalf of the insured.
- [10] The Supreme Court of the Seychelles held in *Privatbanken Aktieselskab v Bantele* (1978) SLR 226 that as the rules governing the jurisdiction of the Supreme Court are almost entirely governed by English law or by law based on English law guidance with respect to questions of international jurisdiction is to be sought from the English rules of private international law. In *Vizcaya Partners Limited (Appellant) v Picard and another*

(Respondents) (Gibraltar) [2016] UKPC 5 the Privy Council held that under the English common law an agreement to submit to the jurisdiction of a foreign court did not have to be explicit or contractual in nature. In that case the Privy Council held that an implied agreement would suffice as long as there was an *actual* agreement (or consent) to submit to the jurisdiction of the foreign court. The Court listed a number of instances which would not suffice to fulfill the threshold of such an implied agreement: e.g. the fact that a party was a shareholder in a foreign company, that the contract was concluded or was to be performed in the foreign country or that the foreign law had been agreed upon as the applicable law. As these instances show, the threshold for deriving implied consent to submit to the jurisdiction of a court from a party's conduct prior to the commencement of the proceedings is quite high.

The submissions made by Counsel for the plaintiffs in this regard do not suffice to fulfill this threshold: the letter produced by Counsel for respondents merely indicates that settlement negotiation were taking place, but in no way evidences or even alludes to an agreement that SACOS would submit to the jurisdiction of Italian Courts. Rather the letter merely informs Mr. Georges of the fact that the proceedings had been commenced in Italy. Contrary to the contention of counsel for the plaintiffs the fact that the insured had submitted to the jurisdiction of the Italian courts and that SACOS had previously been acting on behalf of the insured does not suffice to indicate that SACOS had consented to the jurisdiction of Italian Courts either. The mere fact that SACOS had acted on behalf of the insured does not lead to the inference that the insured was also entitled to act on behalf of SACOS

Under the test established in *Privatbanken Aktieselskab v Bantele, Dhanjee v Dhanjee* and *Bank of Credit and Commerce v Berlouis* (supra) this suffices to prevent the judgment of the Court of Messina from being declared executory against SACOS.

The plaint is therefore dismissed. With costs.

Signed, dated and delivered at Ile du Port, 26 September 2018.

S. Nunkoo

Judge.