

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CS 97/2011

[2018] SCSC 874

UNIVERSITY OF SEYCHELLES, AMERICAN INSTITUTE OF MEDICINE

Plaintiff

versus

THE ATTORNEY GENERAL

Defendant

Heard:

Counsel: Mr. Derjacques for plaintiff

Mr. Chinnasaamy for defendant

Delivered: 28 September 2018

DAMAGES

B. RENAUD J

Background

[1] The full background information is set out in the judgment on liability and need not be repeated here.

- [2] On 29th January, 2018, I delivered a judgment on the issue of liability in favour of the Plaintiff as against the Defendant for breach of Agreements. I reserved the judgment on the quantum of damages and invited the parties to make further attempts at negotiating an amicable settlement, including the possibility of reaching mutual agreement on the issue of quantum of damages. When the case came up, the parties informed Court that they were unable to reach an amicable settlement.
- [3] I invited Counsel for the parties to make written submissions on the issue of quantum of damages. Only Counsel for the Plaintiff made written submissions.
- [4] It must be noted that the Defendant, during the hearing, did not call any evidence on the issue of damages. The only available evidence on damages came from the Plaintiff's Director, Dr. F. Alkhairy (MD) and the Plaintiff's Auditor/Accountant, S & N Associates, represented by Mrs. Fiona Lagrenade, which adduced an Accounts Report dated 12th July, 2012, which was admitted as Exhibits 130(a)(b)(c).

Law and Principles

- [5] When determining the quantum of damages, I reviewed the relevant law, and jurisprudence, and also gave due consideration to the submissions of Counsel for the Plaintiff as well as the relevant evidence on record.
- [6] Article 1149 of the Civil Code of Seychelles inter alia stipulates that the damages which are due to the creditor cover in general the loss that he has sustained and the profit of which he has been deprived and that the damages payable under this Article apply as appropriate to the breach of contract and commission of delict.
- [7] Article 1150 of the Civil Code provides that the debtor shall only be liable for damages with regard to damage which could have been reasonably foreseen or which was in the contemplation of the parties when the contract was made, provided that the damage was not due to any fraud on his part.
- [8] Article 1151 provides that even if failure of the debtor to perform the contract is the result of fraud on his part, damages in respect of loss sustained by the creditor and the profit of

which he has been deprived shall only cover the immediate and direct consequences of the failure to perform.

- [9] Under the Civil Code, a party is entitled to compensation for all prejudice suffered, both moral and material. In determining the quantum of damages, the court must consider the evidence and the awards given in comparable cases. (*Seychelles Breweries v Sabadin SCA 21/2004, LC 278*).
- [10] In the case of *Dubois v Nalletamby (1979) SLR 33*, it was held that damages for breach of contract include damages for loss sustained and for profit not gained if they were reasonably foreseen or were in the contemplation of the parties when the contract was made.
- [11] There is no doubt that the Agreements entered into by the parties were for the Plaintiff to establish and operate a business venture for profit. Therefore, any breach of such Agreements would result in the loss of profit.
- [12] In the case of *Kilindo v Morel SCA 12/2000 LC 196*, it was held that - awards based on reasonably ascertainable damage are permissible. Awards based on uncertain damage are not permissible.
- [13] In the case of *Fisherman's Cove v Petit and Dumbelton Ltd (1979) SLR40*, the Court reiterated the principles on payment of damages by inter alia stating that – under Articles 1149 and 1150 of the Civil Code damages cover the loss a person has sustained and the profit which he has deprived of which are the immediate and direct consequences of the failure.
- [14] Dalloz 1991-1992, or Article 1149 states that - “*Les juges ont un pouvoir souverain pour évaluer et régler le montant des dommages-interet due en vertu de l'article 1149, civ 24 Oct. 1893. It is further stated that – “un dommage est prévisible au sens de l'article 1150, lorsqu'il peut être normalement prévue par les contractants au moment de la conclusion de la convention.”*
- [15] In the instant suit, it is evident that the contract period is for -“... as long as the University exists.” In normal circumstances, when interpreting contracts, the common

intention of the parties is also sought rather than only the literal meaning of the words in the agreement.

[16] Learned Counsel for the Plaintiff in his submissions cited from “*Chitty on Contracts Volume 1*”. I believe that this is not necessarily relevant to the instant suit.

Analysis of Plaintiff’s Claim

[17] The Plaintiff is claiming damages in the total amount of US\$20,017,000.00 with interest at the commercial rate.

[18] The Charter and Agreements entered into by the parties were for the Plaintiff to establish and operate a medical university as a commercial venture. It would accept students who would eventually come out as medical graduates. The annual intake of students was approximately 120 coming from numerous jurisdictions. At each semester 45 new students, including 2 Seychellois per semester were admitted.

[19] It is in evidence that as a result of the closure of the University, the Plaintiff inter alia had to refund student fees, pay off employees’ compensation for length of service upon redundancy, incur costs in attempting to move the University overseas.

[20] The Plaintiff’s Account Report and receipts attached to it are before the Court as exhibit 129. The Accountant Mrs. Fiona Lagrenade testified on the payments and costs incurred and produced the Account Reports which showed direct payments amounting to US\$1,989,000.00. The Account Reports, also showed that the total loss of expected revenue had the university continued to operate amounted to US\$13,028,000.00.

[21] At the hearing the Defendant only sought to cross examine Mrs. Lagrenade, but did not call any witness in opposition. According to the Plaintiff, the Account Reports indicated the loss incurred and is deemed by the Plaintiff to be a direct result of the closure, and that as such it ought to have been within the contemplation of the Defendant. The Plaintiff submitted that it could therefore be considered as being reasonably foreseeable and possibly directly attributable to the breach caused by the Defendant.

- [22] Both Dr. Alkhairy and Mrs. Fiona Lagrenade deponed on the lost reputation or/and goodwill. The Plaintiff submitted that in principle, a university normally exists in perpetuity. In such case it accumulates reputation and acquires goodwill through its constant and permanent endeavour to deliver professional, competent, reputable and learned graduates. It becomes not only a centre of learning academia but also of good doctors and medical staff.
- [23] It is in evidence that the Plaintiff, at the time of closure had over 48 graduates who are now professionals practicing around the world, especially in USA. The only Seychellois is presently finalizing his post graduate degree overseas after years of being only a graduate/apprentice at the Victoria Hospital.
- [24] The Plaintiff also obtained a lease of one acre of land from Government, at Plaisance, to build its campus. The Defendants' witness, Mr. Domingue, stated that it was provisionally accredited as a university and would have received permanent accreditation. Evidently, it was developing as a *bona fide* centre of medical studies and was attracting students from around the world. It was stated that it was already affiliated with hospitals in Dubai, India and Victoria Hospital and may be considered as a national asset as it could have possibly produced, free of charge, 6 Seychellois annually and possibly several foreign students would have remained in Seychelles, to practice medicine which could have resolved shortage of doctors in Seychelles.
- [25] It is my considered opinion that its closure destroyed the viable existence of the university which has by then accumulated reputation and goodwill. The students came from many different countries, making the loss of reputation possibly global. In the age of the internet, Facebook and google, every interested and disinterested person would acquire knowledge of the closure.

Determination

- [26] It is incumbent on this Court to determine the quantum of damages difficult as it may be. However, the amount to be awarded must be reasonable and based on judicious determination. It is not a matter of plucking a figure from the air. I have analysed each head of claim of the Plaintiff, and in my view, these claims are stated at their highest.

- [27] Damages awarded by the Court are not necessarily to allow the Plaintiff to make a profit out of the circumstances. It is neither a situation where the Plaintiff is made to benefit from unreasonable profits at the expense of the Defendant. Risks of incurring losses and facing unforeseen adverse events, are integral phenomena or risk inherent in any business venture. This is evident where in the instant case, the Plaintiff when drafting the Agreements included provisions for a one year's notice for terminating the Agreements.
- [28] Bearing in mind that the Plaintiff was in operation for only eight years, and for reasons stated above, I am of the considered judgment that the Plaintiff is entitled to damages for the entire amount claimed under certain heads of claims; under some other heads of claim the amount to be awarded ought to be not more than 20% of the amount claimed by the Plaintiff under such heads, and, under some other heads of claim I have made no award. A reasonable sum for loss of reputation and goodwill is also allowed.
- [29] The losses and damages that the Plaintiff is claiming from the Defendant are set out in the Plaintiff which I am reproducing hereunder. In determining the Plaintiff's claim for the damages, I have also analysed each head of claim and determined whether it falls within the ambit of the applicable law and principle. Secondly, I have determined the quantum of damages of those items of claim that are, in my judgment allowable. I also set out my reasoning for making or not making, of any award of damages under the heads of claim.
- [30] **Initial investment** – Upon setting up a business, the Plaintiff must necessarily incur initial expenses. When any person enters a business he/she knows that there are both benefits and risks involved. Such initial setting up costs are normally deductible as normal expenses over the future trading periods. Therefore, Plaintiff which had been in operation as a successful business for over 8 years, must have recouped the best part of its initial financial input. It is my judgment that Plaintiff's is entitled to be awarded damages under this item but its claim is unreasonably high and ought to be considerably reduced to not more than 20% of the sum claimed, say US\$76,000.00.
- [31] **Land Lease and expenses at Plaisance & Architect from Germany Plus Expenses** – These items refer to land that the Defendant leased to the Plaintiff in order to enable it to build its own building to house its University instead of continuing to use facilities which had been hitherto made available by the Defendant to the Plaintiff to operate its

University. It was incumbent on the Plaintiff to develop the said leased property at its own costs this being its own future immovable asset. The said property is still under lease to the Plaintiff. Whatever financial expenses the Plaintiff incurred towards that end cannot be a legitimate claim against the Defendant, in the present circumstances. I make no award under this head.

[32] **Stationary Loss; Advert material and advert media** – All these three heads relate to the running of the University. The fact that the Defendant had unlawfully terminated the contract cannot attract a claim against it for whatever the Plaintiff had planned or was planning to advertise. Agreeably, stationery expenses incurred in the contemplation of its future activities in the form of the printing of brochures, prospectus, or other printed materials to attract students specifically to the USAIM cannot now be fully made use of and is obviously a loss to the Plaintiff. There is reasonableness in the claim of the Plaintiff to recoup such expenses but not necessarily the cost of all advert materials and adverts media. The Plaintiff's heads of claim are on the high side. I award the Plaintiff a sum as damages for these items of claim, being US\$10,000.00 for loss of Stationary and not more than 20% of its claim for advert material and media, say US\$36,000.00.

[33] **Relocation cost; Charges incurred in setting up Mauritius campus; Consulting fees – IT investment (Software and Hardware)** – All these expenditure arose as a result of the closure of the University upon termination of the Agreements by the Defendant. The Plaintiff has the choice of either closing down its business venture and suffered considerable losses, or try to relocate its business elsewhere than Seychelles in order to meet its obligations towards its students as well as mitigating its losses. It chose to take the course of relocating the business. All the expenses in doing so cannot be legitimate claims against the Defendant in the circumstances. The relocated venture will be a continuing business albeit with the necessity of more financial or other input to get it going. Obviously it has to ship materials already in Seychelles to another location. However, I am not convinced that cost for setting up campus in Mauritius, consulting fees and IT Software and Hardware are reasonable foreseeable losses that ought to be reimbursed by the Defendant. I consider that only part of the expenses involved under these items of claim are reasonable. It is my considered judgment that the Plaintiff ought

to be awarded reasonable damages in respect of relocation cost only, that is, US\$20,000.00.

[34] **Legal fees** – Such claim arises when a party to litigation is successful before the Court and is accordingly awarded costs. As the Plaintiff is successful herein, the Court will make an award for costs. At this juncture I make no award under this head of claim.

[35] **Pay offs due to breach of employees contracts and overseas employees** – The Defendant gave the Plaintiff one year's notice to wind up its operation in Seychelles. This Court considers this sufficient time for the Plaintiff to notify its employees in accordance with employment legislation in order to mitigate the necessity to incur such expenses. In any event employment law applicable to termination of employment for whatever reason is known to any investor. I make no award under this head of claim.

[36] **Courier and travel charges** – That item of claim refers to the various transactions that the Plaintiff had to undertake with other overseas institutions, students' parents; students themselves etc. when the Plaintiff was winding up its operation here. All these expenses arose for the obvious reason that the Plaintiff had to stop its business here following the termination of the Agreements. Such expenses would not have necessarily occurred in the normal circumstances. I believe that there is certain justification for the Defendant to be made liable to the Plaintiff for part of such item of claim. The Plaintiff shall therefore be awarded 20% of the sum claimed under this head of claim - that is US\$14,000.00.

[37] The Plaintiff's claims for overseas employees, in my considered judgment, are not maintainable. The Defendant cannot be made liable for damages in respect of employees who were in employment overseas. I make no award under this head of claim.

[38] **Book inventory** – This head of claim is not sufficiently clear to this Court. In any event if this refers to textbooks, other literary assets or equipment, such assets are not altogether redundant and useless when USAIM ceased operation here since these could still be used in its future operation. I make no award under this head of claim.

[39] **GMC loss of students** – Obviously when the University ceases its operation by virtue of its impossibility to continue because of reasons beyond its control as in this instant case,

the impossibility to enrol future new students to come to Seychelles to study at the USAIM as well as not being able to retain students who have already enrolled and paid their fees, is a necessary loss which the Plaintiff has to bear in the circumstances. Some of these may be recuperated in the future when it starts its operation anew at another location. It is true that the Defendant may have given the Plaintiff one year's notice of its intention to terminate the Agreements but that period was not sufficient time for the Plaintiff to mitigate all its losses under this head of claim. I am making a reasonable award under this head of claim to the Plaintiff in order to meet part of its losses, at 20 % of the claim that is US\$129,600.00.

[40] **Lack of PG SMDC registration** – Although the Seychelles Medical and Dental Council (SMDC) is an autonomous statutory institution operating under its own law, yet it is an agency of the Defendant. The registration or otherwise of students for USAIM is subject to such law but it is evident that non-licensing of the graduates of the students of the Plaintiff was deliberate, unfair and unjust. It is evident that the Defendant had a role to play in influencing the decision of the SMDC. In my considered judgment the claim is on the high side as the Plaintiff may claim its losses only and not those in respect of the students. I make an award under this head of claim of 20% of the sum claimed, that is, US\$300,000.00.

[41] **Loss of affiliation fee with EUIMS** – Any affiliation fee with EUIMS is in my considered judgment not claimable as a loss arising out of the termination of the Agreements which culminated in the cessation of the operation of the USAIM. Wherever USAIM is located, such fee will still subsists or would have otherwise lapsed. I make no award under this head of claim.

[42] **Loss of potential USAIM income from future students** – The business of the Plaintiff having been ceased to continue in Seychelles does not, as the evidence reveals, mean that it cannot continue operating in another location and thereby continue to earn income from prospective students. I do not believe that it is reasonable to expect the Defendant to reimburse the Plaintiff for all probable potential income that may have arisen due to the termination of the Agreements. The Plaintiff will continue to earn income from students at whatever location it may choose to operate in the future. If anything, the Plaintiff will

obviously lose some profits because those students who were actually on campus will have to cease their studies and will not continue paying fees. In my considered judgment a reasonable sum ought to be awarded to the Plaintiff to cover loss of potential profit from actual students. I award the Plaintiff not more than 10% of the sum claimed under this item that is US\$256,000.00.

[43] **Loss of reputation and goodwill as a University** – The reputation and goodwill of a business venture arise because of its location, environment, programmes, tutoring etc. Such intangible assets are created over a period of time by the operational success of the venture as established by the successful results of its operation and its outcome. Wherever the Plaintiff chooses to operate its University in the future, it may not necessarily carry with it the reputation and goodwill earned while operating in Seychelles over those years. The termination of the Agreement had obvious negative effect on the reputation of the Plaintiff and diminished its goodwill in the circumstances. The claim of the Plaintiff is on the high side. It is my considered judgment that the Plaintiff is therefore entitled to reasonable damages under this head of claim. I award the Plaintiff US\$100,000.00 under this head of claim.

Awards

[44] In view of the foregoing assessments, I award damages to the Plaintiff as follows:

Direct Expenses	Claims	Awards
Initial investment –	380,000.00	76,000.00
Land Lease and expenses at Plaisance -	60,000.00	0
Architect from Germany Plus Expenses –	33,000.00	0
Stationary Loss –	10,000.00	10,000.00
Advert material and advert media –	180,000.00	36,000.00
Relocation cost –	20,000.00	20,000.00
Charges - setting up Mauritius campus –	1,000,000.00	0
Consulting fees –	50,000.00	0

IT investment (Software and Hardware) –	410,000.00	0
Legal fees –	50,000.00	0
Pay offs - breach of employee contracts –	30,000.00	0
Courier and travel charges –	70,000.00	14,000.00
Overseas employees –	50,000.00	0
Book inventory –	40,000.00	0
Total	1,989,000.00	156,000.00 US\$

Loss of revenue

GMC loss of students –	648,000.00	129,600.00
Lack of PG SMDC registration –	1,500,000.00	300,000.00
Loss of affiliation fee with EUIMS –	1,280,000.00	0
Loss of potential income - future students	9,600,000.00	256,000.00
Total	13,028,000.00	685,600.00 US\$

Loss of reputation/ goodwill – 5,000,000.00 100,000.00

Grand Total 20,017,000.00 941,600.00 US\$

[45] In the final analysis, and having entered judgment in favour of the Plaintiff as against Defendant on the issue of liability, I hereby enter judgment on the issue of damages in favour of the Plaintiff as against the Defendant in the sum of US\$941,600.00 with interest at the commercial rate of 4% and costs. The conversion rate of the United States Dollars and its equivalent in Seychelles Rupees shall be as set by the Central Bank of Seychelles on the date of judgment.

Signed, dated and delivered at Ile du Port on 28 September 2018

B. RENAUD
Judge of the Supreme Court