

**IN THE SUPREME COURT OF SEYCHELLES**

**Civil Side: CC31/2013**

[2018] SCSC 1061

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**SEYCHELLES PETROLEUM COMPANY LIMITED**

Plaintiff

versus.

**JOHN MARENKO**

Defendant

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Heard:

Counsel: Mr. Renaud for the Plaintiff  
Mr. Gabriel for the Defendant

Delivered: 30 October 2018

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**JUDGMENT**

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**F. ROBINSON, J**

*The case for the plaintiff*

- [1] In its plaint, the Plaintiff alleged that it was allocated premises at Anse Royale by the Government of Seychelles and has developed and designed the premises and the equipment

thereon to function and run as a petrol station. The Defendant was given the franchise by the Plaintiff to operate the said petrol station. The Plaintiff alleged that the Defendant has breached the agreement on the 27<sup>th</sup> March 2013, by terminating it with immediate effect, without giving the Plaintiff three months' notice in terms of the agreement. The Plaintiff accordingly prays for a judgment ordering the Defendant to pay the Plaintiff the sum of 4,793,650.97 rupees owed to the Plaintiff with interest at the commercial rate with effect from the 4<sup>th</sup> April 2013, and costs.

#### *Agency*

- [2] The hearing of this suit started on the 22<sup>nd</sup> November 2016. During the course of the testimony of Mr. Mondon, Counsel for the Defendant objected to Mr. Mondon testifying about the role of Mrs. Rose-Mary Marengo, in this case, on the ground that the plaintiff failed to allege any particulars supporting an agency relationship with the Defendant. In the light of this objection, this court adjourned the testimony of Mr. Mondon and gave time to the Plaintiff to make application for leave to amend its plaint or make submissions in relation to the question in issue. An application seeking leave to amend the plaint, to address the objection raised by the Defendant, was filed, on the 15<sup>th</sup> February 2018, four days before the continuation of hearing of this suit. During the course of proceedings, on the 19<sup>th</sup> February 2018, Counsel for the Plaintiff acknowledged that "*the application may have been filed too late for consideration today...*". The application to amend was withdrawn with the leave of this court. This court briefly considers the objection raised on behalf of the Defendant later in the judgment.

#### *The evidence*

- [3] *The evidence of Mr. Charles Paul Mondon.* On the 22<sup>nd</sup> November 2016, Mr. Mondon testified that he is the Chief Financial Officer of the Plaintiff. He has been delegated by the Plaintiff to give evidence on its behalf.

- [4] The Defendant was an operator at Anse Royale Petrol Station from 2011, right through to 2013. During those years, the Plaintiff *inter alia* supplied bulk fuel to the petrol station. The Plaintiff's gate keeper and driver both signed on the invoice on loading the fuel. The operator later checked what has been delivered and signed on the invoice that he has accepted the product. Mr. Mondon testified that the Defendant had agreed to that. When asked as to who would make the order for the goods, Mr. Mondon confirmed that it would be the Defendant who would come to the Plaintiff's Sales Office and indicate what products he needed.
- [5] Mr. Mondon stated that he had a meeting with Mr. Marengo on two occasions and a few more meetings with his wife Mrs. Marengo with respect to the debt issue. He explained that the debt issue was alerted back in 2011; and that they started having discussions with the operator at that time. Mr. Mondon did not know officially the relationship between the Defendant and Mrs. Marengo but that on occasions when the Plaintiff had addressed written letters to Mr. Marengo, Mrs. Marengo would turn up to represent the Petrol Station. Mr. Mondon personally was not aware of Mr. Marengo delegating his wife to come attend the meetings. He stated that there was a document dated the 24<sup>th</sup> October 2011, pertaining to the agreement for repayment of outstanding balance by Anse Royale Petrol Service Station; and that it was signed by Mrs. Marengo.
- [6] On the 27<sup>th</sup> March 2013, Mrs. Sarah Romain, the Commercial Manager of the Plaintiff received a letter from the Defendant. The letter stated the intention of the Defendant to terminate his agreement for operating the Anse Royale Petrol Station. Therefore, this was to notify the Plaintiff that they would not be ordering any stock of fuel or lubricant as of that day.
- [7] *The unsworn Testimony of Mr. John Marengo.* When the hearing of this suit resumed on the 19<sup>th</sup> February 2018, the Plaintiff through Counsel applied for leave to examine the Defendant on his personal answers. That application was not challenged by the Defendant's Counsel.

- [8] This court interjects to state that only the admissions made by the Defendant on his personal answers are of evidential value, the other answers are merely unsworn statements.
- [9] The Defendant is 70 years old. He declared that he indeed had an agreement with the Plaintiff to run the Anse Royale Petrol Station; and that he gave the Plaintiff notice in writing to terminate the agreement. When asked whether "*Q: ... during the time [he] run the petrol station [he] accumulated debt amounting to 4,793,650.97*", he answered yes. He was then asked by Counsel "*Q: In the letter we are talking about Seypec to you that you owe Seypec the sum of 4,793,650.97. Do you understand that?* ". His response was yes. He indicated that when he left the petrol station in 2013 that is when he was told he owed that sum of money. Then he stated that he left because he did not have any money. When asked by Counsel "*Q: After that day in May 2013 did you have meetings with SEYPEC on several occasions with a view to settling the debt?* ", he went on to say that "*A: When I left we had a meeting and they told spoke about stock in the tanks and that is when they mentioned the fact that I owed them that amount of money.*"
- [10] The Defendant stated that he attended meetings but they were never about debts even though he confirmed that there was a letter requesting him to pay the Plaintiff 4,793,650.97 rupees. His wife attended meetings on his behalf if he was unable to do so. He did not recall a letter dated the 10<sup>th</sup> October 2012, confirming a meeting between Mrs. Marengo and the Plaintiff about outstanding debt. When asked about the possibility of her going to the meeting without his consent, the Defendant stated that if it was a meeting about money he would have gone himself.
- [11] Defendant remembered that he never responded to the letter sent on the 23<sup>rd</sup> May 2013, by the Plaintiff in which he was held responsible for the debt. The Defendant confirmed that he attended a meeting on the premises of the plaintiff on the 29<sup>th</sup> May 2013, concerning the debt. The Defendant declared that he attended that meeting but that he did not do anything afterwards.

- [12] When asked about the letter dated the 23<sup>rd</sup> September 2013, from the Plaintiff telling him that he owed it money, he went on to say that he never got a "*credit note*" from the Plaintiff. He had a guarantee from the bank and when that was over he decided to leave. The Defendant further stated that when he left he did not really write to the Plaintiff because he did not have any money.
- [13] When cross-examined, the Defendant stated that he remembered signing the agreement every two years and being the sole person having the authority to sign everything from thereon. He signed cheques for the Plaintiff when he had some orders but would give the authority to his wife if ever he was not in the capacity to do so.
- [14] The Defendant did not quite remember replying to the letter from the Plaintiff dated the 27<sup>th</sup> March 2013, but remembered receiving a letter to state whether he wished to continue. He informed the Plaintiff that he did not wish to sign a new agreement.
- [15] When asked whether he owed any money to the Plaintiff, the Defendant stated that it was when he had left that the Plaintiff notified him that he owed it "*so much money*". The Defendant left approximately 5 years but does not recall if it was after he sent them the letter. He stated that no one brought him a letter saying that he owed 4,000,000 rupees; and that he only knew about it during the meeting on the 29<sup>th</sup> May 2013.
- [16] The Defendant did not know if Mrs. Marengo signed any cheques as payment towards the debt. Defendant had an account with about 26,000/- rupees. He cannot recall whether that was the account she used to pay money to Plaintiff on his behalf or whether that it was out of this account that payment were made to Plaintiff.
- [17] *Continuation of examination-in-chief of Mr. Mondon.* He remembered seeing a copy of a letter from the Defendant dated the 7<sup>th</sup> September 2010, P1 in which he informed the Plaintiff of his intentions to continue to operate the Anse Royale Station and he made a proposition to pay 2500 rupees per month.

- [18] Mr. Mondon did not recall if the Defendant was a regular payer but he recalled that there were some bounced cheques. Mr. Mondon personally never talked about the issue of debt with the Defendant even though the Defendant is indebted to the Plaintiff. He stated that the Defendant is indebted to the Plaintiff in the sum of 4,793,650 rupees. Mrs. Marengo signed the agreement for repayment of debt amounting to 3,442,719.83 rupees outstanding as of the 21<sup>st</sup> October 2011, on behalf of the Operator of Anse Royale Petrol Service Station.
- [19] When shown a letter signed by Mr. Lebon dated the 24<sup>th</sup> October 2011, Mr. Mondon confirmed that it was a letter referring to a meeting held on the 6<sup>th</sup> October, between Mrs. Marengo and the Plaintiff. They were to discuss the outstanding payment of Anse Royale Petrol Station of 3,442,719.83 rupees as of the 21<sup>st</sup> October 2011, and the terms of repayments which she herself signed as representing Anse Royale Petrol Station. Mr. Mondon testified that they had no doubt about the position of Mrs. Marengo and the fact that the Defendant would pay the debt especially because the Plaintiff did everything to facilitate the payment process.
- [20] When shown a copy of a document, Mr. Mondon confirmed that it was a cheque from Anse Royale fuel Station for a sum of 697,955.04 rupees dated the 13<sup>th</sup> April 2012, made out to the Plaintiff presumably for the sale of goods. However he does not know which one of the Marengo signed it. The cheque was returned saying *"represent on 20 April and then represent again on 24 and represent again on 25 May"*. Mr. Mondon was unaware as to whether the money was received.
- [21] Mr. Mondon confirmed that on the 19<sup>th</sup> September 2012, he got a copy of a letter written to the Defendant by a certain Mr. Lebon concerning payment to the Plaintiff, which informed the Defendant that the amount 1,967,106.84 rupees presented to as cheques was not able to be cleared on his account. Mrs. Marengo was the one who gave the cheques; and that was why Mr. Lebon wrote to her when the cheques got bounced. Mr. Mondon was not familiar with Mrs. Marengo's signature but was of Mr. Lebon's because they used to work together from 2004 to 2012.

- [22] Mr. Mondon recalled chairing a meeting between himself, Mrs. Sarah Romain and Mrs. Marengo on the 12<sup>th</sup> March 2013, at the Plaintiff's premises. He testified that the meeting was initiated by the Plaintiff to discuss the Anse Royale outstanding debt and the acceptance of the new service station agreement as well as service issues at the station itself.
- [23] He was aware of the meeting held on the 29<sup>th</sup> May 2013, between the Plaintiff and the Defendant but he did not attend.
- [24] The invoices are before this court as P3.
- [25] When cross-examined, Mr. Mondon stated that Mrs. Marengo's name was not included in the agreement to begin with; and that she was not included in the plaint. Mrs. Marengo was acting as the defendant's proxy since she signed a letter that she was the operator and signed on cheques.
- [26] Mr. Mondon confirmed that the Defendant sent a letter informing the Plaintiff that he did not wish to enter into any new agreement in March 2013. He further agreed that it did not constitute a breach of contract. When the Defendant did not wish to proceed with any new agreement he [Mr. Mondon] decided to call a meeting on the 29<sup>th</sup> May. He testified that a letter was sent in September 2013, six months after the Defendant had moved out about certain claims.
- [27] After the 29<sup>th</sup> May, the Plaintiff did not try to collect the debt from the Defendant because they were giving the Defendant time to act on the documents sent to him concerning the debt.
- [28] There was an inventory procedure done by a representative of the Plaintiff in the presence of a representative of the operator when the operator stopped working at the Petrol Station at Anse Royale.

- [29] The Plaintiff had a bank guarantee with Barclays bank that was supposed to cover some outstanding debt. The bank guarantee expired because the Defendant did not renew it long before he decided not to work as an operator at the Anse Royale Petrol Station.
- [30] Finally Counsel put to Mr. Mondon "*Q: ... first there was no breach by Mr. Marengo the operator who signed the document, secondly, you had spoken about Mrs. Marengo who had nothing to do with the case, she was not even in Court, who never signed any agreement, who was never sued. And thirdly, Mr. Marengo does not owe you that amount of money stated in the plaint?*" Mr. Mondon stated that the Defendant owed the amount of money stated in the plaint because there are invoices to prove it to be the case.
- [31] *The testimony of Mr. Lebon.* Mr. Lebon testified that he was working for the Plaintiff as the Commercial Manager at the material time. While he was working with the Plaintiff Mrs. Marengo was the contact person that they used to deal with regarding transactions, orders and meetings on behalf of Anse Royale Petrol Station but he believed that the contract to run the Anse Royale Petrol Station was under the Defendant.
- [32] Mr. Lebon remembered sending a letter on the 24<sup>th</sup> October 2011, to Mrs. Marengo who accepted and signed it as the representative of the Anse Royale Petrol Service Station with regards to the terms and conditions of repayment. This agreement stemmed from a meeting that was held in the presence of Mrs. Marengo on the 6<sup>th</sup> October 2011, regarding the outstanding debt P5. Mr. Lebon was not aware that Mrs. Marengo did not have any authority to make dealings with the Plaintiff. He testified that Mrs. Marengo was always present during meetings that concerned the service station.
- [33] He recalled having several meetings with Mrs. Marengo where they tried to sort out the outstanding debt. He remembered that there was one or two payments made that started coming in to settle the outstanding debt. Mrs. Marengo had authority that allowed her to negotiate with the Plaintiff because her presence at meetings meant that she had some sort of authority to negotiate whatever matter arises in the meeting. He further stated that



agreements were reached at those meetings leading to some payments being made regarding the outstanding debt.

- [34] There were payments by cheques made by Mrs. Marengo that were not honoured and some that were honoured by the Bank in the name of Anse Royale Petrol Station.
- [35] He confirmed a letter, dated the 19<sup>th</sup> September 2012, P4, sent by himself to Mrs. Marengo informing her about all the amounts that were outstanding that had to be sorted out. As a result of this letter, a few payments had come in P4.
- [36] When cross-examined, Mr. Lebon agreed with Defendant's Counsel that Mrs. Marengo was not the one being sued in this case. He confirmed that the name Rose-Mary Marengo was not included in the agreement. He also stated that the Defendant did not sign any document whereby he appoints Mrs. Marengo as his representative but that Mrs. Marengo signed an agreement to negotiate the terms and conditions of the payment.
- [37] *The evidence of the Defendant.* Having considered the evidence of the Defendant, it was clear that his evidence was in a number of respects skewed to support his case and there were some significant divergences between his plea and his oral evidence. It follows that this court approaches the evidence of the Defendant with some caution.
- [38] The Defendant testified that he has been an operator at Anse Royale, previously known as Shell, for 28 years. The Defendant was shown a letter written by him on the 27<sup>th</sup> March 2013, to the attention of Mrs. Sarah Romain, Commercial Manager of the Plaintiff, in order to notify her of his intention to terminate the agreement to operate the station. He stated that he did not breach any agreement; and that he had wanted to terminate the agreement. The Defendant testified that Mrs. Romain and other Plaintiff's officials came to inspect accounts later that evening and also to verify the products but that nothing was signaled and that no measures to prevent him from future access to the station were taken. He gave all the keys to them.

[39] The Defendant confirmed that the Plaintiff called a meeting on the 29<sup>th</sup> May 2013, which he attended to talk about the remaining stocks and the money he owed them. The Defendant also confirmed that he was dispensed of a letter in September 2013, by the Attorney for the Plaintiff but could not remember when exactly he heard from the Plaintiff next. The Defendant was shocked when he heard that he owed the Plaintiff such a huge amount of money. He went on further to testify that he never renewed the contract.

[40] When asked about why he never showed interest in discussing a debt settlement with the Plaintiff, the Defendant testified that it was not a matter of not being interested but that the whole situation was unbeknown to him. He wanted this court to dismiss the plaint against him because he is *"living on a very small pension"*.

[41] When cross-examined, the Defendant testified that he was the head of the company that ran the petrol station at Anse Royale; and that his wife worked with him but that she was not one of the Directors. He was unaware that his wife, Mrs. Marengo was attending meetings concerning arrears. He testified that he only knew that his wife was representing him when he left the Anse Royale premises. This court interjects to state that it is not clear to it which company the Defendant is referring to.

[42] He stated that he could not remember whether some cheques were not processed by the bank. He acknowledged that in meetings he was provided with a statement of account and a draft acknowledgment of debt; and that he asked twenty-one days to go over the documents which were handed to him. He gave the documents to a lawyer. However ever since then, he never replied back.

#### *The submissions and analysis*

[43] This court has considered the pleadings, evidence and the written submissions of both Counsel.

#### *A situation of agency or "mandat apparent"*

[44] A situation of agency or *mandat apparent*, as the case may be, does not arise for the consideration of this court because, as correctly pointed out by Counsel for the Defendant, the plaintiff failed to allege any particulars supporting an agency relationship with the Defendant. Section 71 of the Seychelles Code of Civil Procedure reads "*The plaintiff must contain a clear and distinct statement of the material facts on which the plaintiff relies to meet the claims...*". For example in the case of *Gallante v Hoareau* [1988] SLR 122, G.G.D de Silva Ag. J, stated "*the function of pleading is to give fair notice of the case which has to be met and to define the issues on which the Court will have to adjudicate in order to determine the matters in dispute between the parties*". In the case of *Marie-Ange Pirame v/s Armano Peri SCA 16 of 2005*, the Court of Appeal of Seychelles, at paragraph 8, of the judgment, held "*this Court did state (in CA8/87) inter alia that evidence outside the pleadings although not objected to and the relief not pleaded for, cannot and does not have the effect of translating the said issues into the pleadings or evidence. Indeed we should reiterate here that the above quoted views of this Court are still remain to be good law*".

[45] In the light of the above, this court cannot consider any evidence outside of the pleadings concerning the role of Mrs. Marengo in relation to the facts in issue.

*The alleged debt issue*

[46] This court now considers the alleged debt issue.

[47] The defence does not specifically deny the existence of an agreement between the Plaintiff and the Defendant. In his defence the Defendant alleged that there was no breach of agreement as alleged by the Plaintiff; and that the Defendant did pay invoices to the Plaintiff as and when those invoices were tendered. The defence further alleged that the Defendant received only one letter dated the 2<sup>nd</sup> September 2013, from the Attorney of the Plaintiff and denied that he had shown no sign or interest to settle the debt referring to the meeting held on the 29<sup>th</sup> May 2013.

[48] The principle of the system of pleadings is that every allegation of fact in a statement of claim or in a counterclaim must be traversed specifically, otherwise it is deemed to be admitted. According to *Dalloz Codes Annotés Art. 1168 à 1581* at note 23, "23. — II. — *L'aveu judiciaire peut encore résulter des pièces de procédure qu'une partie signifie à son adversaire. — J.G Obligat., 5070. — J.G.S. eod. vº, 2075*". The admission made by the Defendant, in the course of legal proceedings, of the subsistence of an agreement between the Plaintiff and the Defendant, at the material time, is a judicial admission under article 1356 of the Civil Code and binds the Defendant. Article 1356 of the Civil Code provides

—  
"Article 1356

A judicial admission is the declaration which a party or his specially authorised proxy makes in the course of legal proceedings.

It shall be accepted against the persons who makes it.

It may not be admitted only in part to the detriment of the person making it.

It may not be revoked unless it be proved that it resulted from a mistake of fact. It shall not be revoked on the ground of a mistake of law."

Moreover, the evidence in this case also establishes the existence of an agreement between the Plaintiff and the Defendant on a balance of probabilities at the material time. In the light of the above, Counsel for the Defendant cannot be heard to submit "*strangely, although the Plaintiff relied on a contract between himself and the Defendant no document to this effect was ever produced as an exhibit in Court. In fact it was not even pleaded on the plaint.*".

[49] The Defendant admitted that he terminated the agreement on the 27<sup>th</sup> March 2013; and that he returned all the keys to the Plaintiff following a premises audit. This court having considered the Plaintiff's case, is satisfied that it should not concern itself with the Plaintiff's allegation that the Defendant did not give a three months' notice of his intention to terminate the agreement.

- [50] The next issue for the determination of this court is whether the Plaintiff has satisfied it, on a balance of probabilities, that the Defendant, as from the 4<sup>th</sup> April 2013, is indebted to it in the sum of 4,793,650.97 rupees. It is not clear to this court why the alleged debt is stated, in the plaint, to be due as from the 4<sup>th</sup> April 2013.
- [51] **Be that as it may, the Plaintiff in its plaint alleged that during the tenure period the Defendant had ordered and received products and had accumulated outstanding and unpaid invoices to the sum of 4,793,650.97 rupees that is to say invoices from the 16<sup>th</sup> September 2011, to the 4<sup>th</sup> March 2013. In reply to the said allegation, the defence alleged that the Defendant did pay invoices to the Plaintiff as and when those invoices were tendered. Further paragraph 5 of the plaint alleged that the Defendant had received and acknowledged receipt by signing all invoices upon delivery of all products delivered to him. The reply of the Defendant to the said allegation is to the effect that *"All particulars of paragraph 5 of the Plaint are admitted"*. It is significant to note that the Defendant when confronted with the allegation, contained in paragraph 6 of the plaint, that the Defendant has not made any payment in respect of the products delivered, answered *"6. Paragraph 6 of the Plaint is denied. The Defendant avers that payments were made to the Plaintiff as and when invoices were tendered and signed"*.**
- [52] This court having considered the allegations contained in the pleadings with care, is satisfied that the Defendant is claiming that he has paid all invoices as from the 16<sup>th</sup> September 2011, to the 4<sup>th</sup> March 2013; and that, consequently, the Defendant had admitted the debt. However, at the trial the position of the Defendant, as this court understands it, was that the Defendant did not owe any money to the Plaintiff or was not aware as to whether he owed such a huge sum of money to the Plaintiff. According to his evidence, he came to know of the huge debt to the Plaintiff after the termination of the agreement. Moreover, in this court's judgment it is significant that the Defendant was not examined in relation to the material facts on which he has relied to meet the claims. This court also noted that the evidence of Mr. Mondon in relation to the alleged debt was not seriously

challenged by the Defendant through Counsel. The following discourse between Counsel for the Defendant and Mr. Mondon in relation to the alleged debt is pertinent —

"Q: Now you are making a claim against Mr. Marengo the operator although you have adduced evidence against Mrs. Marengo for 4,793, 650 right?

A: Yes.

Q: And the invoices you have tendered in Court today do they tally with this amount?

A: Yes.

Q: Cent to Cent?

A: Yes.

...

Q: ...If these invoices do not tally with that what would you say?

A: I would be surprised.

Q: You would be surprised or not?

A: I would.

...

Q: So what I am putting to you Mr. Mondon is that first there was no breach by Mr. Marengo the operator who signed the document, secondly, you had spoken about Mrs. Marengo who had nothing to do with the case ... who never signed any agreement, who was never sued. And thirdly, Mr. Marengo does not owe you that amount of money stated in the plaint correct?

...

A: I cannot respond to that, I could say yes the station was operated for 30 years with Mr. Marengo not being present so therefore he was accepting that someone else was running on his behalf. That amount owed yes they do owe because there is invoices that no proof of payment can come forward with.

Mr. Gabriel: Thank you."

Proceedings of 19 February, 2018, at 9:30 a.m., pp. 44 & 45 of 48.

[53] In the light of the Defendant's plea that he has paid all invoices and having regard to article 1315 of the Civil Code, the burden is on the Defendant to prove payment. Article 1315 of

the Civil Code provides — *"A person who demands the performance of an obligation shall be bound to prove it. Conversely, a person who claims to have been released shall be bound to prove payment or the performance which has extinguished his obligation"*. Having considered the evidence, this court is satisfied that the Defendant did not bring any evidence to prove payment in terms of article 1315 of the Civil Code.


[54] Moreover, there is no evidence on record in relation to the alternative claim of the Defendant that the amount being claimed by the Plaintiff is an exaggerated amount.

[55] The total amount owed to Plaintiff as per the invoices P3 is 4,618,230.74 rupees.

***The decision***

[56] In the light of the above, this court is satisfied that the Plaintiff has established its claim as against the Defendant on a balance of probabilities. This court orders the Defendant to pay to the Plaintiff the sum of 4,618,230.74 rupees owed to the Plaintiff. This court makes no order as to costs.

Signed dated and delivered at Ile du Port on 30 October 2018



**F. Robinson**  
**Sitting as a Judge of the Supreme Court**