

SUPREME COURT OF SEYCHELLES

Reportable/ Not Reportable / Redact
[2020] SCSC 204
CS 73/17

In the matter between:

BOTANICA RESORT AND SPA
(rep. by Frank Elizabeth)

Plaintiff

and

AMIRANTE INTERNATIONAL CUISINE (PTY) LTD
(rep. by Alexia Amesbury)

Defendant

Neutral Citation: *Botanica Resort and Spa v Amirante International Cuisine (Pty) Ltd* (CS 73/17) [2020] SCSC 204 (20th March 2020)

Before: Pillay J

Summary: Breach of contract – claim for damages – arrears of rent – 6 months’ notice

Heard: 7th September 2018 and 5th September 2019

Delivered: 27th March 2020

ORDER

On the basis of the above it is ordered as follows:

- (1) The Defendant shall pay the Plaintiff the sum of Euros 12, 600 being 3 months rent in lieu of notice.*
- (2) The Defendant shall pay the Plaintiff the sum of SCR 44, 783.00 for damages to the Premises.*
- (3) The above sums shall be set off against the two months deposit retained by the Plaintiff and the Defendant shall pay the balance at today’s Euro rate.*
- (4) Each side shall bear their own costs.*

JUDGMENT

PILLAY J

- [1] The Plaintiff in this matter seeks a judgment of the Court against the Defendant in the sum of SCR 640, 250.65 on the basis of the Defendant's breach of contract.
- [2] The Plaintiff claims that on or about 4th November 2013 the parties entered into an agreement to lease the Club House of the building known as Botanica Residences and Resort situated at St Louis, Mahe on title No. V1841 for a period of 9 years starting from the 1st December 2013.
- [3] The Plaintiff claims that it was a condition of the lease agreement that;
- (1) *Paragraph 3.2 (a) The Lessee shall use the leased premises for the purpose of a restaurant.*
 - (2) *Paragraph 51. The Lessee shall be responsible for maintaining and keeping the building in good tenantable repair and condition at all times.*
 - (3) *Clause 8 "Promptly upon expiration or sooner determination of this lease, the lessee shall peacefully surrender and give up possession of the premises, including all fittings and fixtures in as good order and condition as the same was at the commencement date, reasonable use and wear excepted."*
 - (4) *Clause 9 "This lease may be terminated at any time after the term of 24 months by either party giving 6 months' notice in writing to the other party as provide in paragraph 2.5."*
- [4] The Plaintiff claims that in breach of the said agreement, on or about the 29th September 2015, the Defendant wrote to the Plaintiff and gave 4 months' notice of termination.
- [5] The Plaintiff further claims that in breach of the agreement the Defendant has unlawfully removed equipment, furniture fixture and fittings from the leased premises and caused extensive damage to the property of the Plaintiff.
- [6] The Plaintiff quantified its loss as a result of the breach at SCR 640, 250.65:
- a) *Utility bills in arrears SCR 30, 588.65*
 - b) *6 months' notice of rent from September 2015 to 29th March 2016 Euro 25, 200.00*
 - c) *Arrears of rent Euro 2, 500.00*

d) Cost of repairs SCR 221, 862.00

- [7] The Defendant denied the claim and averred when the lease is read disjunctively it would appear that the Plaintiff can make the averments it did in paragraphs 4 and 5 but when the contract is read conjunctively there is a conflict and ambiguity which if the Court finds it exists it should be interpreted against the Plaintiff and in favour of the Defendant.
- [8] The Defendant relied on the case of **Gerard McGee (a minor suing by his father and next friend Thomas McGee) (plaintiff) v Francis O'Reilly and the North Eastern Health Board (defendants)** delivered by the Chief Justice of Ireland on 9th July 1996 to support her proposition that the burden of proof is on the Plaintiff and that the Court must be satisfied that on the evidence the occurrence of an event was more likely than not.
- [9] Counsel went on to submit that the evidence of Michelle Vidot who testified for the Plaintiff was that the utility bills stood at SCR 30, 588.65 which amount was on the electric meter of Botanica/Plaintiff and not on the Amirantes International Cuisine/Defendant.
- [10] Counsel submitted that both parties admitted that four months' notice was given and the Plaintiff admitted that he retained the two months' deposit that was paid by the Defendant.
- [11] Counsel submitted that the reasons for the non-payment of the utility bills were explained by the Defendant in her evidence. It was her submission that Defendant testified that a carpentry workshop was plugged into her meter and when she switched off the electricity on the mains the lights went out in the workshop as well. It was counsel's submission that the evidence of the Defendant was not challenged on the issue during cross examination.
- [12] Counsel submitted that based on the extract from the proceedings the Court cannot be satisfied on a balance of probabilities that there were rent arrears.
- [13] The Defendant's counsel further submitted that Plaintiff's testimony contradicted the instructions he gave to his counsel. Counsel pointed to the Plaintiff's evidence "in the beginning when we took over, the place was still a restaurant, so we allowed her to come

and take all her equipment ad whatever” whereas his counsel in cross examining the Defendant stated as follows: “I am instructed that the lessor could not have access to the premises because you had blocked the place up. You left your equipment there and they could not go in for fear that you might claim. They stay away from your equipment so they could not have access to the premises after you left on the 15th October.”

[14] Counsel further submitted that the Plaintiff did not meet the required standard of proof in view of his claim that the Defendant left his premises on 15th October 2015 leaving all her equipment behind while the Defendant testified that she opened her new restaurant on 9th of November so she definitely left with everything on the 15th.

[15] Counsel submitted that with regards to the issue of cost of repairs there was no evidence that “repairs” were carried out in view of the testimony of the Plaintiff that he could not remember who effected the repairs.

[16] Counsel further pointed out that the quantity surveyor candour in his evidence that “I mean the purpose was to identify the deficiencies. One thing is that I do not know how it was before. I just identify deficiencies like it is now on the based on my experience in construction.” According to counsel the witness does not say how the “defects” were caused or when they happened or who caused them. She submitted that these “defects” were the cause of the termination.

[17] Essentially counsel submitted that based on the evidence adduced before the Court the Plaintiff had failed to prove his case to the required standard and the case should be dismissed with costs.

[18] The Plaintiff’s counsel was given an opportunity to file submissions but none were forthcoming.

[19] The Defendant’s counsel identified the issues as follows:

(1) Did the Defendant breach the lease Agreement by failing to give six months’ notice prior to vacating the premises?

(2) Did the Defendant owe the Plaintiff for unpaid rent and utilities?

- (3) *Were there defects to the premises when the Defendant terminated the agreement and vacated the premises, which were caused by her?*
- (4) *Did the Plaintiff incur the expenses he claimed for rectifying those defects?*
- (5) *Was the Defendant liable to the Plaintiff in law and on the facts for those losses and damages claimed?*

[20] Having gone through the pleadings I find that the issues as identified by counsel for the Defendant are indeed the issues for the Court to decide upon but can be grouped together under two heads. In the circumstances this Court will address the above issues as follows:

(1) *Did the Defendant breach the lease Agreement by:*

- *failing to give six months' notice,*
- *being in arrears with rent*
- *owing utilities*
- *causing damage to the property*

(2) *Is the Defendant liable in law and on the fact for the losses and damages claimed?*

[21] This Court also agrees with counsel for the Defendant that the burden is on the Plaintiff to prove its case on a balance of probabilities.

[22] *Firstly did the Defendant breach the lease Agreement?*

[23] Clause 9 of the Agreement reads as follows:

This lease may be terminated at any time after the Term of 24 months by either party giving notice to the other party 6 months' notice in writing as provided in Par (2.5)

[24] Paragraph 2.5 of the Agreement reads as follows:

After this initial period of 24 month either party may terminate this agreement by notice in writing of 6 months.

[25] The referral 'this initial period of 24 months' is a reference to clause 2.4 which provides that:

In the first 24 months of this contract both parties agree that the lessor shall let the lessee keep the premises for this 2 years period and no notice of termination or vacation of premises by either will be considered.

- [26] It is clear from the contract, clause 9, that the parties can terminate the Agreement by giving the other party 6 months' notice in writing.
- [27] The Defendant gave notice of her intent to terminate on 29th September 2015¹. The effective date of her vacating the premises would have been 28th March 2016. Per the statement of account dated 6th October 2015 the Defendant owed rent for the months of September, October and November. It is obvious from the statement of account that the Defendant had no arrears of rent. The only rent if due was from the date of termination to the effective date 6 months therefrom.
- [28] Per D1 on 14th October 2015 the Defendant transferred the sum of SCR 125, 000.00 to the Defendant. On 5th November 2015 the Defendant transferred the sum of SCR 60, 900.00 to the Plaintiff. The two transfers cover three months' rent. According to Ms. Verheydan the payment of 5th November 2015 was the last payment of the regular rent.
- [29] The Defendant explained that she gave 4 months' notice and that the other two months came off the two months deposit that the Defendant retained. Unless the Plaintiff and the Defendant agreed that the two months deposit would be forfeited as two months' rent in lieu of notice the Defendant cannot unilaterally expect the two months deposit to be part of her six months' notice requirement. As Mr. ElMasry correctly stated in cross examination², the two months deposit was to offset any claims that may have arisen at the termination of the Agreement and which indeed did arise.
- [30] The Defendant has not accounted for the balance of the 3 months' rent in lieu of notice.
- [31] Having failed to give the Plaintiff the required 6 months' notice in breach of the Agreement the Defendant is liable for the balance of 3 months in lieu.

¹ Per PE2

² Page 13 of the proceedings of 5th September 2019 at 9am, "The deposit never counted as a rent agreement...it is not counted and the deposit is for damages for whatever electricity bills;...."

- [32] As regards arrears of rent, PE6 the statement of account and as well as Ms. Vidot's evidence shows no arrears of rent in the sum of Euro 2, 500.00 but rather shows the amounts due for the months of September, October and November, covering the notice period.
- [33] As regards the liabilities for utilities, the only evidence of the Defendant's liabilities for utilities is that of the Plaintiff's representative Mr. ElMasry and Ms. Vidot.
- [34] Ms. Vidot produced a statement of account which included several invoices for PUC Bill. However there was no evidence of the PUC Bill itself or the meter reading or otherwise, specially in view of the Defendant's assertion that she was not liable for that claimed usage as there was a carpentry workshop on the property using the same meter.
- [35] In fact in PE2, the Defendant's notice of termination, she refers to the termination closing "any discussion about electricity..." Clearly the issue of the electricity payments were in issue from the very start of the Agreement and it was for the Plaintiff to show conclusively that the Defendant was indeed liable for payment of the said utility bills for April, May and September 2014.
- [36] As regards damage to the property Mr. Valentin testified that he made a report at St Louis on Parcel V1841. The purpose of the surveyor's report as stated at paragraph 1 of the report³ was 'to establish the value for making good to match the condition that it was prior to the leasing agreement solely for possible remedial action and/or litigation purposes.'
- [37] Issues identified by Mr. Valentin at the basement level was floor drainage which needed to be removed and tiled; ceramic tiling which included original tiles having been removed and holes made in some for water supply, drainage and electrical points requiring removal and placement of new tiles as well as plastering and painting; walling where he found "an opening for the possible installation of an extractor fan has been made in the external walls" and remedial works to that wall included "reconstruction of

³ PE7

the internal layer concrete leaf and external rockwork cladding”, ceiling and electrical system were identified needing remedial action.

[38] In terms of services he found that ceiling light points had been removed, one damaged and others left in bad condition as well as water supply points and drainage not installed by the Plaintiff were found which needed to be remedied.

[39] On the first floor he found that the floor needed to be re-varnished as a result of heavy wear and tear. The walls needed cleaning as well as the ceiling. In terms of services he found that there was wear and tear on switches and sockets which needed to be replaced. He also found a wine cabinet that needed to be dismantled. A ceramic sink had been left dirty and stained which needed to be cleaned; a bar storage cabinet needed re-varnish and door handle replaced.

[40] Mr. Valentin testified that he visited the site in April 2016 in order to compile the report⁴. He accepted the possibility that anything could have happened to the property during the lapse of four months, also accepting the possibility that the damage was not necessarily caused by the person who was there because of the time lapse⁵.

[41] In any event his report is clear that some of the “damage” was wear and tear. Some was a result of the lack of cleaning. Other “damage” were obviously alterations made to the premises to accommodate a restaurant operation.

[42] The evidence of Mr. ElMasry is that the property was originally “just a house. We converted for her.”⁶ Though he agreed with counsel in examination in chief that as a result of what the defendant had done to his property he had suffered loss and damages he did not elaborate further.

[43] In cross examination he stated that he did an inventory with the Defendant’s representative when she moved in. Though the inventory was not produced Mr. ElMasry

⁴ Page 8 of the proceedings of 5th September 2018 at 2pm

⁵ Page 10 of the proceedings of 5th September 2019 at 2pm.

⁶ Page 5 of the proceedings of 5th September 2019 at 9am

accepted that there was “a piece of paper signed which said there were a certain amount of air condition unit and number of lights...”⁷

[44] According to clause 5 of the Agreement, Maintenance and Repairs;

5.1 The Lessee shall be responsible for maintaining and keeping the building in a good tenable repair and condition at all times.

5.2 Structural alterations or additions to the Building shall be made by the Lessor unless the Lessor shall otherwise direct in writing. The Lessee shall not make or permit any alterations or additions to the premises without the prior written consent of the Lessor.

53 The Lessor shall keep the exterior of the Building including the road, gutters down pipes, sewers, supporting structures, wires, cables, conduits, car parking facilities and foundations serving the Building in good condition, painted (if necessary) and in complete repair.

[45] Clause 8.1 of the Agreement provides that

Promptly upon the expiration or sooner determination of this Lease, the Lessee shall peacefully surrender and give up possession of the Premises, including all fittings and fixtures in as good order and condition as the same was at the Commencement Date, reasonable use and wear excepted.

[46] In cross examination Mr. ElMasry admitted that the Plaintiff retained the deposit.

Q: *She terminated the lease. And at the time of termination, did you have any deposit money that you retained for her?*

A: *Yes we did.*

Q: *The deposit was for how many months?*

A: *I think for two months.*⁸

[47] The evidence of Mr. ElMasry in re-examination is that the Plaintiff paid for all the repairs to the property⁹. However he could not remember who the contractor was. It is surprising that he does not remember who the contractor was who effected the repairs to the

⁷ Page 7 of the proceedings of 5th September 2019 at 9am

⁸ Page 13 of the proceedings of 5th September 2019 at 9am

⁹ Page 19 of the proceedings of 5th September at 9am

property more recently but recalls the contractor who effected the conversion years before.

[48] The crux of the Plaintiff's case rests on the following exchange in cross examination.

Q: *So whatever damage if there was, could have been claimed against the insurance policy.*

A: *No, I cannot be and this is what I was trying to explain to you. When we rented the premises, it was a house, we have to convert that into a restaurant. We have to change a lot of things inside, we have to put walls, we have to put tiles, we have to put everything to do with the conversion which was asked for and this is why the lease was for nine years because if the expenses which we have to put. Once the lease expires, I could not keep the place as a restaurant, I have to actually take everything out which we have to put an extra cost tot eh company to return the place back to the same way which we gave it.*

Q: *When you say 'way which you gave it' back to when you first leas it to the defendant or back how it was before it was converted?*

A: *When we signed the lease the place was a house. We have to do all the work to convert it into a restaurant.*

Q: *Do you mean to say then, the date you signed the lease the premises was still a house?*

A: *Yes.*

Q: *It was only after the lease was signed that you converted it?*

A: *Absolutely. And this is why when you asked what was in the place I told you there was a bar, chairs, aircon and actual floor and nothing else.*

....

Q: *You are saying therefore because she terminated the lease earlier, she has to pay for all the damages that you had to pay.*

A: *Not all the damages, I have to convert back the place from a restaurant to a normal house.*

Q: *That is a choice that you made but you are charging that to her.*

A: *Of course I have to, she breached the lease. We have a six month termination of the lease especially for something like this to happen to at least recover some of the money spent.*

[49] In view of the above *was the Defendant liable to the Plaintiff in law and on the facts for those losses and damages claimed?*

[50] It is the finding of this Court that the Agreement was for the Defendant to use the premises as a restaurant. If any alterations were needed it could only be made with the Plaintiff's prior written consent. Mr. ElMasry accepted that the alterations were made and his company made those alterations. It cannot be said that clause 8.1 covered the eventuality of alterations and additions being made with the permission of the Lessor and the Lessee thereafter being expected, at the end of the Lease or upon termination, to put the Premises back to the state it was prior to the alterations or additions.

[51] The Defendant is liable for the damage caused to the Premises as a result of the Defendant's use as well as the Defendant's failure to keep the Premises in a good state of repair and condition inclusive of cleanliness.

[52] Accordingly the Defendant is liable for the works found to be needed in the report as follows:

- (1) 4.1.3 -ceiling surface needing cleaning and painting - SCR9, 904
- (2) 4.1.4 (i) (a) – ceiling lighting removed and damaged needed replacing – SCR 7, 500
- (3) 4.2.2 - walling needing cleaning – SCR 10, 020
- (4) 4.2.3 - ceiling needing cleaning and fresh coat of paint – SCR9, 859
- (5) 4.2.4 (b) (ii) – ceramic sink dirty and stained needing thorough cleaning – no sum given
- (6) 4.2.4 (b) (iii) – bar cabinet needing re-varnish and door handle replaced – SCR 7, 500
- (7) In total a sum of SCR 44, 783.00

[53] On the basis of the above it is ordered as follows:

- (8) *The Defendant shall pay the Plaintiff the sum of Euros 12, 600 being 3 months rent in lieu of notice.*
- (9) *The Defendant shall pay the Plaintiff the sum of SCR 44, 783.00 for damages to the Premises*
- (10) *The above sums shall be set off against the two months deposit retained by the Plaintiff and the Defendant shall pay the balance at today's Euro rate.*
- (11) *Each side shall bear their own costs.*

Signed, dated and delivered at Ile du Port on 27th March 2020

Pillay J