

SUPREME COURT OF SEYCHELLES

Reportable/ Not Reportable / Redact
[2020] SCSC 712
CS 32/2017

In the matter between:

MONIQUE DOROTHE HERMITTE
(rep. by Alexandra Madeleine)

Plaintiff

and

ELIOT ANTOINE LOW HONG
(rep. by Clifford Andre)

Defendant

Neutral Citation: *Hermitte v Low Hong* (CS 32/2017) [2020] SCSC 712 (30 September 2020)

Before: Pillay J

Summary: Breach of contract

Heard: 24th September 2018, 24th October 2018, 20th May 2019, 23rd May 2019 and 8th November 2019

Delivered: 30th September 2020

ORDER

- [1] The Plaintiff is dismissed.
 - [2] With regards to the counter claim there is no proof that the Plaintiff owed any sums to the Defendant and accordingly the counter claim is dismissed.
 - [3] Each side shall bear their own costs
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JUDGMENT

PILLAY J

The Claim

[1] The Plaintiff claims from the Defendant the sum of SCR 1, 500, 000.00 for an alleged breach of contract in that the Defendant:

- (1) *Used materials, equipment and Nissan Double Cab purchased for business for own benefit and profit;*
- (2) *Failing and refusing to credit business bank account with the proceeds of the business and denying Plaintiff her share of the profits;*
- (3) *Failing and refusing to share profits of business with the Plaintiff from the date of business operation to date.*

[2] The Plaintiff's claim is as follows:

- (4) *At all material times the Plaintiff was a business woman undertaking a tourism development at Les Cannelles, Mahe and the Defendant was a plumber.*
- (5) *On 4th April 2014, the Plaintiff and Defendant registered the business VIS Blasting Drilling and Plumbing Contractor (B.R.N B8413693).*
- (6) *Plaintiff made monetary contribution to the business in the sum of SCR 607, 000.00 which was used to purchase materials and equipment for the business from Italy.*
- (7) *The Defendant did not make any monetary contribution to the business.*
- (8) *The business through the Plaintiff and Defendant, obtained a loan from the Seychelles Commercial Bank in the sum of Seychelles Rupees SCR 292, 000.00 for the purchase of a Nissan double cab S6675.*
- (9) *The loan is repaid monthly by direct debit from the Plaintiff's personal bank account with the Seychelles Commercial Bank in the sum of SCR 7, 992.00.*

- (10) *Although the Defendant credit Plaintiff's personal bank account with the monthly repayment sum, Plaintiff has to cater for additional funds in the sum of SCR 2000.00 in her personal account monthly for the repayment of the said loan.*
- (11) *Plaintiff and Defendant agreed that the Defendant having know-how and skill will carry out the business using the materials, equipment and the Nissan double cab purchased for the business, and will credit the proceeds of the business in the business bank account and share the profits with the Plaintiff.*
- (12) *Since commencement of business operation, Defendant has been, and is using, the materials, equipment and the Nissan Double Cab purchased for the business in respect of various projects.*
- (13) *Save for a total sum of SCR 25, 000.00 paid directly to the Plaintiff, Defendant has persistently failed and refused to credit the business bank account with the proceeds of the business and to pay the Plaintiff her share of the profits.*
- (14) *Plaintiff asked Defendant to credit the business account with the proceeds of the business and to pay her share of the profits but the Defendant failed and refused to do so.*
- (15) *By his conduct as described in paragraphs 11, 12 and 13 above, Defendant has breached his agreement with the Plaintiff.*

Particulars of breach

- *Used materials, equipment and Nissan Double Cab purchased for business for own benefit and profit;*
 - *Failing and refusing to credit business bank account with the proceeds of the business and denying Plaintiff her share of the profits;*
 - *Failing and refusing to share profits of business with the Plaintiff from the date of business operation to date.*
- (16) *As a result of the breach by the Defendant, the Plaintiff has suffered the following losses:*
- *Loss of financial contribution used to purchase material and equipment for business from Italy* SCR 607, 000.00

- *Loss of share of profits from time of business operation to date. SCR 883, 000.00*

Total: SCR 1, 500, 000.00

- [3] The Defendant denied the claims by the Plaintiff and counter claimed in the sum of SCR 2, 500, 000.00 for non payment for work done by the Defendant for the Plaintiff, non payment of furniture and materials done by the Defendant for the Plaintiff and moral damage.
- [4] The Plaintiff in turn denied the counter claim, averring that the Defendant carried out plumbing works for Emitheirs (Pty) Ltd pursuant to an agreed quotation provided by the Defendant, and not personally for the Plaintiff.

Submissions

- [5] The Defendant submitted that there was no proof by the Plaintiff as to how she came to the figure of SCR 883, 000.00 as being the profits from the business. It was his submission that the Plaintiff was unable to show that the business had contracts which would have brought a profit of over one million which she would have earned half of it.
- [6] Learned counsel for the Defendant submitted that the Defendant had produced evidence that he paid for the clearing of the goods that were his and the Plaintiff gave him money to additionally pay to Mrs. Marie for the clearing of the container when it arrived in Seychelles.
- [7] He submitted that there is evidence that the Plaintiff had not paid the Defendant for work done.
- [8] It was his submission that “based on the evidence tendered in Court and on all the exhibits tendered it is clear that the only conclusion that could be arrived at is to award the prayers of the Defendant/counter claimant”. According to counsel the Court cannot award any claims of the plaintiff as such was not proved and that Court cannot come to a figure as such was not proved and that the Court cannot come to a figure which has not been proved.

- [9] For her part the Learned counsel for the Plaintiff submitted that the Plaintiff has established her case against the Defendant.
- [10] It was her submission that there was proof of an agreement between the parties by way of their registering the business name VIS under which they could trade as well as registration with the Seychelles Revenue Commission.
- [11] It was further her submission that the Plaintiff had proved her initial contribution to the business by way of production of receipts and bank transfers. She contended that the Plaintiff has established on a balance of probabilities that since the “commencement of business operation the Defendant has and is using the materials, equipment and the Nissan Double Cab purchased for the business in respect of various projects.”
- [12] Learned counsel for the Plaintiff submitted that the Defendant was in breach of the agreement to the extent that materials and equipment were used but the business account is not credited with the proceeds leading to the Plaintiff not receiving payment.
- [13] It was her submission that the Plaintiff incurred loss since she has lost the initial capital SCR 607, 000.00 she injected into the business as well as her share of the profits derived from the various contracts and projects that the Defendant performed, which she estimated at SCR 883, 000.00.

Evidence

- [14] The evidence of the Plaintiff is that she set up a business in the name of VIS Blasting Drilling and Plumbing contractor with the Defendant. A loan of SCR 292, 000.00 was taken in the name of the business with which a Nissan pick up was bought. The agreement was for her to inject money into the business while the Defendant would provide the skills. She injected SCR 607, 332.00 in the business for the purpose of buying materials including fittings, sprinklers, one vibrator, two compressors, one compactor and a jack. She paid the Defendant’s air ticket to Italy to purchase the said items and also paid for the freight and clearing of the container on arrival. It was the Plaintiff’s evidence that she only received SCR 25, 000.00 from the Defendant as proceeds from work done by the business. Thereafter the Defendant told her there was no business because she was involved in

politics but she learnt from other people that the Defendant was being paid in cash for works done.

- [15] Neil Surman testified that the Defendant stored his compressor at his (the witness') yard at Providence and they had a mutual agreement that he could use the compressor when he needed it. He further testified that he made payments to the Defendant by way of cheques made out cash which he gave to the Defendant or sometimes by way of cash payments.
- [16] Ewa Ossoska testified that she is the Director of Finance at Savoy Resort and Spa. She testified that there were no records of any payments made to the specific person named in question, as per the summons she received "to produce records of payments made to Eliot Antoine Low Hong for works performed." It was her evidence that usually Savoy Development makes payment to businesses not individuals but based on what she was asked she was not able to identify any payments.
- [17] Paul Barrack testified that he is the Commissioner of Customs and produced the assessment notice from the Seychelles Revenue Commission's records as PE30 (b) in relation to the container bearing identification PONU1597853 .
- [18] The exhibits produced were as follows:

<i>PE1</i>	<i>Certificate of registration of VIS BLASTING DRILLING AND PLUMBING CONTRACTOR as a business name by the Parties</i>
<i>PE2</i>	<i>Seychelles Revenue Commission letter regarding registration of Tax with Tax Identification Number 243 684 845</i>
<i>PE3</i>	<i>Letter of Offer for loan from Seychelles Commercial Bank</i>
<i>PE4</i>	<i>Road Fund Licence Duplicate for S6675 dated 24th October 2016</i>
<i>PE5</i>	<i>H Savy Insurance Renewal Certificate dated 24th June 2016 for Motor Commercial Goods in the name of VIS BLASTING DRILLING AND PLUMBING CONTRACTOR</i>
<i>PE6</i>	<i>Cash Plus Voucher for transfer of Euro 16, 800 amounting to SCR 289, 210 from VIS PTY LTD to GARNER DENVER SRL dated 5th September 2014</i>
<i>PE7</i>	<i>Invoice from Gardner Denver for the sum of Euro 16, 800</i>
<i>PE8</i>	<i>Quote from Gardner Denver for dated 4th September 2014 for a portable compressor</i>

- PE9 Receipt dated 26th August 2014 from Western Union for a transfer of Euro 900 equivalent to SCR 16, 759.13 from Monique Hermitte to Eliot Low- Hong
- PE10 Receipt dated 3rd September 2014 from Western Union for a transfer of Euro 900 equivalent to SCR 16, 820.74 from Monique Hermitte to Eliot Low-Hong
- PE11 Receipt dated 16th September 2014 from Western Union for a transfer of Euro 900 equivalent to SCR 16, 652.43 from Monique Hermitte to Eliot Low-Hong
- PE12 MCB cash deposit slip dated 31st October 2014 for the sum of SCR 33, 000 into the account of Eliot Low-Hong
- PE13 Invoice for the sum of Euro 450 from Vistarini dated 17th September 2014 to VIS DRILLING CONTRACTOR
- PE14 Bill of Lading number 9287/204/RE consignee Hermitte Heirs Pty Ltd
- PE15 Cheque book
- PE16 Bundle of emails and air tickets in the name of Eliot Low Hong
- PE17 VIS BLASTING DRILLING PLUMBING CONTRACTOR cheque book
- PE18 Without prejudice letter to Eliot Low Hong from Attorney Alexandra Madeleine dated 25th November 2016
- PE19 Quotation in the sum of SCR 325, 000 from the Defendant to Ermitheirs Pty Ltd dated 15th July 2013
- PE20 Receipt of part payment in the sum of SCR 280, 000 from Ermitheirs Pty Ltd to the Defendant dated 21st October 2013
- PE21 Copy of diary entries of payments made to the Defendant – SCR 50, 000 on 10th June 2013, SCR 10, 000 on 2nd September 2013, SCR 10, 000 on 3rd September 2013, SCR 100, 000 on 17th October 2013, SCR 100, 000 on 20th October 2013, SCR 10, 000 on 21st October 2013, USD 7, 100 on 15th September 2013 equivalent to SCR 85, 200
- PE22 Official oath of Sabrina Lapolla
- PE23 Bundle of invoices from Crespi and Vistarini translated from Italian to English by Sabrina Lapolla
- PE24 Bundle of invoices from Oviene translated from Italian to English by Sabrina Lapolla
- PE25 Receipt from BDA Overseas to Ermitheirs Pty Ltd for Euro 335 dated 29th November 2014 and SCR 3, 351 dated 14th November 2014

PE26	<i>Receipt from Hunt Deltel to Plaintiff dated 3rd December 2015 in the sum of SCR 8512</i>
PE27	<i>MCB Deposit slip dated 16th September 2014 for the sum of SR 47, 940</i>
PE28	<i>Supplier Report from PMC for works done by the Defendant from 20th July 2016 to 31st January 2018</i>
PE29	<i>Cheque Stubs from Neil Surman</i>
PE30(a)	<i>Bundle of documents dated 4th December 2014 from SRC with regards to duty paid on container from Crespi and Gardner Denver showing SRC 56, 376.91 paid in taxes</i>
PE30(b)	<i>Bundle of documents showing that on 4th December 2014 SRC collected SCR 34, 807</i>

[19] The evidence of the Defendant is that he had an agreement with the Plaintiff to register a business with the Plaintiff because they were both not working and he has done a lot of work for her for which she owed him money. The arrangement was that the Plaintiff would help him with paperwork like tax returns and then at the end of each year he would give her something. It was his evidence that the business only did one job from which he gave the Plaintiff SCR 25, 000.00. He denied using any materials bought by the Plaintiff on any plumbing jobs. It was his evidence that the compressors were to be his personal property because the Plaintiff owed him money.

The issues

[20] The issues for the Court to consider are as follows:

- (1) *Did the parties enter into an agreement to join up as partners in a business?*
- (2) *Did the Defendant fail to pay the loan instalments?*
- (3) *Did the Defendant fail to pay the Plaintiff profits earned by the business?*

[21] The case is based purely on the facts to be decided on a balance of probabilities.

Analysis

Did the parties enter into an agreement to join up as partners in a business?

- [22] The Defendant vehemently denied that along with the Plaintiff he registered the business VIS Blasting Drilling and Plumbing Contractor. Yet he avers that he only agreed with the Plaintiff that they would register a company but came to no arrangements as to the sharing of profits.
- [23] It is the view of this Court that his averment that he only agreed to register a company with the Plaintiff is an admission that the Plaintiff and Defendant registered a company in their joint names. The nature of the business then governs the nature of the arrangements for profits.
- [24] In any event PE1 shows that the business name VIS Blasting Drilling and Plumbing Contractor was registered on 4th April 2014 with the Plaintiff and Defendant as partners. Furthermore the business was registered with the Seychelles Revenue Commission for tax purposes with Tax Identification Number 243 684 845, by way of PE2
- [25] PE3 shows that a loan of SCR 292, 000.00 was taken out in the name of the business and a vehicle was bought with the said loan with a charge being applied to parcel H3128 belonging to Mr. Eliot Low-Hong and Mr. James Low-Hong.
- [26] Furthermore in his evidence, right off the bat he accepted that “Mrs. Hermitte has ask me 50% in a business that I have registered with her. It is true that we had registered a business the both of us.”
- [27] On the basis of the above I find that there is ample evidence that there was an agreement between the parties to join up as partners in the business of VIS Blasting Drilling and Plumbing Contractor.

Did the Defendant fail to pay the loan instalments?

- [28] With regards to the repayment of the loan, the Plaintiff at paragraph 8 claims that “The loan is repaid monthly by direct debit from the Plaintiff’s personal bank account with the Seychelles Commercial Bank in the sum of SCE 7992/-.”

- [29] At paragraph 9 the Plaintiff claims that “Although the Defendant credits Plaintiff’s personal bank account with the monthly repayment sum, the Plaintiff has to cater for additional funds in the sum of SCR 2, 000.00 in her personal bank account monthly for the repayment of the said loan.”
- [30] The Plaintiff attempted to explain at page 6 of the proceedings of 24th September 2018 that the additional SCR 2, 000.00 was required because she already had “a personal loan of about SCR 11, 000 odd, and the amount that was left out of that SCR 19, 000.00 there was an additional Rs2000 that I have to pay every month if the loan is not paid by VIS...”.
- [31] Indeed PE3, the letter of offer from the Seychelles Commercial Bank, shows that the monthly repayments were SCR 7992.00. In fact the additional SCR 2, 000.00 is a requirement from the Seychelles Commercial Bank as part of the loan terms and conditions. The letter of offer states that the “monthly repayments shall be SCR 7992, to be settled from the account of Mrs. Monique Hermitte’s Savings A/C. Additional funds of approximately SCR 2000.00 has to be credited in the account to cater for loan repayment apart from the monthly salary deposit of SCR 19, 000.00”.
- [32] My understanding of the above is that an extra SCR 2000.00 had to be credited to that Savings account from which the VIS loan was to be debited from because SCR 19, 000.00 that was already being credited to that account monthly was not sufficient to cover the Plaintiff’s personal loan repayments of over SCR 11, 000/- as well as that of VIS at SCR 7992/-. As long as the VIS was crediting the Plaintiff’s account with the loan repayment of SCR 7992/- the Plaintiff would not be out of pocket.
- [33] The issue then is whether the Plaintiff’s account was being credited with the loan repayment, which was totally dependent on the business earning money.
- [34] PE 17, the cheque book drawn on VIS Blasting Drilling and Plumbing Contractor account reflects payments of loan at SCR 8025 per month for the months of April 2015, May 2015, June 2015, July and August 2015, September 2015, October 2015, November 2015, December 2015, January 2016, March 2016, May 2016, June 2016, July 2016, August 2016 and September 2016.

- [35] There is no evidence as to the reasons why SCR 8025/- was being paid to the Plaintiff as repayment for loan when the monthly repayment sum was SCR 7992/-. Nor is there evidence of the Defendant's failure to pay the loan in terms of default letters from the bank, which the Plaintiff stated she received nor bank statements, unless the Plaintiff's position is to leave the Court to assume that there were no payments other than those months above.
- [36] It is noted that the Defendant in cross examination stated that the loan had been paid off, though he did not say who had paid it off.
- [37] On the above I find that there is insufficient evidence to show that the Defendant failed to pay the loan instalments.

Did the Defendant fail to pay the Plaintiff profits earned by the business?

- [38] The Plaintiff estimates her share of profits lost from the works done by the Defendant but not credited to the business at SCR 883, 000.
- [39] In order to decide whether the Defendant failed to pay the Plaintiff her share of the profits earned by the business, it stands to reason that the Plaintiff has to prove that the business has been functioning, as Learned counsel for the Defendant submitted, that the business was attracting contracts and earning money.
- [40] In that line the Plaintiff produced a cheque book (PE17) in the name of VIS BLASTING DRILLING PLUMBING CONTRACTOR from Seychelles Commercial Bank. A series of cheques have been drawn on the account from 11th March 2015 to September 2016 for various transaction including payments of SCR 10, 000 on 22nd December 2015 to the Plaintiff as share for work done for Heritage, SCR 15, 000 on 22nd December 2015 to the Defendant and SCR 15, 000 on 8th April 2016 to the Plaintiff for Heritage work and SCR1500 to the Defendant on an unknown date.
- [41] The above total payment of SCR 25, 000.00 to the Plaintiff tallies with the Defendant's evidence in cross examination that VIS did only one job on an old house at Les Cannelles from which he gave the Plaintiff SCR 25, 000.00.

- [42] The Plaintiff attempted to bring evidence of the business earning other monies through one Neil Surman who testified that he was paying the Defendant for use of the compressor. However the witness Surman could not show conclusively that he was indeed paying the Defendant for use of the compressors.
- [43] Witness Neil Surman produced 5 cheque stubs as PE29 showing that on 4th July 2016 he paid Antoine Low Hong SCR 8720 for plumbing works, 8th March 2016 he paid one Antoine SCR 25, 000, 10th December 2015 he cashed a SCR 20, 000 cheque for one Antoine, 6th May 2016 he paid SCR 30, 000 to a plumber for one Antoine, 8th August 2016 paid SCR 10, 000 to one Eliot Low Hong plumber. The cheque stubs do not match the evidence of the witness in that the payments were made to the Defendant for plumbing works whereas the witness stated he paid the Defendant for use of the compressor per his evidence at page 2 of the proceedings of 8th November 2019 at 2pm. It is further noted that Mr. Surman stated that he provided the materials for the plumbing works and only paid the Defendant for labour.
- [44] It is noted that according to PE28, the Property Management Corporation was paying the Defendant for plumbing works on its properties. However, there is no evidence that the Defendant was using any equipment or materials from the business for plumbing works. I cannot subscribe to the view that the Defendant having agreed to enter into business with the Plaintiff to undertake drilling, blasting and plumbing works was excluded from undertaking works in his own name. Had the Plaintiff shown that the Defendant was undertaking basting and drilling works using the compressor belonging to the business or was undertaking plumbing works using the equipment and materials of the business that would have been a different matter. In as much as I accept the evidence of the Plaintiff that she injected money into the business for the purchase of the materials and compressor, and assisted with the purchase of the pickup, on the record though there is no evidence that the Defendant was using materials owned by the business for plumbing works and there is insufficient evidence that he was renting out the compressor.
- [45] The Defendant testified that the compressor was meant to be his personal property because the Plaintiff owed him money for works that he had done. This I find not tenable on the

evidence. PE 19 reveals that the Defendant quoted the sum of SCR 325, 000 for plumbing works at Santa Maria and PE20 shows payments he received amounting SCR 280, 000 meaning if there was any outstanding it was SCR 45, 000.00. According to PE6 a sum of SCR 289, 210.00 was paid to Gardner Denver who was the supplier of the compressor. That sum is well over the SCR 45, 000.00 that would have been outstanding from the quoted works. It is further noted that the invoice from Gardner Denver was made out to VIS. The evidence shows that the Defendant is the one who went to Gardner Denver, so if the compressor was meant to be his personally, on an agreement with the Plaintiff, why then did he have the invoice made out to VIS?

- [46] It has to be said that there were discrepancies galore in the evidence of the Plaintiff and the case as a whole.
- [47] The repayment of the loan was SCR 7992.00 yet the cheque stubs shows a refund of SCR 8025.00.
- [48] The records show that container with number PONU1597853 for which the bill of lading PE14 was produced contained compressors, furniture, spare parts for building machine, pumps and valves, kitchen appliances and home accessories. PE30 (a) from the Plaintiff's records shows that the sum of SCR 56, 376.91 was paid as duty on the said container whereas PE30 (b) from the official records of the Seychelles Revenue Commission shows SCR 34, 807.00 was paid for the said container on the exact same date and time as the payment on PE 30 (a). The Plaintiff for her part produced a cheque book (PE15) cheque stub number 000128 dated 4th December 2014 for the payment of tax on compressor in the sum of SCR 31, 000.00.
- [49] Some of the money transfers were made in the name of VIS while others in the name of the Plaintiff to the Defendant. Yet the container was sent to Hermitte Heirs Pty Ltd for the attention of Monique Hermitte.
- [50] The disorganised nature of this whole business is best explained by the Plaintiff herself in examination in chief, at page 9 of the proceedings of 24th September 2018, "Since the work he was supposed to do on our business at Santa Maria, was not finish because the fixtures

needed to be fixed and he had no work; so we talked to him about buying our furniture for the business in Italy and at the same time we were discussing the setting up of the business; so he took the opportunity, we paid his ticket, he went to Italy, he purchased the equipment, the compressors, the sprinklers all other plumbing materials and then at the same time he purchased our furniture, the lounge furniture for our project.”

[51] In conclusion, though I accept that the Plaintiff and the Defendant set up the business of VIS Blasting Drilling and Plumbing Contractor together, there is insufficient evidence that the Defendant failed to pay the loan installments and/or pay the Plaintiff her share of the profits earned by the business.

[52] On the basis of the above the Plaintiff is dismissed.

[53] With regards to the counter claim there is no proof that the Plaintiff owed any sums to the Defendant and accordingly the counter claim is dismissed.

[54] Each side shall bear their own costs.

Signed, dated and delivered at Ile du Port on .. 30th September 2020

