

**SUPREME COURT OF SEYCHELLES**

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**Reportable/Not Reportable / Redact**  
[2020] SCSC ...  
CC 05/2017

In the matter between:

**SUN EXCAVATIONS (PTY) LTD**

**Plaintiff**

Herein represented by its Director  
Mrs. Mavis Lafortune  
(rep. by Karen Domingue)

and

**ASSOCIATED CONSTRUCTION & INVESTMENT  
CO. L.L.C.**

**Defendant**

Herein represented by Mr. Barber Malik

(unrepresented)

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**Neutral Citation:** *Sun Excavations (Pty) Ltd v Associated Construction & Investment CO. L.L.C* (CC 05/2017) [2020] SCSC 1007 (18 December 2020).

**Before:** Carolus J

**Summary:** Claim for unpaid debt – Interest - Article 1153 of Civil Code of Seychelles Act – Provisional Seizure – Section 280 and 281 Seychelles Code of Civil Procedure

**Heard:** 21 September 2020

**Delivered:** 18 December 2020

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**ORDER**

I enter judgment in favour of the plaintiff in the sum of **SCR 1,929,533.00** with interest at the legal rate from the date of filing of the plaint, that is 16<sup>th</sup> March 2017, until settlement of the debt in full.

The defendant shall pay costs of this suit to the plaintiff.

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**JUDGMENT**

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## CAROLUS J

### Background

[1] The plaintiff, which avers that it is a company engaged in excavation and construction works, claims loss and damages in the sum of SCR1,929,533.91 with interests and costs for works carried out and remaining unpaid, from the defendant which it claims is one of its clients.

[2] The plaintiff avers that in 2013 and 2014, the defendant commissioned its services to carry out excavation works and build several walls at Intendance. As at June 2015, the defendant owed the plaintiff the sum of SCR 2,968,511.91 for works done by the latter. Following several verbal and written demands by the plaintiff to the defendant, on the 25<sup>th</sup> June 2015, they entered into a payment guarantee whereby the defendant agreed to pay the plaintiff the sum owing as follows:

- (a) First 35% of Outstanding Due amount, that is SCR1,038,979.00 within one week's time, from the date of agreement of payment terms.*
- (b) Second 35% of Outstanding Due amount, that is SCR1,038,979.00 after 3-4 weeks from the receipt of first installment by M/S Sun Excavations (Pty) Ltd.*
- (c) Third and final Outstanding Due amount, that is SCR 890,554.00 after 3-4 weeks from the receipt of Second Installment by M/S Sun Excavations (Pty) Ltd.*

[3] The plaintiff avers that the defendant has paid it only the first installment of the debt and to date owes the plaintiff the sum of SR1,929,533.91. Plaintiff avers that the defendant has failed, neglected and refused to pay the outstanding amount despite repeated requests by the plaintiff to do so, as a result of which the plaintiff has suffered loss and damages as particularised below, which the defendant is liable to make good –

- *Sum owned by the Defendant to the Plaintiff SR 1,929,533.91*
- *Interests on the sum owed by the Defendant from 1<sup>st</sup> December 2013 at the rate of 10% per month and continuing until the judgment debt is repaid*

[4] The Plaintiff further avers that it is desirous that a Provisional Seizure is placed on the assets of the Defendant pending the determination of the case. It prays for judgment in its favour and for the following reliefs:

- (a) Payment of the sum owed, namely SR 1,929,533.99;
- (b) Interests on the sum owed by the Defendant from 1<sup>st</sup> December 2013 at the rate of 10% per month and continuing until the judgment debt is paid;
- (c) An order that a provisional seizure of the assets which are in the hands of the Defendant be made pending the final determination of the case;
- (d) Any other orders that the Court deems fit in the circumstances of the case; and
- (e) Payment of costs of this case.

[5] Personal service of the plaint with summons out of the jurisdiction on the representative of the defendant company was not effected despite an order for the same. On the application of the plaintiff, by Order dated 11<sup>th</sup> October, the Court ordered substituted service by way of publication of notice of the proceedings in three consecutive issues of two widely circulated newspapers in Dubai, UAE, by the plaintiff. Proof of such publication was provided to the Court but the defendant company was not represented in ensuing Court proceedings either by a representative or counsel. The matter was therefore fixed for *ex-parte* hearing at which Mrs. Mavis Lafortune a director of the plaintiff company testified.

#### **Testimony of Mrs Lafortune for the Plaintiff**

- [6] Mrs Lafortune stated that she and her son Warren are directors of the plaintiff company, of which she owns 51% shares and her son 49% shares, and that as a director she is empowered to represent the company in these proceedings.
- [7] She stated that the plaintiff is licensed as a class 1 contractor and did some work for the defendant company for which the plaintiff was paid only a first instalment in July 2015. Thereafter no further payments were effected. She stated that she kept a record of what was owed by the defendant which showed all sums invoiced as well as payments made which were deducted therefrom as and when they were made, and the resulting balance of the outstanding sum due. She produced Exhibit P1 which she explained is a statement prepared by herself showing the sum of outstanding payments due from the defendant as at 31<sup>st</sup> October 2014, namely the sum of SCR3,321,196.51.
- [8] Mrs. Lafortune also produced as Exhibit P2 three emails dated 19<sup>th</sup> September 2014, 31<sup>st</sup> October 2014 and 3<sup>rd</sup> November 2014 respectively, forming part of a chain sent from the

email address “films@seychelles.net. She stated that the emails were requests for payment and were sent to Mr. Pandu Rangan who was in charge of the Seychelles project in respect of which the plaintiff company had provided services to the defendant. The emails were copied to his accountant in Seychelles namely Mr. Zacaria.

[9] Mrs. Lafortune produced as Exhibits P5(a) and (b) the final statements of accounts prepared by herself of the sums due to the plaintiff by the defendant before commencement of negotiations between the parties which culminated in the signature of a payment guarantee by the parties. Exhibit P5(a) dated 04.05.2015 shows a net amount of SCR 2,820,391.51 due and Exhibit P5(b) dated 24.05.2015 shows a net amount of SCR3,087,910.43 due.

[10] Mrs Lafortune confirmed that several verbal and written demands were made by the plaintiff to the defendant for payment of the sum due. She produced collectively as Exhibit 4 two letters from attorney-at –law Karen Domingue dated 4<sup>th</sup> November 2014 and 14<sup>th</sup> May 2015 respectively addressed to Mr. Pandu Rangan, Seychelles Project Manager, Ascon. These were letters of demand written on behalf of the plaintiff requesting settlement of the outstanding debt of SCR3,321,196.51 owed to it by the defendant.

[11] She confirmed that as a result of the verbal requests and letters of demand the plaintiff and defendant companies signed a payment guarantee in June 2015 which she produced as Exhibit P3. She explained that the payment guarantee was prepared by the defendant company and emailed to the plaintiff company. Her husband Terence Lafortune who was a director at the time signed on behalf of the plaintiff company. She testified that the first instalment of SCR1,038,979.00 was paid in July 2015 as per the terms of the payment guarantee but that the two other instalments were never paid.

[12] Mrs. Lafortune testified that after the defendant failed to pay the two other instalments as per the terms of the bank guarantee, the plaintiff made a request by email to the defendant to pay the outstanding amount. She produced as Exhibit P6 an email dated 1<sup>st</sup> February 2016 addressed to Josip Durda (who signed the payment guarantee on behalf of the defendant) in which she requested the unpaid balance of SCR 1,929,533.00. The reply

from Mr. Durda dated 1<sup>st</sup> February 2016 is as follows: “*I’m personally following this project close out that completely went out of ASCON Management hands. We are selling all equipment but not allowed in Seychelles because of TAX. If you can help all will appreciate and in particular to settle our dues*”. This was the last communication she received from the defendant company which did not reply to any emails she sent after that.

[13] Mrs. Lafortune prayed for judgment ordering the defendant to pay the plaintiff the sum of SCR 1,929,533.99 owed by it by the defendant with interest at the rate of 10% per month from 1<sup>st</sup> December 2013 until repayment of the judgment debt. She stated that she had informed the defendant that such interest would be claimed if they failed to settle the amount outstanding to the plaintiff.

[14] Mrs. Lafortune further prayed for an order for the seizure of any assets in the hands of the defendant in the Seychelles. She stated that in 2015 when the defendant company was still present in Seychelles, they were based at Zone 21 at Pointe Larue Mahe where they kept their construction materials, machinery and other assets. At the time there was also another company incorporated in Seychelles namely Reliance Engineering which she believes has a link with the defendant company, which was also and is still based there. When the defendant company ceased operating Reliance Engineering took over the place which is now so heavily guarded that nobody can enter the premises. Consequently Mrs. Lafortune is not sure if the defendant company still has anything there but maintains that an order of seizure is made against assets belonging to it which may still be there.

[15] She also prayed for costs to be awarded to the plaintiff against the defendant.

### **Analysis**

#### *Claim of SCR 1,929,533.99*

[16] The plaintiff claims the sum of the sum of SCR 1,929,533.99 owed by it by the defendant for works allegedly performed by it for the defendant. Evidence in the form of testimony of Mrs. Lafortune and various documents produced by her on behalf of the plaintiff company, has been brought to show that the plaintiff company performed excavation works and constructed retaining walls for the defendant company, which was partly paid

for by the defendant but that the defendant still owes the plaintiff an outstanding sum of SCR 1,929,533.00. These are examined below.

[17] Exhibit P1, a statement dated 31<sup>st</sup> October 2014, with the heading “*Sun Excavations*” and addressed “*To: Ascon*” lists amounts payable under invoices from December 2013 to October 2014 amounting to SCR3,321,196.51. Mrs. Lafortune states she prepared this statement on the basis of invoices issued to the defendant company and payments made by them.

[18] Exhibit P2 consists of a chain of emails emanating from the email address [films@seychelles.net](mailto:films@seychelles.net) with the subject matter “*PAYMENT FROM ASCON*” requesting payment of the debt due to the plaintiff from the defendant. Mrs Lafortune testified that the emails were sent to Mr. Pandu Rangan who was in charge of the project in respect of which the plaintiff had provided services to the defendant, and copied to his accountant in Seychelles namely Mr. Zacaria.

[19] The first email dated 19<sup>th</sup> September 2014 addressed to one Hassan at the email address [hez@asconuae.com](mailto:hez@asconuae.com) purports to be from “*Terence SUNEXCAVATIONS*”. I note that Mrs. Lafortune testified that her husband Terence Lafortune was a director of the plaintiff company before he passed away. The email reads as follows

*Further to our conversation of yesterday 18<sup>th</sup> September 2014, I Terence from SUNEXCAVATIONS SEYCHELLES formally asking again to be paid for the work done for ASCON. For more than a year your people are telling 'next week, next week, next month but the next week never came. Now you are telling me that you are not in charge of ASCON Seychelles anymore.*

*Who is in charge now. You always pay me 10% of what you owe and the sum keep accumulating. Today it is almost 3.5 million.*

*If I am not being paid in the next 14 days, we will charge you interest and I will stop offering you our services. I have done very big walls and paid all the sub contractors. Why are you not paying us.*

[20] The second email dated 31<sup>st</sup> October 2014 addressed to one Mr. Gokul at the email address [gokul@asconuae.com](mailto:gokul@asconuae.com) is stated to be from “*Mrs. Lafortune, Director of Sun*

Excavations”. It is copied to *inter alia* [hez@asconuae.com](mailto:hez@asconuae.com); [pandupsv@gmail.com](mailto:pandupsv@gmail.com); Jackariya. The contents of the email are as follows:

*I called you yesterday with regard to the long outstanding debt that Ascon has with our company SunExcavations in Seychelles. Kindly find attached statement of the total sum that your company owe us. This statement has been confirmed by your accountant Mr. Jackayia.*

*As per below email sent to Mr. Hassan since 19<sup>th</sup> September 2014 we inform (sic) him that if we are not paid within 14 days, **we will charge you interest** and I will stop offering you our services.*

*We have already suspended our services to you since the beginning of this week. We will now start charging you **10% interest per year as of 1<sup>st</sup> November 2014 on all invoices dated more than 3 months. As of Monday the 3<sup>rd</sup> November if we do not receive payment this case will be pass on to our lawyer to start legal proceeding.***

*We have been chasing your local office constantly in order to get payment. All kind of excuses have been given to us and promises to pay next week or next month, but payment has never been received. Unfortunately we cannot wait no more. We have in return been accumulated debt due to your none payment and we have reach a point where we could not even pay our workers.*

[21] The third email dated 3<sup>rd</sup> November 2014 is again addressed to Mr. Gokul at the email address [gokul@asconuae.com](mailto:gokul@asconuae.com) and is stated to be from “Mrs. Lafortune”. It is copied to [pandupsv@gmail.com](mailto:pandupsv@gmail.com) and [jackariya@etamech.com](mailto:jackariya@etamech.com). The email states the following:

*As per our phone conversation on Saturday, you were meant to give me a feed back yesterday with regards to email below. I have been calling you since yesterday afternoon but my calls have not been answered.*

*Kindly answer my email before noon today.*

[22] Exhibit P4 consists of two letters from attorney-at-law Karen Domingue (plaintiff’s counsel in the present proceedings) acting on behalf of the plaintiff. Both letters are addressed to Mr. Pandu Rangan, Seychelles Project Manager, Ascon, demanding that the defendant settle its outstanding debt to the plaintiff within a stipulated time frame failing

which legal action would be commenced against the defendant for recovery of the same without further notice.

[23] In the first letter dated 4<sup>th</sup> November 2014, Mrs. Domingue requested payment of the outstanding sum of SCR3,321,196.51 for excavation and retaining wall works carried out by the plaintiff for the defendant from December 2013 to October 2014. She gave the defendant 5 days from the date of the letter to deposit the said sum with the plaintiff or at her chambers and informed the defendant that “[I]n the event that you fail to comply with this request I will be filing legal action against your company without further notice”.

[24] The second letter is dated 14<sup>th</sup> May 2015 and in it, Mrs. Domingue informed the defendant that it has an outstanding debt amounting to SCR3,320,391.51 owing to the plaintiff. She stated that she is instructed that in December 2014 the defendant settled the sum of SCR500,000.00 reducing the debt to SCR2,820,391.51. All this is reflected in Exhibit P5(a), the statement of accounts dated 04.05.15 with the heading “*Sun Excavations*” and addressed “*To: Ascon*” listing sums paid and payable from December 2013 to December 2014 with the “*Net amount due*” stated to be SCR2,820,391.51. Mrs. Domingue gave the defendant 7 days from the date of the letter to pay the said debt to the plaintiff or at her chambers failing which legal action would be commenced against the defendant without further notice.

[25] Mrs Lafortune testified that following verbal requests for payment of the outstanding sums and the letters of demand, the parties signed a payment guarantee, Exhibit P3. This is dated 25<sup>th</sup> June 2015 and signed by Josip Durda, CEO, for ASCON and Terence Lafortune for Sun Excavations (Pty) Ltd and bears the stamp of both ASCON, Associated Construction & Investment Co. L.L.C. and Sun Excavations (Pty) Ltd. The relevant part thereof reads as follows:

*Reference: Subcontract Agreement with ASCON on excavation and retaining wall works for Seychelles Palace DOPA*

*Subject: Payment Guarantee for the Settlement of outstanding dues of SCR2,968,512.00*



*We, the undersigned, M/s Associated Constructions & Investments Co. LLC- ASCON, hereby irrevocably declare that we guarantee to make the payment of SCR 2968 511.91, which is outstanding monies as on date, to M/s Sun Excavations (Pty) Ltd into 3 instalments, as briefed hereunder:*

- (a) First 35% of Outstanding Due amount, i.e. SCR1,038,979.00 within one week time, from the date of agreement of payment terms.*
- (b) Second 35% of Outstanding Due amount, that is SCR1,038,979.00 after 3-4 weeks from the receipt of first installment by M/s Sun Excavation (Pty) Ltd.*
- (c) Third and final 30% Outstanding Due amount, i.e. SCR 890,554.00 after 3-4 weeks from the receipt of Second Installment by M/s Sun Excavation (Pty) Ltd.*

*Payment shall be made without objection or legal proceedings of any kind. We shall not delay the payment, nor shall we oppose it for any reason whatsoever.*

*Furthermore, we accept that no amendment to the terms of the agreement signed between M/s ASCON and M/s Sun Excavation (Pty) Ltd can release us from our obligation under the present guarantee.*

*We have taken note that the present payment guarantee shall remain in force until the M/s ASCON has made the payment SCR 2968 512 [SCR Two Million Nine Hundred Sixty Eight Thousand Five Hundred Twelve] as per above stipulated payment terms.*

*The present guarantee shall come into force and shall take effect upon its signature.*

[26] She testified that only the first payment of SCR1,038,979.00 under paragraph (a) of the payment guarantee was effected, leaving the balance of SCR1,929,533.00 (SCR1,038,979.00 + 890,554.00 ) unpaid. This is supported by Exhibit P6, an email dated 1<sup>st</sup> February 2016 from Mrs. Lafortune sent at 19.52 hrs to Josip Durda and his reply of even date sent at 20.21 hrs. Both emails are reproduced below:

*Email of Mrs. Lafortune*

*Kindly find attached payment guarantee you sign on behalf of ASCON since the 25<sup>th</sup> June 2015. As you know you company has paid only the first instalment since July 2015 and never paid the remaining balance of SCR 1929 533.00. After*

*various emails to Mr. Hussain who has always ask us to give your company more time to resolve this issue up until now no additional payment has been received. For the past 3 month I have try to call Mr. Hussain several times but he never take my call. I came to Dubai 2 weeks ago and try to call him so that we could meet to discuss this issue but again my calls were not answered.*

*Please I want to know when you are going to honour your agreement with SunExcavations and pay all outstanding amount. I was at the place where Ascon used to be based here in Seychelles. All your machineries are still there in the yard. Why don't you sell them and pay your debts? If you need any help I would be happy to help in any way I can as long as we are paid.*

*Please I would appreciate at least someone would answer my email. I have already start a court case. If you do not want to pay the demand made in this case, Court and lawyer fees please settle the matter as soon as possible.*

*Email of Josip Durda*

*"I'm personally following this project close out that completely went out of ASCON Management hands. We are selling all equipment but not allowed in Seychelles because of TAX. If you can help all will appreciate and in particular to settle our dues".*

[27] The matter having been heard *ex parte*, none of the evidence has been challenged. I am satisfied on the uncontroverted evidence on record that the defendant owes the plaintiff the sum of SCR 1,929,533.00. This is borne out by the testimony of Mrs Lafortune and the documentary evidence admitted as exhibits. I find Mrs Lafortune to be a credible and reliable witness and find no reason to disbelieve or doubt her testimony. She has admitted that the defendant has partly settled the outstanding debt to the plaintiff and is only claiming the outstanding balance. I therefore find her claim of SCR 1,929,533.00 proved on a balance of probabilities.

*Interest*

[28] The plaintiff also claims interest at the rate of 10% per month from 1<sup>st</sup> December 2013 until repayment of the judgment debt.

[29] Article 1153 of the Civil Code of Seychelles Act ("Civil Code") provides that:

*Article 1153*

*With regard to the obligations which merely involve the payment of a certain sum, the damages arising from delayed performance shall only amount to the payment of interest fixed by law or by commercial practice; however, if the parties have their own rate of interest, that agreement shall be binding.*

*These damages shall be recoverable without any proof of loss by the creditor. They are due from the day of the demand, except in cases in which they become due by operation of the law.*

*However, the creditor who sustains special damage caused by a debtor in bad faith and not merely by reason of delay, may obtain damages in addition to those for delayed performance.*

- [30] It is clear that the obligation of the defendant “merely involve the payment of a certain sum” as provided for in alinea 1 of Article 1153 and that this case therefore falls within the ambit of that Article. In terms of this provision the rate of interest if not determined in an agreement between the parties, shall be as fixed by law or commercial practice.
- [31] Mrs. Lafortune claims that she had informed the defendant that the interest as claimed in terms of the plaint would be claimed if it failed to settle the amount outstanding to the plaintiff. The issue of interest was addressed in Terence Lafortune’s email dated 19<sup>th</sup> September 2014 in which he stated that “If I am not being paid in the next 14 days, **We will charge you interest ...**”. Mrs Lafortune in her email dated 31<sup>st</sup> October 2014 to Mr. Gokul reminded him “[A]s per below email sent to Mr. Hassan since 19<sup>th</sup> September 2014 we inform him that if we are not paid within 14 days, **we will charge you interest...**” and further stated “We will now start charging you **10% interest per year as of 1<sup>st</sup> November 2014 on all invoices dated more than 3 months...**” Further in her first letter of demand dated 4<sup>th</sup> November 2014, Mrs. Domingue stated “In her email to your company, dated 31<sup>st</sup> October 2014, my client informed your company that it would start charging your company interest ... if her company was not paid within fourteen days of the email”.
- [32] The Court is not in the presence of the original contract between the parties for performance of works by the plaintiff and setting out the parties’ respective obligations under such contract, and is therefore not in a position to know whether the rate of interest

was stipulated in such contract. The only agreement entered into by the parties which is before this Court is the payment guarantee dated 25<sup>th</sup> June 2015, which does not contain any provision relating to interest. The rate of interest must therefore be determined by law or by commercial practice.

[33] In Vijay Construction Pty Ltd & Anor v Aluminium And Steel Works Ltd SCA2/02 [2003] (11<sup>th</sup> April 2003) the Court, in defining the term “commercial practice” in Article 1153, relied on the case of Seychelles National Commodity Co. Ltd v Faure (1981) SLR 160 and stated:

*As to what is commercial practice the decision of Sauzier, Ag CJ in Seychelles National Commodity Co. Ltd v Faure (1981) SLR 160 161-162 is apt. It is the rate of commercial interest that is charged in normal commercial practice in such transaction as was involved in the case. The burden is on the party who claims interest at a commercial rate to aver and prove commercial practice. Where there is [no] proof of commercial practice, rather than refuse to award any interest, the court will award interest fixed by law.*

[34] In that case, the Court found and determined as follows-

*... although in the relief the plaintiff, Aluminium, claimed interest at commercial rate, there are no averments of commercial practice nor, consequently, proof of such practice. In the circumstances award of commercial interest at 14% per annum made by the trial judge was erroneous. He should have awarded interest fixed by section 3 of the Interest Act at 4%.*

[35] Relying on the two abovementioned cases, the plaintiff in the present case having made no averments of commercial practice in the plaint or brought proof of the same, I hold that interest should be calculated at the legal rate.

[36] So much for the rate of interest. The Court now has to determine when such interest starts running. In Eden Island Development Company (Sey) Ltd v Hibberd (CC38/2014) [2016]SCSC 823 (26 October 2016) the plaintiff and the defendant had entered into a contract in terms of which the plaintiff who is engaged in property development, built a “maison” for the defendant. Pursuant to the “Schedule of Finishes Maisons and Apartments” plaintiff installed “optional extras” for which he was not paid. The plaintiff

sent a written notice of “mise en demeure” before suit requesting the defendant to pay plaintiff the sum of US\$33,450.00 in respect of the optional extras which the defendant failed to pay. The plaintiff filed a claim against the defendant in the sum of US\$33,450.00 for the “optional extras”. The Court stated the following at paragraphs 5 and 6 of its judgment:

[5] *In terms of Article 1153 of the Civil Code of Seychelles Act, this Court is of the opinion that "demand" must mean a prayer for the principal sum. The "demand" is intended to play the part of a "notice" sufficient to set interest running in the cases of non fulfilment of obligations, by which "notice" the principal sum alone can be obtained. Article 1153 of the Civil Code of Seychelles Act provides that the interest is due, that is to say, in my opinion, demandable. In view of the construction which I have placed on the word "demand", being due as from the date: (see Baichoo v Fowdar 1975 MR (Mauritius Report) 80 SCJ 76 Garrioch, S.P.J\*, and de Ravel, J; Lewis Gerald v The New India Assurance Co Ltd 1943 MR109; Alleaume v Biram 1913 MR44, Jean Louis v Jenkins 1907 MR 7, and the judgment of this Court in CC35/2014 Dolor Ernesta v Frankie Petrouse, delivered on 29 April 2016.*

[6] *Having concluded that a notice of “mise en demeure”, before suit is not necessary in terms of Article 1153 of the Civil Code, the court is satisfied that interest is due from the date of the filing of the plaint.*

[37] The Court then proceeded to enter judgment for the plaintiff against the defendant in the principal sum of US\$33,450.00 with costs “and interest fixed by law on the principal sum of US\$33,450.00 due from 30<sup>th</sup> December 2014, until payment in full”.

[38] In the present case therefore, I hold that interest should run from the date of filing of the plaint that is, 16<sup>th</sup> March 2017.

#### *Provisional Seizure*

[39] Plaintiff further prayed for an order “that a provisional seizure of the assets which are in the hands of the Defendant be made pending the final determination of the case”. Provisional seizure of movable property of a defendant in a pending suit is provided for under section 280 and 281 of the Seychelles Code of Civil Procedure (“SCCP”), which are reproduced below:

280. *At any time after a suit has been commenced, the plaintiff may apply to the court to seize provisionally any movable property in the possession of the defendant in the suit or to attach provisionally any money or movable property due to or belonging to the defendant in the suit, which is in the hands of any third person. The application shall be by petition supported by an affidavit of the facts and shall be signed by the plaintiff or his attorney, if any, and shall state the title and number of the suit.*

281. *If the court is satisfied that the plaintiff has a bona fide claim, the court shall direct a warrant to be issued to one of the ushers to seize provisionally such property, or shall make an order prohibiting the third person in whose hands such money or other movable property is from paying such money or delivering such property to any other person pending the further order of the court. The order shall be served on the third party by an usher of the court. The court, before any such warrant or order is issued, may require the applicant to find such security as the court may think fit.*

[40] The purpose of that procedure is to ensure that such property is not disposed of by the defendant pending the determination of the case thereby ensuring that the plaintiff if successful is able to enjoy the fruits of the judgement given in his or her favour. It is only after the plaintiff obtains judgment in his or her favour that seizure of property provisionally seized may be validated in accordance with section 283 SCCP which provides:

283. *If the plaintiff obtain judgment in his favour, any property provisionally seized shall remain under seizure, unless the plaintiff otherwise request, until the seizure is validated. If no application be made within eight days after judgment has been delivered to validate such seizure, the property seized shall be released from seizure on motion made ex parts by the judgment debtor. If the provisional seizure be validated, the procedure thereafter shall be the same as in the case of movable property seized in execution after judgment.*

[41] It is obvious from the use of the word “provisional” in relation to such seizure, as well as the wordings of sections 280, 281 and 283 that provisional seizure is made while a suit is still pending and not after judgement has been delivered.

[42] This is also made clear in the Court of Appeal judgment in the case of *Eastern European Engineering Limited v Vijay Construction (Proprietary) Ltd Civil Appeal SCA13/2015*

[2018] (31 August 2018), in which the Court identified two prerequisites for obtaining an order of provisional seizure and/or attachment as laid down in Article 280 and 281 of the SCCP, namely (1) that a suit has been commenced and (2) that the applicant has a “*bona fide claim*”. In addition to these two requirements the Court of Appeal stated at paragraph [5] of its judgment that: “*Seychellois jurisprudence has interpreted Articles 280,281 of the Seychelles Code of Civil Procedure to include an additional requirement of “urgency” based on a purposive interpretation of the respective provisions*” and further at paragraph [6] that “[P]ursuant to this interpretation, the respective provisions can only be invoked in cases in which the basis for the claim is at stake, i.e. where the provisional measure is necessary to protect the respondent’s assets from the risk of disappearance or diminution in value. The Court in that case made reference to the opinion of the then C.J Egonda-Ntende expressed in *Eastern European Engineering Limited v. Vijay Construction (Proprietary) Ltd (unreported) MC 275/2012 arising in CC28/2012, delivered on 28 March 2013* “*that such a restrictive interpretation was necessary to prevent abuse, as the defendant’s assets could otherwise be sequestered for the entirety of the legal proceedings, i.e. possibly for many years at a time, despite him having “done nothing wrong” ...*”

[43] In the present case, counsel for the plaintiff did not pursue the matter of provisional seizure whilst the matter was pending before the Court. The matter has now been heard and judgment being rendered. In my view, the time has passed for this Court to grant an order for “provisional seizure”. Judgment having been given in favour of the plaintiff, if the defendant fails to satisfy the judgment, enforcement of the judgment by means of execution under section 255 SCCP should now ensue and property of the defendant may be seized and sold under section 228 SCCP to satisfy the judgment debt. For that reason I decline to grant the plaintiff’s prayer for provisional seizure.

### **Decision**

[44] Accordingly, I enter judgment in favour of the plaintiff in the sum of **SCR 1,929,533.00** with interest at the legal rate from the date of filing of the plaint, that is 16<sup>th</sup> March 2017, until payment in full.

[45] The defendant shall pay costs of this suit to the plaintiff.

Signed, dated and delivered at Ile du Port on 18<sup>th</sup> December 2020.

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Carolus J