

SUPREME COURT OF SEYCHELLES

Reportable

[2021] SCSC 741

CS 149/2019

In the matter between:

CHALET D'ANSE REUNION (PTY) LTD

(rep. by Frank Elizabeth)

1st Plaintiff

HUGHES LADOUCEUR

(rep. by Frank Elizabeth)

2nd Plaintiff

NORA MUSSARD

(rep. by Frank Elizabeth)

3rd Plaintiff

and

SEYCHELLES MERCANTILE BANKING

Defendant

CORPORATION (SIMBC)

(rep. by Alexandra Benoiton)

Neutral Citation: *Chalet D'Anse Reunion & Ors v SIMBC* (CS 149/2019) [2021] SCSC 741

(12 November 2021).

Before: Burhan J

Summary: Claim of EUR 26,578.31 and SCR 635,886.04 with interest and costs

Heard: 16th November 2020, 17th December 2020 and 1st July 2021

Delivered: 12 November 2021

ORDER

Claim of 1st, 2nd and 3rd Plaintiff dismissed.

Counterclaim of Defendant dismissed.

No order made in respect of costs

JUDGMENT

BURHAN J.

[1] The aforementioned Plaintiffs filed a complaint against the Defendant (also referred to as Nouvobanq) averring that the Defendant committed a fault by unlawfully debiting the accounts of the Plaintiffs in a sum of EUR 26,578.31 and SCR 135,886.04 and for freezing their bank accounts in the Defendant's Bank without notice. The Plaintiffs seek the following sums by way of damages:-

- a) A sum of EUR 26,578.31 being the amount debited by the Defendant from the Plaintiff's Account bearing number 21002225331018.
- b) A sum of SCR 135,886.04 being the amount debited by the Defendant from the Plaintiffs Account bearing number 01002200214003.
- c) A sum of SCR 500,000.00 for moral damage for financial hardships, emotional distress and psychological trauma in respect of the 2nd and 3rd Plaintiffs

[2] The Defendant filed a defence and a counterclaim. In defence the Defendant denied the said sums were unlawfully debited and denied committing any fault. The Defendant averred that the Plaintiffs were in breach of the Merchant POS Agreement (Point of Sale Agreement) in that the 1st Plaintiff failed to issue a refund voucher in accordance with the procedure guide to provide a refund on being informed of the fraudulent nature of the credit card transactions. The Plaintiff instead withdrew by way of cheques, transfers and direct debits, the amounts to be refunded and paid the amounts to a third party which was contrary to the POS Agreement. As the 1st Plaintiff had failed to transact as per the POS Agreement the 1st Plaintiff became liable to make good the full payment.

[3] The Defendant further avers that according to the contractual obligations between the Defendant Bank and the Plaintiffs in respect of banking facilities provided, when any account became overdrawn any overdrawn amount would be subject to 12% interest per

annum from the date the 1st Plaintiff's account was overdrawn 30th April 2019. The Defendant avers that on this basis Defendants owe the Plaintiff a sum of Euros 33,019.36 which includes a 2% penalty interest.

[4] In their counterclaim set out in the defence the Defendants/ Counterclaimants seek the following relief from the Plaintiffs/ Counter- Defendants:-

A

- a) An order ordering the Plaintiffs/Counter Defendants to pay the Defendant / Counter claimants a sum of EUR 33,019.36 as at 30th April 2019
- b) Interest at the rate of EUR 12% per annum and 2 % on penalty as of 31st April 2019 and continuing

B

- a) Dismissing the Plaintiffs Counter-Defendant plaint.
- b) In the alternative to above, award the Plaintiffs/Counter- Defendants minimal damages.

C Any other order this the Honourable Court deems fit.

D. Costs.

[5] The Plaintiffs further aver that on or around 12 July 2018 the Defendant (also referred to as Nouvobanq) unlawfully debited, without notice, the sums of EUR 26,578.31 and SCR 135,886.04 from the two bank accounts they have with the Defendant bank and froze their bank account, and that, despite several requests from the Plaintiffs to the Defendant to refund back the said sums and unfreeze their bank account, the Defendant has failed, refused or neglected to do so. The Plaintiffs aver that the action of the Defendant constitutes a "faute" in law, for which the Defendant is liable to make good to the Plaintiffs in law. The Plaintiffs claim to have suffered loss and damage because of this and are claiming the sums allegedly due to them from Defendant to Plaintiffs as well as

moral damage for financial hardship, emotional distress and psychological trauma in respect of the 2nd and 3rd Plaintiffs only.

- [6] The evidence of Ms Nora Mussard the 2nd Defendant indicates she is not a Director of the 1st Plaintiff company but employed as the secretary of Mr. Hughes Ladoucer who she states is the Director of the Chalet D' Anse Reunion (Pty) Ltd the 1st Plaintiff Company which run a business of self-catering apartments in La Digue. Her evidence is that their e-mail address was hacked and the hacker had emailed them saying they had clients for their self-catering apartments. The hacker acting as one of their known overseas agents Paul had given the date and made the reservation and payment was made by credit card through the Point of Sale (POS) machine and the money credited to their account at Nouvobanq. At the end of the month the commission amounting to 40 per cent of the payment was paid as commission to the hacker on the belief he was their commissioned agent. Several such fraudulent bookings were made during the period January to March 2018. On the 12th of July 2018 a lady attached to the Nouvobanq informed them that a sum of Euro 26,578.31 in their account in Nouvobanq had been frozen. She had informed it was due to credit card fraud. The relevant letters were produced as P1 and P2.
- [7] The Defendant bank in their defence denied debiting any monies from the Plaintiff's accounts unlawfully. They admit that the two bank accounts referred to in the plaint were opened with their bank. It is averred that on the 16th of October 2017, the 1st Plaintiff represented by the 2nd Plaintiff entered into a Merchant POS Agreement. This fact is not denied by the Plaintiffs. Paragraph 4 of the defence and counter clam sets out the numerous conditions relevant to this POS agreement. The Defendant further avers that between 3rd April 2018 and 24th April 2018, the Plaintiff received payment from over seven (7) credit cards through its EUR Account in excess of EUR 40,000.
- [8] It is further stated in paragraph 6 of the defence that in breach of its conditions of the Merchant POS agreement ("POS Agreement"), the 1st Plaintiff failed to issue a refund voucher in accordance with the procedure guide to provide a refund in respect of sales voucher presented to the Bank. Instead the 1st Plaintiff withdrew the amounts to be refunded by way of cheques, transfers, direct debits and otherwise paid the amounts to a

third party outside of the transaction and also a cheque drawn in favour of the 2nd Plaintiff dated 27th April in the sum of EUR 14,000.

[9] The Defendant was notified that the said credit cards had been used unlawfully by the credit card owners' banks and pursuant to the Visa policy and Agreement, proceeded with the investigation as to the location of the funds, at which points the above conclusion was reached. The Defendant avers that the refund of the alleged fraudulent transactions was in line with the Charge-Back Rights as specified in clause 5.1(b) of the POS Agreement. The Defendant also avers that as the 1st Plaintiff had failed to transact as per the POS Agreement and refund the sums, the 1st Plaintiff became liable to make good the full amount. The Defendant avers therefore the Plaintiffs are not entitled to any refund, and further that they are overdrawn in both accounts.

[10] The Defendant avers that there has been no faute on the part of the Defendant, that the Defendant's actions in debiting the sums of EUR 26,578.31 and SCR 135,886.04 from the two bank accounts are in line with the agreements between the parties as the Defendant was authorised to deduct any funds from the 1st Plaintiff's other accounts as per the POS agreement.

[11] Mr. Collin Confait explained that when a credit card holder's card is used and the owner of the credit card contests the transaction, he will inform the bank that issued his credit card that the transaction is fraudulent or not authorised by him. The issuing bank will settle the credit card holder and inform the bank to which the money was credited, in this instant case Nouvobanq, through the banking platform that the money has been fraudulently credited to their merchant Chalet D'Anse Reunion account. Nouvobanq then informs the merchant Chalet D'Anse Reunion and if no satisfactory explanation has been received from the merchant within the prescribed period, then the transaction is presumed fraudulent. The money relating to the transaction is then debited from the account of Chalet D'Anse and the necessary financial entries made to ensure that the issuing bank gets its money back.

[12] It is clear from the evidence in this case led by the defendant and the documents produced that the 1st Plaintiff was informed of the fraudulent transactions in respect of the credit

card transactions. However the Plaintiffs without taking steps to have the fraudulent funds credited in their Euro account refunded by issuing a sales refund voucher, the said fraudulently credited money had been withdrawn as specified in paragraph 6 of the defence. As the transactions were subsequently reported as being fraudulent by the cardholders and though informed by the Defendant of same as the 1st Plaintiff provided no satisfactory explanation for the transactions pursuant to the POS agreement the defendant in accordance with the POS agreement clause 11.1 debited the account of the 1st Plaintiff of the sums fraudulently credited.

[13] Further, the Plaintiffs' claim that the money was debited without notice has been disproved by the evidence. The Defendant/Counter-Claimant notified the Plaintiff/Counter-Defendants of the reports through several letters in addition to the letter dated 12 July 2018 from Mr. Michael Benstrong, CEO of Nouvobanq informing them that the accounts would be deducted. The parties even had meetings about the issues and the Defendant suggested that they take a loan to settle the repayment, which they refused. This shows that there were discussions between the parties about the fraud, debt and charges.

[14] The Defendant further contends that the fraudulent transactions crediting the account were as a result of the Plaintiff inserting the numbers into the card machine without the cards physically being present at the time of booking. They relied on the numbers being sent via email by the said "Paul" to them. There was no verification by them of the cards/card numbers or cardholders' identities before proceeding. While it is true that the 1st Plaintiff was also victim of a scam and they made contact with the police during the course of the investigation, they had an obligation to the Defendant under the POS Agreement to indemnify the bank against all losses, costs, penalties, payments or liabilities whatsoever due to any error, omission or fraud on the part of the merchant, its employees, agents or sub-contractors or any wilful misuse and/or neglect by any persons. The relevant clauses in the agreement as set out in paragraph 4 of the defence and indeed the agreement in general, was not contested by the Plaintiffs. Therefore, the contractual obligations not being challenged, they should be valid and it is clear that the bank's

actions were in conformity with the agreement and the Defendant bank had not committed a *faute* as alleged by the Plaintiffs.

[15] *Faute* is provided by Article 1382 and necessitates a damage to another. Art 1382.2 defines it as an error of conduct, whether it be the result of a positive act or an omission, which would not have been committed by a prudent person in the special circumstances in which the damage was caused. Having elected to bring a claim in delict, the Plaintiffs must prove the *faute* of the Defendant in order to succeed. In this case for the aforementioned reasons I am of the view the Plaintiffs have failed to prove any *faute* on the part of the Defendant.

[16] I proceed to dismiss the claim of the 1st, 2nd and 3rd Plaintiffs.

[17] The Defendant also filed a counterclaim and avers that upon opening the Bank Accounts, the Plaintiffs/Counter-Defendants agreed to receive banking facilities, which included that where an account went into overdraft, any overdrawn amount would be subject to 12% per annum. The counterclaim avers that the Plaintiffs/Counter-Defendants as of the 30 April 2019, is indebted the Defendant/Counterclaimant in the sum of €33,019.36 representing the outstanding debt and interest (12% per annum and 2 % penalty interest), which is increasing, and which sum the Defendant is liable to make good to the Defendant/Counterclaimant. It is also averred that despite the Defendant/Counterclaimant's demand to the Plaintiffs/Counter Defendants to pay the outstanding sum more specifically by notice dated 30 July 2018 the Defendant/Counterclaimant's has failed to pay any/all of the said debt. The counterclaim seeks further to and in the alternative, set off the Defendant/Counterclaimant's alleged debt of EUR 33,019.36 against the Plaintiffs'/Counter Defendants' claim. .

[18] In this case, the parties had entered into a contractual relationship of banker-customer: firstly, by the opening of a bank account in the name of the 1st Plaintiff in the Defendant bank, and secondly, by virtue of the POS Agreement. While the Plaintiffs have pleaded *faute* of the Defendant, the Defendant has filed a counterclaim based on contract. While the parties are free to elect the cause of action they wish to pursue, they would also be bound by their pleadings. When one considers the counterclaim, it is clear that at the time

the money was owed to the bank the bank on its own accord, based on the agreement between the parties, debited the account of the Plaintiff. This resulted in the Euro account being overdrawn in a sum of EUR 33,019.36. Therefore for all purposes, the cause of action that arose at the time of money being owed to the bank ceased to exist when the bank debited the account of the Plaintiff for the said sum owed in respect of the fraudulent transactions. It appears that what now exists is for the bank to recover the overdraft created by the debiting of the funds from the account of the 1st Plaintiff Euro account which is EUR 33,019.36, together with the interest and penalty interest. This in my view cannot be claimed by way of counterclaim in an action based on faute but is a new cause of action which should be brought by way of a separate action and a claim by way of a new plaint. As was held in *Allied Builders v Fregate Island* (2011) SLR 150, a counterclaim must contain issues that are within the scope of the subject-matter of the initial claim. In this case, the subject-matter of the counterclaim is separate to the initial claim and therefore cannot be entertained.

[19] I therefore proceed to dismiss the counterclaim of the Defendant as well. No Order is made in respect of costs.

Signed, dated and delivered at Ile du Port on 12 November 2021

Burhan J.