

SUPREME COURT OF SEYCHELLES

Reportable

[2022] SCSC ...931
CS 13/2021

In the matter between

DIANNA BARRA

(rep. by Mr S Rajasundaram)

Plaintiff

and

EXPRESS SOLUTION (PTY) LTD

(rep. by Mr C Lucas)

Defendant

Neutral Citation: *Barra v Express Solution (Pty) Ltd* (CS 13/2021) [2022] SCSC 931 (28th October 2022)

Before: Govinden CJ

Summary: Breach of contract; specific performance

Heard: 17/04/21; 19/04/21; 13/05/21; 22/06/21; 11/02/22

Delivered: 28 October 2022

ORDER

The Court orders the Defendant to pay to the Plaintiff:

- (i) The sum of SCR415,000.00 being the price for the same vehicle if she would have imported as in February 2021;
- (ii) The sum of SCR50,000.00 as damages caused for mental anguish and suffering;
- (iii) The costs of the proceedings.

JUDGMENT

GOVINDEN CJ

The Pleadings

- [1] The Plaintiff avers that she is a Seychellois national of Anse Boileau, Mahe and is a party to a contract for the purposes of this suit. The Defendant is a registered company under the Companies Act and is incorporated as a corporate body involved in trading, more specifically, in import and sale of automobile vehicles to its client.
- [2] The Defendant through its director or the legal representative Mr. Andy Labrosse at the first instance has received a sum of SCR140,000.00 (Seychelles Rupees One Hundred and Forty Thousand only) from the Defendant on 29th January 2020 and agreed to sell a new car to the Plaintiff on the condition that the Plaintiff pays the balance of SCR100,000.00 (Seychelles Rupees One Hundred Thousand only). Acknowledgement dated 29th January 2020 was attached.
- [3] The Plaintiff avers that the Defendant thus agreed to sell the car Toyota (new) Glanza "G" Hybrid 2019 model and more specifically described in the Acknowledgement/Agreement dated 29th January 2020.
- [4] The Plaintiff has also paid the second and final payment of sale price of the car in the sum of SCR100,000.00 (Seychelles Rupees One Hundred Thousand only) through a bank transfer to the Defendant on 5th February 2020 within a week of the first payment.
- [5] The Plaintiff avers that she has paid the total sale price of the car in the sum of SCR240,000.00 (Seychelles Rupees Two Hundred and Forty Thousand only) and the Defendant has received the entire sale price of car. The Defendant has however been delaying, ignoring and refusing to sell the car to the Plaintiff.
- [6] The Plaintiff issued a claim letter dated 18th February 2021 to sell the car that the Defendant has already imported and also warned the Defendant to desist from selling the car to any third party. The Defendant has neither responded to the letter nor did it transfer the car to the Plaintiff.
- [7] The Plaintiff avers that she reasonably understands that the Defendant is seriously attempting to sell the car to a third party and papers are lodged at the office of Seychelles Licensing Authority for the intended registration of the transfer of the car in favour of the third party.

[8] The Plaintiff avers that by virtue of Defendant's wilful and wanton failure to sell the car, she is not only deprived of right to purchase the car as agreed between the parties but she would also be put to serious financial loss as she may have to buy a new car under this difficult economic climate for a sum not less than SCR420,000.00 (Seychelles Rupees Four Hundred and Twenty Thousand only) for the same brand, model and make in the Republic of Seychelles, evident from the quote attached.

[9] The Plaintiff avers that the cause of action arose in this matter when the Defendant received the total sum of SCR240,000.00 (Seychelles Rupees Two Hundred and Forty Thousand only) from the Plaintiff and upon its refusal to sell the car to the Plaintiff.

[10] The Plaintiff prays this Honourable Court for a judgment for permanent injunction directing the Defendant:

- (a) To register the ownership of the vehicle Toyota (new) Glanza "G" Hybrid 2019 make (petrol version) (Hybrid Engine) 1,197 CC bearing Sportin Red colour and having 5 speed manual transmission in her favour;
- (b) To direct the Office of Seychelles Licensing Authority, in the event of defendant's failure, to register the car described in (a) above, in the name of the Plaintiff;
- (c) Directing the defendant to pay a sum of SR 200,000.00 as moral damages for the gross failure and blatant refusal in breaching the lawful contract and for having subjected the Plaintiff for a continued stress and anxiety;
- (d) To pay the costs of this suit and other incidental proceedings.

[11] In the alternative The Plaintiff also makes the following prayers:

- (a) Directing the defendant to pay the Plaintiff a sum of SR 420,000.00 as being the price of the same type, model of the car described in (a) above;
- (b) Directing the defendant to pay a sum of SR 100,000.00 as moral damages for the gross failure and blatant refusal in breaching the contract unlawfully;

- (c) To pay the Plaintiff the total costs of this suit and other incidental proceedings.
- [12] On the other hand the Defendant does not dispute the fact that it is involved in the trade of vehicle importation and that the Plaintiff contracted its services for the importation of a Toyota Glanza.
- [13] The Defendant does not dispute the sale of the vehicle to the Plaintiff. However, the Defendant insisted that it is subject to the pro forma invoice issued by the Defendant to the Plaintiff, dated 17th January 2020, more particularly the Terms and Conditions referred to therein, specifying that the "*Final price is subject to change based on official exchange rate, Seychelles Government policy, applicable taxes and laws of Seychelles*". These implied terms and conditions were conditions precedent, which would take effect upon delivery and calculations of the final price of the vehicle. It is averred that the Plaintiff accepted the entirety of the invitation to treat, reflected in the pro forma invoice. It is further averred that the Plaintiff bound herself by her part performance as an act of acceptance to engage herself in the purchase of the car when it would be imported and delivered for calculation (adjustment) of the final price and transfer thereof in full performance of all terms and conditions by both parties. The Defendant states that although the final price was yet to be confirmed, the contract contained conditions precedent to the sale of the car to be imported. These conditions precedent were clear, succinct, and unambiguous.
- [14] The Defendant avers that the funds deposited by the Plaintiff on her account were at all times available for a refund or collection by her when it transpired, as pleaded, that vehicles of agreed colour were not available for import due to grave unforeseen circumstances, which rendered the specific colour version unavailable. These circumstances were not anticipated and occurred at the period of January and February 2020 prior to the lock down effects of the Covid 19 virus pandemic.
- [15] It is averred that Acknowledgement dated 29th January 2020 was a mere receipt confirming fifty percent part payment of the pro forma invoice, which was subject to change of the final price. The terms and conditions of the pro forma invoice comprised the contents of the binding contract, while the acknowledgement reflected the first part payment

instalment modality for the car, subject to such final price changes implied, in the event of change in official exchange rates, taxes and other unforeseen circumstances.

- [16] The Defendant admits receipt of funds totalling SCR240,000.00 (Seychelles Rupees Two Hundred and Forty Thousand only) as at February 2020. The sum reflected the price at the exchange rate of SCR14.35 to the US Dollar, at that material time. It is denied that this sum was the fixed entire consideration for the sale of the car. The terms and condition clause in the pro forma invoice made further provisions on how and why the final price was to be adjusted when the car would be sold to the Plaintiff.
- [17] The Defendant avers that a car of the same model was delivered to Seychelles from India by the supplier. However, the car was white in colour, instead of sportin red due to lack of availability of that colour scheme in the factory yard, which had closed down since February 2020 due to closure of production on account of the Covid 19 virus pandemic. The Defendant avers that he informed the Plaintiff of the circumstances when the Bill of Lading was received, but she refused to accept delivery of that white car or an offer for refund when the car arrived in Seychelles in May 2020. It is averred that the Plaintiff refused the offer for any other alternative available colour, which were silver and magma grey. The Plaintiff accepted that she would wait until such time that the sportin red model would be available, despite the expiry of the three months importation timeframe condition for delivery. It is averred that the Plaintiff therefore condoned the delay by her comportment.
- [18] The Defendant further avers that the supplier could not guarantee that he could supply the car in that colour. The Defendant states that all the information was always passed on to the Plaintiff, who made habitual telephone calls on the progress of the availability of her colour choice, against the advice of the Defendant. It is averred that the Plaintiff at all times refused to accept the offer for a full refund.
- [19] Paragraph 7 of the Plaint is not admitted. The Defendant avers that:
- (i) The supplier managed to secure the car with the Plaintiff's colour scheme in November 2020, after the factory resumed production. The Defendant informed the

Plaintiff and she agreed to take delivery thereof despite likely changes in price according to the terms and conditions clause and lapse of the three months delivery clause.

- (ii) Had she reneged the contract the Plaintiff ought to have refused delivery thereof and she would have opted for a suit for refund, which the Defendant was willing to pay and damages.
- (iii) The car was cleared at Customs Division on the 12th January 2021 after the Defendant had paid all fees, charges, excise tax and clearing agent's fees. It has since been at the Defendant's yard awaiting payment by the Defendant, of such adjusted price.
- (iv) The Plaintiff insisted on the transfer of the vehicle onto her name without payment of the increased foreign exchange rate of the US Dollar from SCR14.35 to SCR21,82390 as at January 2021 for the excise tax rate duly levied and paid by the Defendant which increased from SCR57,169.72 at the US Dollar exchange rate of SCR18.02 in May 2020 to SCR136,999.53 in January 2021.
- (v) The Plaintiff refused to pay the increased rate unlike other clients in similar situations despite the terms and conditions clause provided in the pro forma invoice. The Defendant avers that the Plaintiff refused to pay and perform in compliance with the terms and conditions of the Invoice which were implied and were accepted by part performance of payment by the Plaintiff.
- (vi) The Defendant further avers that it never refused to convey the car onto the Plaintiff but such act was subject to the payment of increased dues, levies and charges which had arisen for reasons which were not imputable to the Defendant but due to an act of God or in the alternative, Force Majeure on account of the universal pandemic of Covid 19, ramifications of which caused closure of factories and ports in India, devaluation of the Seychelles Rupee currency, increased excise tax in January 2021 from 12% to 37.5% and therefore caused cumulative increase of the price of the car to SCR378,560.00

- (vii) It avers further that the price difference from January 2020 to January 2021 increased by SCR138,560.00 through no fault of either party. However, the plaintiff was contract bound to perform payment and was in breach thereof by failing to pay that sum in terms of the Terms and Conditions Clause including all implied obligations contained therein and arising therefrom.
- (viii) With regards to the quotation of SCR415,000, the Defendant avers that it is the price of a similar car as at January 2021, which price was more expensive than that of the Defendant's.
- [20] The Defendant avers further that for a period in excess of one month the Plaintiff failed to pay the balance due for the car, while the Defendant had incurred extra cumulative expenses in excess of SCR138,560.00 to ship the car to Seychelles and clear the same through Customs, for which he has suffered loss in an equal sum.
- [21] It avers that the contract referred to in the Plaintiff cannot be strictly interpreted as a fixed term contract. It ought to be read together with the invoice dated 17th January 2020, which precedes the document dated 29th January 2020 relied on by the Plaintiff, which is an acknowledgement of receipt of funds, erroneously relied on as a contract.
- [22] It avers further that the Defendant never refused to sell the car to the Plaintiff as she alleges. However, the sale at the price of SCR240,000.00 would amount to fraudulent extortion by the Plaintiff, in breach of the terms of the pro forma invoice, its terms and conditions clause and the implied obligations of the Plaintiff arising therefrom.
- [23] It finally avers that it was not in control of the ramifications of the pandemic, increase in the price of the car due to increase of the costs and delay to import the vehicle colour sportin red, its unavailability for a period in excess of six months, devaluation of the Seychelles Rupee and that increment in excise taxes as per new legislation were not attributable to it personally. These ramifications were not his responsibility and he ought to be absolved from all liability as a result of the Terms and Conditions Clause.

The evidence

- [24] The Plaintiff testified that in January 2020 she bought a car from the Defendant. The first portion of payment was a bank transfer of SCR140,000.00 (Seychelles Rupees One Hundred and Forty Thousand only) and the second was SCR100,000.00 (Seychelles Rupees One Hundred Thousand only) on the 5th of February 2020. The Plaintiff stated that the car she paid for was a red Toyota Glanza 2019, G Model. The Plaintiff stated that the total sum for the car was SCR240,000.00 (Seychelles Rupees Two Hundred and Forty Thousand only) and the car was supposed to be delivered after three months of payment. She produced an invoice from the Defendant to this effect and a document issued by the Defendant acknowledging the receipt of the sum of SCR140,000.00 with the balance to be paid in full upon the delivery of the vehicle. After the period of three months from her last payment she approached the Defendant's Director, Mr Andy Labrosse, and she was reassured that the car was already shipped from India and was on its way.
- [25] On the 18th of February 2021 she informed her lawyer about the car issue and her counsel wrote a letter to the Defendant in which the latter was instructed to deliver the car within seven working days and not to sell the vehicle to any third party. The Seychelles Licensing Authority was also notified. No reply was received to this letter. According to the Plaintiff, when she met Mr Andy Labrosse, a Director of the Defendant, she was informed that the car was already in the country but that she needed to pay SCR138,000.00 (Seychelles Rupees One Hundred and Thirty Eight Thousand only) more before it would be delivered to her.
- [26] Up to date the car had not been delivered to the Plaintiff and neither has she been refunded the money she paid. She is of the view that any excess over and above the agreed sum for consideration regarding tax and foreign exchange cannot be valid as the extra sum was being demanded after one year from the date she made a payment. She stated that if she was to buy the same car from a new supplier it would cost her SCR415,000.00 (Seychelles Rupees Four Hundred and Fifteen Thousand only). The Plaintiff produced another supplier's document to this effect. The Plaintiff does not want a refund, she only wants her

car and any refund should be in a sum that commensurate with the existing market value of the same car.

[27] Under cross examination she acknowledge that as per the invoice the final price of the car was subject to change based on the official exchange rate, Seychelles Government policy and the applicable taxes and laws of Seychelles. The Plaintiff further acknowledged that at the time she was issued the invoice the exchange rate was SCR14.35 to US Dollar. However, the Plaintiff insisted that this term was only valid during the three months she had to wait for the delivery. She again refuted the defence version that she was called in April 2020 to be informed that they had received a white instead of a red car due to manufacturing difficulties caused by the Covid 19 pandemic. She visited the Defendant yard in January 2021, it was then that she refused to take a car because of the extra sum being demanded and not because it was white. She acknowledge the increase in the USD rate but stated that it occurred outside the three months limit and therefore she was not obliged to pay. Evidence adduced by the Plaintiff that a similar car of the make and description that she sought to be purchased from the Defendant costs SCR415,000 as of February 2021, the date when it became apparent to the Plaintiff that the Defendant has actually breached and had no intention to honour his contract.

[28] The Plaintiff also called the Commissioner of Custom who testified that the Custom Department has an automated system of validation where the computer system called the ASYCUDA WORLD will make a determination of whether a particular declaration or bill of entry should be physically examined and there is a percentage that is not physically examined. According to him, five consignments came from India from the 24th of March to 24th of April 2020; four arrived from the 11th of August to 19th of November 2020. The commercial port was not closed at the material time. All containers came from Nava Shiva, Mumbai. According to the witness one of the container would probably have come in January 2021.

[29] The Defendant called Mr Andy Labrosse, who testified that his company imports and sells vehicles. He is the principal director of the Defendant. The Plaintiff ordered a sportin red Toyota Glanza from his company. A pro forma invoice containing the terms and conditions

of purchase was issued to her together with the vehicle specifications. He identified the pro forma invoice he issued and informed the court that as per the stated terms and conditions the final price is subject to change based on the official exchange rate, Seychelles Government Policy, applicable taxes and the laws of Seychelles. These terms and conditions mean that it is only when the vehicle would come to Seychelles that the price would be finalised. According to him this was discussed with the Plaintiff at the time of purchase in the presence of Niko Hertel, an employee. He admitted that the Plaintiff paid the total price of SCR240,000.00 (Seychelles Rupees Two Hundred and Forty Thousand only).

[30] According to him, between March 2020 and April 2021 due to the Covid 19 pandemic vehicle production in India slowed down and they called the Plaintiff on many occasions and explained to her the rise in exchange rate and the reduced supply of vehicles. Nevertheless, they received a consignment of vehicles in April 2020 and this is supported by a Bill of Entry. However the vehicle was a white Toyota Glanza and the Plaintiff was informed. She came to the yard but refused to accept the car given that it was of different colour. At that time the exchange rate was SCR18.02040 to US Dollar whilst in January 2020 the exchange rate was SCR14.35 to US Dollar. At that time the Plaintiff was offered a refund of her original purchased price, but she refused. Consignment was also received in August but the vehicle was refused by the Plaintiff on the same basis.

[31] The December consignment did not contain any red Glanza and in January 2021 the Plaintiff was again informed of the increase in price caused by rise in exchange rate and the non-availability of the red vehicle due to production difficulties. The Plaintiff still insisted on her preferred colour. It was then that the Defendant made an offer to her in new price increased by SCR138,000.00 caused by the increase in exchange rate. The Defendant refused the letter of demand of the Plaintiff's counsel as to sell the car in January 2021 for the price of January 2020 would have led him to make a loss.

[32] Under cross examination Mr Labrosse stated that he had no supporting documents to show that the supplier in India was having a production problem. He further insisted that the exchange rates on his Bill of Entries reflects the official rates. He admitted that that full

payment was made by the Plaintiff for the vehicle that was to be delivered in accordance with agreed specifications.

[33] Mr Niko Hertel is an employee of the Defendant. According to him, when he joined the Defendant the Plaintiff was already a client and she had deposited an amount to purchase a red Toyota Glanza. In April 2020 there was a lock down in India following the spread of the Covid 19 virus. He told the Plaintiff that she would not be able to have a red car as the supplier was not sending this colour. He was present when the Plaintiff's car came in April. She did not like the colour and wanted to wait for another batch. From then until the next shipments of cars that came in August he kept reassuring the Plaintiff that her car would come. In August, however, only a grey one came, which was refused by the Plaintiff. She was offered a refund but she refused and when she asked whether a new shipment was to come, she was informed that there was and they tried to give her the same reassurances. In December, as no red Glanza came, she was offered the chance to pay the difference between the actual market value of the imported car and that on the pro forma invoice but she refused.

The Law

[34] Having scrutinized the facts and circumstances of this case I find that the following provisions of the Civil Code of Seychelles find their relevancy in this case:

Article 1148

Damages shall not be due when, as a result of an act of God or an inevitable accident, the debtor was prevented from giving or doing what he has undertaken or he did what he had been forbidden to do. If performance of the contract has only partly become impossible by an act of God or by an inevitable accident and if the defendant is also at fault, the liability of the defendant shall be reduced in proportion to his share of the responsibility.

Article 1604

Delivery is the transfer of the thing sold to the control and possession of the buyer.

Article 1610

If the seller fails to deliver within the mutually agreed time, the buyer may demand, at his option, either the cancellation of the contract or to be put in possession, provided the delay is due to the seller.

Article 1611

In all cases, the seller shall be condemned to pay damage if the buyer suffers any detriment as a result of the failure to deliver at the time agreed upon.

Article 1612

The seller shall not be bound to deliver the thing if the buyer has not paid the price, provided that the seller has not granted him time for payment.

Article 1614

The thing shall be delivered in the state in which it was at the time of the sale. From that day all the profits of the thing shall belong to the buyer.

- [35] I deduce the following legal principles from the above: the thing, if paid for, has to be delivered to the buyer by the seller, in the state that it was at the time of the sale; and if this does not happen the buyer can either cancel the sale or demand to be put in possession of the things. Failure to deliver the things on time can lead to payment of damages if there arises detriment as a result. The Defendant would be presumed to be liable for the breach of its duty to deliver the things in the form as agreed unless it can prove that the breach was the result of force majeure (Act of God).

Issues for the Court's determination

- [36] The Plaintiff's case is that the Defendant had to import a Toyota Glanza, colour sportin red at the original purchase price and that the price could only have been varied during the first three months from entering into the contract of sale. The Defendant, on the other hand, is of the view that variation of the price was agreed between the parties and it could take place at any time provided that the vehicle had not been delivered to the Plaintiff.
- [37] As to the colour of the vehicle, the Defendant's defence is that an act of force majeure has caused him to not be able to deliver the car of the agreed colour. The Plaintiff disputes the

existence of this factor or at least states that any such factor was incapable of preventing the Defendant from carrying out this obligation.

[38] The material points for this court's determination therefore are:

- What colour of the car was subject to the sale agreement and was there an intervening Act of God that prevented the delivery of a vehicle in that colour;
- What was the time that was agreed for the thing to be delivered and whether there was an agreed variation of the time that the vehicle had to be delivered.

Discussions and determination

[39] For force majeure to operate three criteria must all be present: l'exteriorité l'imprevisibilité et l'irrésistibilité (an independent; inevitable; unpredictable act of nature, not dependent on the act of man; See *Jurisprudence General Dalloz. Codes Annotés*). The burden is on the defendant to prove on a balance of probabilities that these circumstances existed.

[40] The pro forma invoice produced in evidence described the vehicle agreed to be imported by the Defendant as "*sportin red*" in colour and the acknowledgement of payment issued by the Defendant to the Plaintiff described the car as "*sportin red*" in colour. Andy Labrosse confirmed that the Plaintiff wanted a sportin red Glanza and that this was set out in the pro forma invoice. Mr Niko Hertel testified that they agreed to sell a red Toyota. It is abundantly clear therefore that the agreement between the parties was to import a car in the colour described by the Plaintiff.

[41] However, Mr Labrosse stated that he could not import one due to the pandemic situation happening in India as a result of which the manufacturers did not have sufficient workers to be in the factory manufacturing vehicles. This was so especially given that the red colour was a premium one. As a result he could not guarantee the Plaintiff that he could import a red vehicle.

[42] Under cross examination Mr Labrosse stated that he came to know that the supplier could not produce the red car only two weeks before the shipment of the last car offered to the Plaintiff. However, later Mr Labrosse went on to state that he obtained an import permit

for a white car for the Plaintiff. This was allegedly as a result of him being informed by the supplier via WhatsApp that no red car was being supplied.

[43] On the other hand Mr Niko Hertel testified that they agreed to sell a red Toyota Glanza but that the Plaintiff got a white colour as a result of the Covid 19 virus pandemic in India. According to him the supplier simply shipped out the white car, though the supplier was requested by the company to ship a red one. He had no written proof to produce as paperwork was done at a different level. He confirmed that there were red cars available in India but that the supplier simply did not ship it.

[44] I find the evidence of Mr Labrosse to be inconsistency and contradictory with regards to the colour of the car within his own testimony. First he attempted to give the impression that the supplier gave him a car of a different colour against his wish and design and that was the same car that was offered to the Plaintiff. However, once confronted with the import permit and the fact that he willingly imported a white car contrary to the agreement, he appeared to change his story and says that he had been informed by the manufacturer via WhatsApp call of the fact that they could not produce a red one. Moreover the proof of the importer's position was not forthcoming in any form whatsoever.

[45] Moreover Mr Labrosse's evidence is also inconsistent with that of Niko Hertel with regards to the availability of the red colour. Mr Hertel even failed to back up the testimony of Mr Labrosse on the import permit and testified instead that they inserted a red car in the permit but got a white one.

[46] As a result I disbelieve both the testimony of Mr Labrosse and Niko Hertel in that respect and I believe that of the Plaintiff. It is clear to me that no efforts have been made by the Defendant to import a car of the colour specification agreed upon. I take judicial notice of the fact that the importation occurred during the Covid 19 pandemic, however that is all that this court can do. During that period the supplier of cars from India may or may not have been able to build red cars, however it is up to the Defendant to prove on a balance of probabilities that it could not and this it failed to do. The Defendant has failed to establish an independent, inevitable, unpredictable act of nature, not dependent on the act of man that had prevented it from delivering on the specific car colour. This leaves this court in

doubt as to whether the Defendant intended to import this colour specification and whether or not the Covid 19 pandemic was used as a subterfuge by the Defendant to go back on this obligation.

[47] As to the time in which the imported vehicle had to be delivered into the possession of the Plaintiff, the pro forma invoice issued by the Defendant, which forms the core of the purchase agreement, stipulates that the delivery shall be in three months. Though not expressly stated, it stands to reason to hold that the three months would start to elapse from the time that the full consideration has been paid by the Plaintiff, which was the 5th of February 2020. In terms of Article 1612 of the Civil Code the Defendant had to deliver on the agreed date which was on or before the 5th of May 2020. The terms of the contract being for that limited period I will also agree with the Plaintiff that the terms and conditions set out in the pro forma invoice that “*The final price is subject to change on official exchange rate, Seychelles Government policy, applicable taxes and laws*” would be operative and would find their applications only during the agreed delivery period. Hence any change of public policy that are obviously beyond the control of the parties during the contracted period would be read into the agreement provided that they fall into the contracted period. In this case it is clear that the changes occurred outside this period, it is for this reason that the Plaintiff has refused to pay the car on a higher tax bracket and official exchange rate bracket.

[48] The only way that the Plaintiff would established that the changes in public policies affects the price of the imported vehicle would be for him to establish that there was an agreed waiver by the Plaintiff of the time for the delivery of the car and that the delivery date was extended by mutual agreement. Article 1610 of the Civil Code provides that the seller is liable only if it fails to deliver within the mutually agreed time, meaning that the time agreed for delivery can be mutually varied with consent of parties. As it is the Defendant who is alleging variation of delivery date, the Defendant needs to prove same on a balance of probabilities. In this instance as the contract was in writing any variation of its terms should have either been in writing or at least been expressly agreed to by the parties.

- [49] The Plaintiff stated that she did not agree to change the terms of the contract and if the Defendant was to deliver the vehicle it should be on the original terms and conditions. The Plaintiff was not willing to acknowledge that force majeure existed or affected the capacity of the Defendant to deliver on time. As it appears, the Plaintiff was willing to wait for the vehicle albeit out of time but on the original terms as agreed between the parties. She was waiting for her sportin red Toyota Glanza as she had purchased. The fact that it was out of time was due to the Defendant's doing and not the Plaintiff's. I have seen the demeanour of the Plaintiff and heard her evidence as tested under cross examination and I believe her fully. I disbelieve the evidence of the representatives of the Defendant that she had agreed to the late delivery of the purchased vehicle. Moreover, as I have held above I also do not believe even the Defendant's justification of force majeure that they had put forward. The delay is clearly due to the Defendant.
- [50] This leaves this court to make applicable the provisions of Articles 1610 and 1611 in full. As the Defendant has failed to deliver within the mutually agreed time, the court can at the option of the Plaintiff either cancel the contract or put the Plaintiff in possession of the thing and condemn the Defendant to pay damage if the buyer suffered any detriment.
- [51] In this case the Plaintiff cannot be put into possession of a vehicle with the specification that she purchased as such vehicle was not imported by the Defendant. Moreover, the Defendant cannot be compelled to effect the import as it is no longer in business according to evidence. The only remedy that would bring justice to the case would therefore be cancellation of the contract and compelling the Defendant to compensate the Plaintiff.
- [52] The Plaintiff asks the Court to direct the Defendant to pay the Plaintiff "*a sum of SR 420,000.00 as being the price of the same type, model of the car*". According to the adduced evidence however the price of the car is SCR415,000.00 (Exhibit P6). The Court therefore bases its Order on the evidence, the quotation provided by the Plaintiff.
- [53] Moreover, it is clear to me that the Plaintiff have gone through moral pain, anxiety and mental anguish as a result of the acts and omission of the Defendant, namely, the endless phone calls and visiting of the Defendants offices. The misleading nature of the Defendant has caused the Plaintiff moral damage and the Defendant is obliged to make good.

[54] Accordingly, I order the Defendant to pay to the Plaintiff:

- (i) The sum of SCR415,000.00 being the price for the same vehicle if she would have imported as in February 2021;
- (ii) The sum of SCR50,000.00 as damages caused for mental anguish and suffering;
- (iii) The costs of the proceedings.

Signed, dated and delivered at Ile du Port on 28th of October 2022



Govinden CJ