

**IN THE SUPREME COURT OF SEYCHELLES**

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**Reportable/ Not Reportable / Redact**  
[2022] SCSC 757  
CS. 60/2017

In the matter of:

**Hospitality Management Services (Pty) Ltd**  
*(rep. by Mr. F. Elizabeth)*

**Plaintiff**

v/s

**Monthly Transit Self Catering Apartments (Pty) Ltd**  
*(rep. by Ms. K. Domingue)*

**Defendant**

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**Neutral Citation:** *Hospitality Management Services (Pty) Ltd v Monthly Transit Self Catering Apartments (Pty) Ltd (CS 60/2017) [2022] SCSC 757*

**Before:** Andre JA sitting as a Judge of the Supreme Court

**Summary:** Breach of agreement – loss and damages – compensation - *Plea in Limine Litis*:  
non-disclosure of a cause of action – non-payment of filing fees

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**Heard:** 23 March 2022 (last submissions filed)

**Delivered:** 6 September 2022

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**ORDER**

The following Orders are made:

- (i) The plaintiff is dismissed.
- (ii) Defendant’s counterclaim for rental owed in the amount of SCR 120,000/- plus interest from February 2015 succeeds.
- (iii) Since the Plaintiff took some, if not most of his equipment from Defendant’s storeroom, but some equipment remains. This court orders that the remaining equipment in Defendant’s storeroom is to be returned/given back to the Plaintiff.
- (iv) *Plea in Limine Litis* that the plaintiff does not disclose a cause of action is dismissed.
- (v) The amount of SCR 2, 458,216.10, for which filing fees were not paid is abandoned.
- (vi) Costs are awarded to the Defendant.

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## JUDGMENT

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### **ANDRE-JA sitting as Supreme Court Judge**

#### **Introduction**

- [1] This Judgment arises out of a plaint filed on the 22 June 2017 by Hospitality Management Services (Pty) Ltd represented by Mr. Melton Ernesta in his capacity as director (the Plaintiff), against Monthly Transit Self Catering represented by Mr. Serge Monthly in his capacity as director (the Defendant).
- [2] As per amended plaint of the 23 July 2018, Plaintiff is claiming an amount of Seychelles Rupees four million one hundred and forty-five thousand, one hundred and thirty-eight and two cents (SCR 4,145 938.02) against the Defendant for the rental of kitchen equipment including interest and cost, as well as the return of equipment in the possession of the Defendant. The Defendant filed a counterclaim for rental owing in the amount of Seychelles Rupees one hundred and twenty (SCR 120,000) with interest at a rate of 5% per month, until the arrears are paid, as well as Seychelles Rupees sixty-three thousand (SCR 63,000) for the storage of Plaintiff's equipment from March 2015 to November 2015 calculated at SCR 7,000 per month for nine months.
- [3] Plaintiff leased the premises from 1 October 2014 and moved out of the premises in February 2015.
- [4] In the original plaint, the Plaintiff was initially claiming Seychelles Rupees One million six hundred and eighty-six thousand, nine hundred and twenty-one, and eighty-eight cents (SCR 1, 686, 921.88) which the Defendant amended *viva voce* on 23 July 2018. No further amendment was made to the plaint, and neither were filing fees paid in that regard. Accordingly, Defendant requests that the court disregard the amount of Seychelles Rupees Two million four hundred and fifty-eight thousand, two hundred and sixteen and fourteen cents (SCR 2, 458,216.14) and adjudicate on the initial sum for

which filing fees have been paid (this as per motion of the 11 February 2019 and which parties agreed this court was to determine at the end of the hearing on the merits: proceedings of the 11 February 2019 at 9 am refers).

[5] Further, the Defendant moved the court to find that the Plaintiff does not disclose a clear cause of action, neither does it contain a concise statement of facts as required by law, and that the plaintiff falls foul of section 71(d) of the Seychelles Code of Civil Procedure (SCCP).

[6] Defendant also prayed for dismissal of Plaintiff's plaint with costs.

## **Background**

### **Plaintiff's case**

[7] The Plaintiff in this matter is cited as Hospitality Management Services (Pty) Ltd, a Seychelles registered company renting out accommodation to tourists and running a restaurant. In the plaint the Plaintiff is stated as being based in Anse Reunion, La Digue, represented by Mr. Melton Ernesta in his capacity as director.

[8] There is no documentary proof of the registration of Hospitality Management Services (Pty) Ltd. A certificate of incorporation and memorandum of association was provided as Exhibit D2 for Creole Management (Proprietary Limited), and Melton Ernesta director of the Plaintiff was cited as a 50% shareholder. However, in terms of Exhibit P24, Melton Ernesta resigned as Director in a document registered on 30 December 2013.

[9] The defendant in their Defence acknowledged that the Plaintiff is a company and was running a restaurant, but averred that they are unaware of the other averments in (*paragraph 1 of the plaint i.e. carrying out activities of tourism, renting accommodation to visitors in Seychelles as well as running a restaurant*). Thus, it appears that the *locus standi* of Plaintiff does not appear to be in dispute.

[10] Plaintiff adduced Exhibit P4, a licence issued by the Seychelles Licensing Authority in the name of Hospitality Management Services (Proprietary) Limited, with the business

name Tropical Oasis dated 23 October 2014, licence number 169488 valid from 23 October 2014 to 23 October 2019.

- [11] The defendant is cited as a Seychelles registered company organised in and carrying out activities of tourism and renting out accommodation to visitors to Seychelles and running a restaurant.
- [12] The background of the matter is set against the backdrop that the parties entered into a lease agreement on 1 October 2014 where the terms of the agreement were that Plaintiff would lease from Defendant a restaurant and takeaway located at Point Larue, Mahe for an initial period of 3 years (hereinafter referred to as the premises). The terms of the agreement as per its schedule were that the rental was payable in monthly instalments at an amount of Seychelles Rupees twenty thousand (SCR 20,000) for the initial three months, and Seychelles Rupees thirty thousand (SCR 30,000) per month thereafter. There was also a returnable security deposit of Seychelles Rupees ninety thousand (SCR 90,000), of which the sum of Seychelles Rupees sixty thousand (SCR 60,000) was due on signing of the lease agreement, and the remaining Seychelles Rupees thirty thousand (SCR 30,000) would be payable within the first three months' period.
- [13] The Plaintiff testified that he encountered financial difficulties within the first three months which resulted in the inability to pay the rental amount as agreed upon in the lease agreement, and he, therefore, approached Defendant to reach an amicable arrangement regarding the outstanding rent.
- [14] Consequent to that, Plaintiff further testified that he and Defendant entered into a verbal agreement which culminated in an acknowledgment of debt (hereinafter referred to as a debtor's note) for the rental owing in the amount of Seychelles Rupees one hundred and twenty thousand (SCR 120 000). This handwritten acknowledgment of debt was provided in the bundle of documents as Exhibit P3 dated 28 February 2015. Plaintiff testified that the acknowledgment of debt (AOD) was registered on 15 May 2015 in register number A58 Number 5764. The registered AOD was provided as Exhibit P12 in the first bundle of documents with a revenue stamp dated 15 May 2015 and in the document, Plaintiff

states that he is indebted to Defendant in the amount of Seychelles Rupees one hundred and twenty thousand (SCR 120,000) for unpaid rent.

[15] In addition, the Plaintiff submitted that the Defendant after agreeing to the above-mentioned details to offset the rental amount, later advised Plaintiff that a third party would be renting the premises and the said third party would purchase the selected items of Plaintiff's equipment and this amount would be due to Plaintiff.

[16] The Plaintiff also testified that owing to this arrangement, any equipment that the new tenants would not require was to be removed from the premises and the Defendant offered to store this equipment in a storeroom located near the previously leased premises, and no rental or remuneration would be payable to Defendant.

[17] The Plaintiff also testified that he received Seychelles Rupees ten thousand (SCR10,000) from the new tenant as rent for the use of equipment, which amount was never discussed or agreed upon by the Plaintiff.

[18] The Plaintiff testified further, that the Defendant informed him that they would be taking over the premises and they would require the equipment for the running of the premises and revert to the original agreement whereby the Defendant would purchase the equipment from the Plaintiff to enable them to run the business and the difference between the Debtors note and the value of the equipment would be paid to the Plaintiff.

[19] It is on this basis that Plaintiff is claiming against Defendant an amount of Seychelles Rupees Four million one hundred and forty-five, one hundred and thirty-eight and cents two (SCR 4,145 938.02), including interest, as well as the return of equipment in the possession of the Defendant.

[20] The amount claimed by the Plaintiff varies, and what has been stated in the plaint contradicts what is stated in the submissions, claiming that Defendant owes him in excess of SCR 1, 514, 157.28 for the rental of equipment with an interest rate payable at 2% per month.

[21] The Plaintiff stated in the plaint and submissions that further to the acknowledgment of debt or debtors note, the agreement included for the Defendant to purchase some of the Plaintiff's equipment, which consists primarily of items required to run and maintain a restaurant business. Further, it was agreed that the funds generated from the sale of the equipment would be offset from the amount specified in the Debtors note, and if there was a shortfall due to either party, the party to which the said difference was due, would be paid by the other party in due course.

[22] On examination of Plaintiff by his Counsel, he confirmed that there was an agreement to set off the owing rental amount of SCR 120 000 in terms of a letter dated 24th October 2015 from Defendant to the Plaintiff and this letter admitted as exhibit P13 (*page 3 of proceedings dated 11/02/2019*). The wording of the letter provides as follows:

*“Further to our email dated 20<sup>th</sup> October, and to a letter we received from you dated the 19<sup>th</sup> October 2015, we advise that from your list of items and equipment’s we are ready willing and able to purchase the items and equipment as per attached list.*

*We also advice that the item and equipment purchase price for those item shall be set of against the unpaid balance of rent sum of Rs120 000/- exclusive of 5% interest thereon.”*

### **Defendants’ case**

[23] The defendant in his defence confirmed that money was owed to him in the amount of SCR 120 000, and an additional SCR 63 000 for the storage of Plaintiff's equipment. There is no proof of an agreement between the parties regarding storage fees for the equipment. During the hearing on 11 February 2019, the Plaintiff testified that there was no agreement to pay for the storage fees in the amount of SCR 7000 (Page of proceedings dated 11 February 2019). He explained that he took the equipment to the premises after the Defendant advised him that he could get more money for the equipment once Mr Collins Labiche leased the restaurant:

*“...when Mr. Collin Labiche came to negotiate with a partner from overseas to lease Serge Monthy’s Restaurant while discussing he tell me that-I know I mention to him we have some more equipment at home and he said to us to ring them over to add to the equipment he have will give his place more value and then I will get more money for my equipment once these people take over the restaurant that was how my equipment end up at Mr. Monthy’s venue.”*

[24] The Plaintiff also confirmed that no keys were issued for the storeroom where the equipment was stored since there was no discussion about the payment of SCR 7000 for the storage of the equipment.

### **PLEA IN LIMINE LITIS**

[25] As afore-mentioned, the Defendant filed a motion after the testimony of Mr. Serge Monthy, moving the Court to find that the Plaintiff’s plaint should be struck off as it does not disclose a clear cause of action and neither does it contain a concise statement of facts as required by law, and that the plaint falls foul of section 71(d) of the SCCP.

[26] The defendant submitted as part of his *plea in limine (and at the hearing of the 11 February 2019)*, that the Plaintiff had not refiled the plaint to amend the amount claimed and therefore the filing fees on the balance of SCR 2, 458,216.14 were not paid. The Defendant requested the Court to disregard this amount and adjudicate on the initial sum, for which filing fees have been paid. These two preliminary issues are dealt with below.

### **Whether the plaint discloses a clear cause of action**

[27] On the issue whether the Plaint discloses a clear cause of action we look at section 71(d) of the SCCP and supporting case law to determine the situation in this case.

[28] Section 71(d) of the SCCP provides that:

*“The plaint must contain the following particulars:*

...

*(d) a plain and concise statement of the circumstances constituting the [cause](#) of action and where and when it arose and of the material facts which are necessary to sustain the action;*

[29] Section 92 of the SCCP allows the court to strike out a pleading that discloses no reasonable cause of action and to dismiss the action. It provides that:

*“The Court may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer, and in such case, or in case of the action or defence being shown by the pleading to be frivolous or vexatious, the court may order the action to be stayed or dismissed, or may give judgment on such terms as may be just.”*

[30] In ***Al Darwish v Eden Island Village Management Association*** (CS 68 of 2021) [2022] SCSC 191 (15 February 2022), Carolus J in determining a plea *in limine litis* that a plaintiff disclosed no reasonable cause of action and was bad in law, held that:

*“A close reading of section 92 reveals that it envisages two scenarios: (1) where a pleading discloses no reasonable cause of action or answer; and (2) where the action or defence is shown by the pleading to be frivolous or vexatious. The wording of the provision suggests that in the former case the pleading may be struck out, but in both cases the court may order the action to be stayed or dismissed or may give judgment on such terms as may be just. The court is given a discretion as to the actions that it may take.*

[31] Defendants Counsel in this matter submitted that the plaintiff in the matter was significantly lacking in material facts that ought to have been pleaded and therefore did not disclose a reasonable cause of action. Relying on the authority of the Mauritius Court of Appeal case of ***Bessin v Attorney General*** (1950) SLR 208 delivered on 12 December 1951, and ***Philip Rath v Robin Richmond*** submitted that a reasonable cause of action is one which must have some prospect of success and should be obvious on the pleadings to the exclusion of any other extraneous evidence.



[32] In Rath (Supra), Robinson J in paragraph 15 considered what the term reasonable cause of action means:

*“... A reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleading are considered (per Lord Pearson in Drummond-Jackson v. British Medical Association [1970] 1 W.L.R. 688; [1970] 1All E.R. 1094, C.A.)”*

[33] In Bessin (supra) it was further held “that *only in plain and obvious cases should the court resort to the summary process of dismissing an action*”. This was reiterated in Rath at paragraph 7. In essence this means that the court cannot strike out a claim unless it is plain and obvious that there is no cause of action. In that regard the court at page 213 cited the following from the English Annual Practice, 1931 at p. 426 on O. 25 r. 4 of the English Rules of the Supreme Court (of which section 92 is a reproduction):

*‘No Reasonable Cause of Action’ — “There is some difficulty in affixing a precise meaning to this term. In point of law ... every cause of action is a reasonable one (per Chitty, J., Rep. of Peru v. Peruvian Guano C. D. p. 495). But the practice is clear. So long as the statement of claim or the particulars (Davey v Bentinck, 1983, 1Q.B. 185) disclose some cause of action or raise some question fit to be decided by a Judge or jury, the mere fact that the case is weak, and not likely to succeed, is no ground for striking it out (Moore v. Lawson, 31 Times Rep. 418, C.A.; Wenlock v. Moloney [1965] 1 W.L.R. 1238; [1965] 2 ALL E.R. 871, C.A. ...).*

[34] In the case of **Gallante v Hoareau (1988) SLR 122** on breach of contract, the court determined that the Plaintiff failed to disclose in the plaint that she was suing on a contract entered into on her behalf by her husband, and thus denied the defendant the defences available to him. The Court in determining this case held that:

*“The function of pleadings is to give fair notice of the case which has to be met and to define the issues on which the Court will have to adjudicate in order to determine the matters in dispute between the parties. It is for this purpose that*

*section 71 of the Seychelles Code of Civil Procedure requires a plaint to contain a plain and concise statement of the circumstances constituting the cause of action and where and when it arose and of the material facts which are necessary to sustain the action.”*

[35] In ***Parcou v Bentley* (250 of 2002) [2004] SCSC 15 (16 May 2004)** the court stated that:

*“A cause of action arises when the wrong or imagined wrong for which a plaintiff is suing, is one for which the substantive law provides a remedy. If a claim is at all arguable, it should not be struck out as disclosing no reasonable cause of action. Thus, on an application to strike out a plaint, it is assumed in favour of the plaintiff that, if the action were to go to trial, the plaintiff would establish all the facts pleaded.”*

[36] Accordingly, the court held that the point of law raised by the Defendant, as worded, is not that the plaint does not disclose a cause of action in defamation, but that the plaint in general, does not disclose any cause action at all.

[37] In this case, although the plaint is not very well drafted and the alleged breach is not that straightforward, it is clear that the Plaintiff is alleging a breach of contract based on an agreement between the Plaintiff and Defendant for the purchase of Plaintiff’s equipment to set off debt owed to the Defendant. Furthermore, Plaintiff alleges due to the failure of the Defendant and third party to purchase the equipment, he has suffered loss and the Defendant has benefitted from running the business without purchasing equipment.

[38] The plaint is quite lengthy and circuitous, and does not detail the breach of contract on an initial reading, and this is essentially what the court is to determine. In the ruling on *Parcou v Bentley (supra)*, Pillay J held that:

*“the point of law raised by the Defendant, as worded, is not that the plaint does not disclose a cause of action in defamation, but that the plaint in general, does not disclose any cause action at all. With respect, I do not believe that that is necessarily the case here. Article 1382 paragraphs (1) to (5) of the Civil Code, which is the civil law of Seychelles, is of relevance.”*

[39] Similarly, in this case the Defendant's *plea in limine* is that the plaint does not comply with the requirements of a plaint i.e. containing a plain and concise statement of the circumstances constituting the cause of action and where and when it arose and material facts necessary to sustain the action.

[40] Accordingly, the Defendants view is not that the plaint does not disclose a cause of action in breach of contract, but rather that the plaint in general does not disclose any cause of action at all. The plaint, although not very clear, is not invalidated as it raises a cause of action based on breach of contract which the Plaintiff seeks to redress.

[41] Therefore, this *plea in limine* ought to be dismissed.

#### **The failure to pay filing fees on the additional amount of 2, 458,216.10**

[42] On 23 July 2018 the Plaintiff amended the Plaint *viva voce* to increase its claim amount from SCR 1,686,921.88 to SCR 4,145,138.02. The Defendant raised the preliminary issue that the Plaintiff had not paid the filing fees on the balance of SCR 2,458,216.14, and therefore the court should disregard this sum and adjudicate on the initial sum for which filing fees have been paid.

[43] The Defendant did not object to the amendment of the plaint, but reminded the Court about the payment of additional filing fees. The court stated that the Registry would oversee to the filing of the fees, but to date there is no proof that these were paid.

[44] In terms of section 28 of the Seychelles Code of Civil Procedure, no proceeding shall be had and no process shall be issued by the Registrar, unless upon prepayment into court of the fees established by law in respect of such proceeding or process.

[45] The issue at hand is different in that the initial filing fees had been paid for the amount of SCR 1,686,921.88, and this is the basis on which the matter proceeded.

[46] The question is whether the amended claim with an additional amount of SCR2,458,216.14, should be disregarded for the failure to pay the filing fees.

[47] Although there was not much case law on similar instances, the judgment in *University of Seychelles American Institute of Medicine Incorporation Limited v Attorney General* (MA 330 of 2019) [2021] SCSC 541 (18 August 2021) by Dodin J may be instructive.

[48] In this case the Petitioner amended its Complaint to increase the damages claimed from SCR10,000,000.00 to SCR 24,090,000.00 but did not pay the difference in Court fees until June 2021, which delayed the delivery of the ruling in the matter.

[49] Accordingly, and taking into account section 28, it is my view that this court can and should decline to entertain the additional claim of Seychelles Rupees Two million four hundred and fifty-eight thousand, two hundred and sixteen and cents fourteen (SCR 2,458,216.14).

#### **Legal analysis and findings (on the merits)**

[50] Remains to be established as to whether the parties are entitled to the claim that they seek against each other which are in essence as follows:

(1) whether the Plaintiff has a claim against Defendant in the amounts claimed?; and

(2) Whether Defendant has a counterclaim against Plaintiff for the amounts claimed i.e. Seychelles Rupees one hundred and twenty thousand SCR 120 000 and Seychelles rupees sixty-three thousand (SCR 63 000/-) respectively.

#### **Whether the Plaintiff has a claim against Defendant in the amounts claimed?**

[51] In terms of the Civil Code of Seychelles Act, 1976 the essential conditions for the validity of contracts are provided for under Article 1108 and these are as follows:

*The consent of the party who binds himself,*

*His capacity to enter into a contract,*

*A definite object which forms the subject matter of the undertaking,*

*That it should not be against the law or public policy.*

- [52] It has been established from the lease agreement that Defendant leased premises to Plaintiff to run a restaurant and takeaway, but Plaintiff defaulted in paying rent for the premises. Apart from the acknowledgment of debt signed by Plaintiff acknowledging that he owed rental monies to Defendant in the amount of SCR120 000, there was no further exclusively written agreement between the parties, especially detailing that Plaintiff's debt would be set off against the equipment bought or rented by the Defendant or third party. However, an inference could be drawn from correspondence exchanged between the parties of some discussion about Defendant purchasing some of Plaintiff's equipment to offset the outstanding rental amounts.
- [53] The Defendant, Mr. Monthy was questioned on his personal answers during the hearing and he confirmed that he had leased out his premises to Defendant from 1 October 2014 to February 2014 and that Defendant still owed him rental money as per the lease agreement in the amount of SCR 120 000 plus 5% interest. He also conceded to initially agreeing to purchase some of Defendant's restaurant equipment to set off the outstanding debt, but that he was no longer interested in purchasing it. Further, there was no agreement to lease the restaurant equipment for its daily use, and the Defendant could have collected his equipment as and when he wanted, but he chose to leave it behind.
- [54] Defendant's brother, Mr. Maxime Monthy testified that he assisted his brother in the running of the day-to-day business and that he was aware of a lease agreement between the Plaintiff and the Defendant. Also, that the Plaintiff never made any payment toward the lease agreement, but he left his equipment behind as security for the debt owed to the Defendant.
- [55] Mr. Maxime Monthy testified that an inventory was done, exhibited as P35 and it was from the list that it was initially agreed that Defendant would purchase in case Plaintiff was not able to pay rent. There were items that were to be kept in the restaurant itself and others that the Plaintiff did not want to go with, which were stored in back storage. About 75% of the Defendant's equipment was stored in the storeroom and later, he collected some of the items in the storage. Mr. Maxime Monthy confirmed that the Defendant's equipment was retained by the Plaintiff in lieu of the debt.

[56] In order to determine whether Defendant has a claim against Plaintiff as claimed, it is necessary to first assess whether there was a contract in that regard. In *Robert v Robert* (1971) SLR 27 and *Dauban v de Failly* (1943) SLR 93 the Court held that:

*“In default of any written contract or any definite expression of the common intention of the parties the court should examine all the surrounding circumstances to find the common intention.”*

[57] In examining all surrounding circumstances in this matter, the reference to a set off of the owing rental in the amount of SCR 120 000 is mentioned a letter Defendant addressed to Plaintiff dated 20th October 2015 at 12:20 p.m. which stated that:

*“...For weeks we have been exchanging words over some of your perusal. Items being kept at the transit restaurant. We have decided to once and for all resolve this matter this way. We will decide from your list of equipment which of them we need, we will see of the value against their outstanding balance of Seychelles Rupees 120,000 which you still owe. Once we have decided on what we need, we will give you 14 days to come and collect the remaining equipment failing which, we will find somewhere to put them. If you are contemplating charging us for the time that your equipment has been in the restaurant, we have to charge you interest on the balance on unpaid rent. We hope that before end of this month we will once and for all solve this matter.”*

[58] Further mention was made in a letter dated 24 October 2015 (Exhibit P2, List 2 of the bundle of documents) and the contents of this letter read as follows:

*“Further to our email dated the 20<sup>th</sup> October, and to a letter we received from you dated the 19<sup>th</sup> October 2015, we advise that from your list of items and equipment’s we are ready, willing and able to purchase the items and equipment’s as per attached list.*

*We also advise that the item and equipment’s purchase price for these items shall be set off against the un-paid balance of rent the sum of SR 120 000, exclusive of the 5 percent interest thereon.*

*You are requested to contact us to arrange for the removal from the Transit Restaurant premises the items and equipments that do not feature on the list attached on the next 14 days failing which they would be placed outside the restaurant.*

*I would also like to bring to your attention that there are certain items and equipment which neither Casanova Bar restaurant and Take way nor Transit Self Catering Apartment (Pty) Ltd used.*

*We had for the last 8 months provide you with storage for those items. We demand payment in the sum of SR 7000 per month for storage for the last 8 months.*

[59] Although Defendant denied having an agreement for the purchase of the equipment to set off the rental debt when he gave his personal answers to the Court,<sup>1</sup> it is clear from the letter above that he had conceded that he was willing and able to purchase the items and equipment on the list and that this amount would be set off against the unpaid rent in the sum of SCR 120 000, excluding the 5% interest. He later stated that he was no longer interested in pursuing this set-off agreement, and it is on this basis that he filed a counterclaim.

[60] It was also established that there was no agreement for the daily rental of the equipment by Defendant or by the third party, Mr. Collins Labiche who took over the running of the restaurant in mid-June 2015, and the kitchen was already set up with some of the Defendant's equipment. (proceedings 02/10/20 at page 12)

[61] However, Mr. Labiche, on the basis of some discussion with Plaintiff agreed to pay an amount of SCR10 000 for cutlery, but this is not relevant to this case and so this need not be discussed any further.

[62] Mr. Labiche also testified that he was aware of a dispute between Plaintiff and Defendant, but he did not involve himself with it (proceedings dated 2/10/2020 pages 12-13).

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<sup>1</sup> 23 July 2018 proceedings

[63] In terms of Civil Code of Seychelles Act, 1976 Article 1341 provides that

*“Any matter the value of which exceeds 5000 Rupees shall require a document drawn up by a notary or under private signature, even for a voluntary deposit, and no oral evidence shall be admissible against and beyond such document nor in respect of what is alleged to have been said prior to or at or since the time when such document was drawn up, even if the matter relates to a sum of less than 5000 Rupees.”*

[64] Article 1342 goes on to provide that [t] the aforementioned rule shall also apply to the case in which the action contains, apart from a claim for the capital, also a claim for the interest, which added to the capital, exceeds the sum of SCR 5000 Rupees.

[65] The Plaintiff has not been able to establish that there was an agreement to justify his claim for the use of kitchen equipment that he left at the Defendant's premises. Oral and documentary evidence provided also fail to establish the claim, and it is thus impossible to find that Plaintiff has any claim against the defendant.

[66] Accordingly, Plaintiff's claim should be dismissed.

### **Whether the kitchen equipment belongs/belonged to the Plaintiff**

[67] The ownership of the kitchen equipment in this matter was also in question, and the Defendant submitted that the Plaintiff failed to prove that he was the owner of the kitchen equipment. He contended that the equipment did not belong to Plaintiff in the first place, but rather to the previous owner of Konoba, Mr. Philogene. Defendant further submitted that:

- a. Plaintiff did not have a value of the initial equipment which he brought to Defendants premises;
- b. He did not conduct an inventory when he brought the equipment to Defendant's premises nor when he left;



- c. Further, he did not know the value of the equipment which he left behind and he also did not know the value of the equipment he left in the store;
- d. Plaintiff never produced any receipts with regards to the value of equipment and tried instead to justify the value stating that he knows the market value of such equipment as this was his field of expertise;
- e. The plaintiff produced self-serving documents which were not corroborated by any other evidence;
- f. The plaintiff was charging 2% on a daily basis on the equipment being used by Defendant for generating revenue but failed to prove this allegation.

[68] In testimony provided by Mr. Collins Labiche when questioned about the ownership of the equipment and whether it solely belonged to Plaintiff, stated that he took Plaintiff's word that the equipment was his and when asked about who pointed out the property he stated as follows:

*“So for the fix equipment which apparently belonged to Mr. Ernesta, were they identified to you by anybody? By Mr. Ernesta himself or by Mr. Monthy?”*

*“Some of it Mr. Ernesta clearly demarcated that it is his and Mr. Monthy agreed but according to Mr. Monthy, he told me that to let them finish settle their agreement or their settlement before he can clearly say this one is his and these one is not his.” (Pg 13 12/10/2020 proceedings)*

[68] Mr. Labiche testified that he, the Plaintiff, and one other employee identified equipment that he might need, and those he did not need for the operation. Defendant's Counsel questioned him about the result of the discussion and his response is outlined in the extract below from proceedings dated 2 October 2020 at page 13.

*“Q: And you discussed about the equipment. What was the result of the discussion?”*

*A: We came to agreement and I specifically brought to the attention of Mr.*

*Melton that knowing that there were some ongoing discussion between him and Mr. Monthy, I will not fully and deeply involved in that discussion. And we had, I will say a gentleman agreement that good number of cutleries, I will be taking just to help me to kick start but the equipment that I will not be needed he would remove it. And we came to agreement and I made a payment of SCR 10,000 as per record I have, based on the cutleries agreement that we have.*

Q: *So you paid to whom? You paid to Mr. Ernesta or Mr. Monthy?*

A: *I paid directly to Mr. Ernesta.”*

[70] Mr. Labiche also testified that he did not know what equipment belonged to the Defendant and which belonged to the Plaintiff, but that he identified the basic equipment and cutlery that he would need, and whatever he did not need was removed and placed in a store annexed to the restaurant, which was also being used as a laundry. He confirmed that he saw the Plaintiff take some of the equipment away in a 12-15 seater bus (page 15 of 2/10/2020 proceedings).

[71] He further testified that Plaintiff went on another day to collect some of the items, and he made 2 or 3 trips on the same day.

[72] Mr. Regis Francourt testified that he was a 50% shareholder in a company named Creole Management Limited registered in his name and the Plaintiff. The Company was registered in June 2013 and it was a management company managing Konoba Restaurant at Eden Island, situated at the entrance to Eden Island. He stated that just like in other management companies the equipment did not belong to the company, it belonged to the owners (page 8 of 11 May 2021 proceedings). He testified that the equipment comprised of a fully fitted kitchen and what would normally be found in a restaurant like tables, chairs, stools, and cocktail tables.

[73] Mr. Francourt testified that he left the company following a fallout with Mr. Melton, the other shareholder and he left all of the equipment on the premises and he did not know what happened to the equipment, until he saw them one at Transit Restaurant, at Point

Larue at Mr. Monthy's restaurant. He testified that while doing consultancy work for a Chinese person to take over the restaurant he recognised the equipment, which was unique and he even questioned where these had been obtained from.

[74] Mr. Francourt further testified that he did not know the value of the equipment at the Transit Hotel because an evaluation had never been done. Further, when asked about the Defendant accusing the Plaintiff of being a thief and stealing the equipment from him, Mr. Francourt responded that:

*“Q: Now, Sir. Your name is in the claim before the Court, in paragraph 36. And the Plaintiff has stated that Mr. Monthy, accused him of being a thief and that he had stolen from you, with regards to this equipment’s.*

*A: Well, that is new to me, that my name was mentioned in the claims, I was not aware of that. But what I would say is that definitely there was a nature, because definitely there was – We had a registered Business and he decided to register another business whilst we were running a Business so definitely there was an issue, but I would not use these words that has been used, it is not in my terminology.”*

(proceedings dated 11 May 2021 on page 10)

[75] From an analysis of all evidence presented it is clear that there was a dispute about the ownership of the kitchen equipment that the Plaintiff is claiming the Defendant benefitted from daily use. It is not for this Court to determine who the rightful owner is, as this was not raised as an issue for determination, but rather as a defence by Defendant who denied benefiting from the equipment which the Plaintiff had left at his premises.

[76] The Defendant stated that it was only after Plaintiff had left that he knew that Plaintiff had left his equipment on the premises. Further, the equipment was left in a place which was left unlocked and to which the Plaintiff could have had access as and when he pleased. In fact, that the Plaintiff had gone back and forth and taken numerous items of equipment when he needed them.

[77] The Defendant also stated in his defence that he had no knowledge of how much the new tenant had benefited from Plaintiff's equipment, and Plaintiff has a right of remedy against the new tenant.

[78] In summary, on the question of whether Plaintiff has a claim against Defendant for the use of kitchen equipment left at the Defendants premises, it has been established that there was only a discussion via correspondence for the purchase of equipment to the value of SCR120 000 to offset the rental amount owed by the Plaintiff.

[79] From the evidence presented, it is clear that this offset was not effected and that the Plaintiff collected some of his equipment from the premises and there is more equipment in the Defendant's possession.

**Whether Defendant has a counterclaim against Plaintiff for the amounts claimed i.e. Seychelles Rupees one hundred and twenty thousand SCR 120 000 and Seychelles rupees sixty-three thousand (SCR 63 000/-) respectively.**

[80] In his testimony the Plaintiff conceded that he is indebted to Defendant in the amount of SCR 120 000, including interest at a rate of 5% from February 2015. Defendant confirmed that he is owed this amount and since the set-off arrangement was never executed; Defendant still owes Plaintiff the said amount. Defendant admitted that while there was a set-off arrangement discussed in the event of failure to pay the owing rental, he was no longer interested in the same.

[81] Accordingly, and from the above, Defendant's counterclaim succeeds in respect of the rental monies owed by Plaintiff in the amount of SCR 120 000, including 5% interest rate from February 2015 to date.

[82] On the claim for SCR 63 000 for Plaintiff's equipment left in Defendant's storage, there is no proof of such an agreement, and Defendant raised the payment of the fee for the first time when Plaintiff sought a claim against him.

### **Conclusion**

[83] From analysis of the evidence provided by both Plaintiff and Defendant, the Plaintiff has not been able to establish a contract for the rental of kitchen equipment by the Defendant. There was an agreement for the set-off of rental amounts owed, through the purchase of the kitchen equipment, but this was not effected and the Defendant confirmed that he was

no longer interested in that arrangement, and demanded a payment of the owing rental, hence the counterclaim.

[84] Accordingly, the Plaintiff's claim ought to be dismissed.

[85] It is also clear that Plaintiff took some, if not most of his equipment from Defendant's storeroom, but some equipment remains. This court finds thus that the remaining equipment in Defendant's storeroom is to be returned/given back to the Plaintiff.

[86] Regarding the Defendant's counterclaim, there is no doubt that the Plaintiff is indebted to Defendant for the amount of SCR 120 000 in rental arrears following a lease agreement signed on 1 October 2014.

[87] The Plaintiff also signed an acknowledgment of debt on 28 February 2015 for the owing rental in the amount of SCR 120 000.

[88] Accordingly, the Plaintiff owes the Defendant an amount of SCR 120 000 for the outstanding rental calculated as follows; SCR 60 000 for October, November, and December 2014 and SCR 60 000 for January and February 2015, plus interest at a rate of 5% from February 2015 to date.

[89] The Defendant was unable to prove that there was an agreement for the storage of equipment of Plaintiff's equipment, and the SCR 63 000 claimed has no basis and should also be dismissed.

### **Decision**

[90] It follows, as a result, that based on the above analysis and findings the following orders are made:

- (i) The plaint is hereby dismissed against the defendant for the reasons given.

- (ii) Defendant's counterclaim for rental owed in the amount of SCR 120,000/- plus interest from February 2015 succeeds.
- (iii) Since the Plaintiff took some, if not most of his equipment from Defendant's storeroom, but some equipment remains. This court orders thus that the remaining equipment in Defendant's storeroom is to be returned/given back to the Plaintiff.
- (iv) *Plea in Limine Litis* that the plaint does not disclose a cause of action is dismissed.
- (v) The amount of 2, 458,216.10, for which filing fees were not paid is abandoned.
- (vi) Costs are awarded to the defendant.

Signed, dated, and delivered at Ile du Port on the 6<sup>th</sup> day of September. 2022.

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**ANDRE JA sitting as a Judge of the Supreme Court**

