

-IN THE SUPREME COURT OF SEYCHELLES

Reportable

[2023] SCSC ...
CC09/2017

I ONE (PROPRIETARY) LIMITED
(rep. by Charles Lucas)

Plaintiff

and

SADDY ZIALOR
(rep. by Alexia Amesbury)

Defendant

Neutral Citation: *I One (Proprietary) Limited v Saddy Zialor (CCS 07/2017) [2023] SCSC*
(28 January 2023).

Before: Vidot J

Summary: Contract Law; whether an agreement is a Hire Purchase or Credit Sale Agreement or a simple Sale Agreement, Hire Purchase and Credit Sale Act 2013, defence of l'exception d'inexécution

Heard:

Delivered: 20 January 2023

ORDER

Judgement granted in favour of the Plaintiff against the Defendant in the sum of SR600,000.00 with interest at commercial rate from date of judgment and cost.

JUDGMENT

VIDOT J

Background

Plaintiff's Claim

[1] The Plaintiff sues the Defendant for breach of contract. This concerns the alleged sale of pick-up truck, registration number S17750. The oral agreement was entered into on 07th July 2014. It is averred that the Plaintiff agreed to sell the truck for SR850,000.00 payable by instalments. The Plaintiff took physical possession of the truck and payment was being made albeit not always on time. The first instalment of SR200,000.00 was paid upon parties entering into the agreement. The second instalment of SR100,000.00 was paid on 18th July 2014. A third instalment was paid on 05th September 2014. That left a balance of SR350,000.00. However, due to delay in making payment by the Plaintiff, the Defendant added a penalty of SR50,000.00 for late payment. The Defendant wrote a letter (exhibit P3) and gave the Plaintiff the option of paying the full balance by 15th December 2014 or pay two instalments of SR100,000.00, one in January 2015 and the other in February 2015, at which point legal ownership would be transferred to the Plaintiff. If the Plaintiff was to opt for the second option, the Plaintiff was to return the truck to the Defendant on the same date of December 2014.

[2] The Plaintiff alleges that there were unilateral breaches of the agreement by the Defendant. They Plaintiff list the imposition of a penalty fee as a breach of the agreement. They also enumerate other breaches which include physical repossession of the truck by the Defendant in February 2015, when full payment was due as per the letter from the Defendant dated 15 December 2014. The Defendant also refused to accept payment of the balance of the consideration. When the truck was repossessed, the Defendant had use it for his own business. As result the Plaintiff makes the following claim of damages;

- | | | |
|------|--|---------------|
| (i) | Refund of payment of consideration | SR 600,000.00 |
| (ii) | Loss of use of truck for 30 days at the rate | SR100,000.00 |
- at the rate of SR3,500.00 per day

The total sum being claimed is SR700,000.00 with interest at the commercial rate of 12% per annum with interest and cost.

(ii) **The Defence**

- [3] The Defendant denies that the initial payment of SR200,000.00 was instalment for the sale of the truck. That sum he claims was for the “*rental of the truck*”. He alleges that a day after taking possession of the truck the Plaintiff approached the Defendant with an offer to purchase the truck for SR850,000.00 and proposed that the Plaintiff would pay, on top of the SR200,000.00, a further sum of SR300,000.00 making a total of SR500,000.00. Unfortunately, the Plaintiff failed to make payment as agreed. After numerous phone calls by the Defendant, they finally made payment of SR100,000.00 on 18th July 2014. However, in further breach of the agreement, the Plaintiff failed to make payment from September 2014. That according to the Defendant, caused him to lose SR3,500.00 per day as his truck was being hired out and he was not receiving payment.
- [4] Thereafter, it is averred, the Defendant contacted the Plaintiff and informed them that should they not be able to make payment as agreed, the truck should be returned. It was as a result of that refusal to return the truck that the Defendant added an additional sum of SR50,000.00 in a way to mitigate his losses. Again, the Defendant informed the Plaintiff that should the Plaintiff not be able to make payment as agreed, they should return the truck. However, the Plaintiff agreed to the penalty fee. By 10th July 2014, the Plaintiff should have paid SR500,000.00, which they failed to do. They only managed to pay the sum by the 05th September 2014. There was a further payment of SR100,000.00 in December 2014. Before then, the Plaintiff had abandoned the truck in a state of disrepair with a broken crane and again as a means to mitigate his losses he was obliged to repossess the truck and have the crane repaired. Nonetheless, it was a term of the agreement that the Plaintiff would maintain the truck and pay insurance. All these obligations were not met and neither was the Plaintiff making payment at the times agreed upon. The Defendant had no option but to repossess the truck and make the necessary repairs and render it serviceable, at which point the Plaintiff wanted to take repossession.

The Evidence

- [6] Billy Ah-Tiff and Kevin Meme, Directors of the Plaintiff company gave almost similar evidence supporting the Plaintiff. Ah-Tiff testified that the Plaintiff never entered into an

agreement to hire a truck whilst Meme recounted that initially it appears that the Defendant wanted to hire the truck but subsequently that agreement was changed into a sale agreement. However, the Court found the evidence of Ah-Tiff was somewhat confusing in that when asked by Counsel for the Plaintiff, “*What about hiring the pickup truck?*” He responded “*[H]iring the pickup truck yes, supposed to buy a pickup according to our discussion with him, in his office that day*”. The Defendant on his part testified that he had drafted a contract to represent terms of the agreement. There was some confusion by the parties as to whether the agreement was signed or not. Meme seems to confirm that there was a written agreement but that was never signed. However, no agreement was exhibited before Court, so I shall take it that the agreement was oral.

[7] The oral agreement was entered into in July 2014. Ah-Tiff testified that the initial price for the sale of the truck was SR950,000.00, but they managed to negotiate it down to SR850,000.00. They were supposed to pay monthly instalments. The Plaintiff acknowledges that they defaulted. However, the Defendant recounted a somewhat different account. Saddy Zialor claimed that since the initial contract was for hire and that the Plaintiff had to pay a daily rental of SR 3,500.00. When examined on his personal answers, Mr. Zialor testified that the agreement was to rent out the truck. Thereafter, that agreement was transformed into one for sale. However, this Court concludes that the agreement appears to be one for sale. Nonetheless, this is clearly evidenced by Exhibit P3, which is a letter dated 15th December 2014, from the Defendant, addressed to the Plaintiff. The beginning of the latter reads as follows;

“You will remember that at the beginning of our dealings concerning the above, you intended to hire the truck from me at the rate of SR3,500.00 per day which you proposed and which you agreed. However, after further considerations you proposed to buy the truck, which again I agree to sell, for the sum of SR850,000.00 to which you agreed.”

Nonetheless, I find that at times the actions of the parties when implementing the agreement went contrary to a simple sale agreement.

[8] Payment made, as evidenced by receipts, which were produced as exhibits (Exhibits P1, P2, P4 and P5). Mr. Ah-Tiff nonetheless contends that they did not receive receipt for the

first payment made. The Plaintiff paid SR100,000.00 on 18th July 2014 (exhibit P1) which according to that receipt was the second payment for the truck. It is admitted that the Plaintiff defaulted in that no payment was made on the 18th July 2014 until 05th September 2014 when another instalment was made for the sum of SR200,000.00 (exhibit P2). On that latter receipt, it was stipulated that there was a balance of SR400,000.00 outstanding to be paid. However, that means that the Plaintiff was defaulting in their obligation of monthly payment. On 23rd December 2014, the Plaintiff made a payment of SR50,000.00 (exhibit P4) followed by another instalment of a similar amount on the same day, but the cheque was post-dated to 20th December 2014 (exhibit P5).

- [9] Though there was a balance of SR400,000.00 which became payable end of November 2014, the Plaintiff again defaulted. Mr. Ah-Tiff claims that the balance outstanding in January 2015 was SR200,000.00. However, by the letter of the 15th December 2014, the Defendant claims that a sum of SR400,000.00 was still due and owing but in evidence the Defendant agreed that SR650,000.00 has been paid. Nonetheless, Mr. Ah-Tiff noted that due to that earlier default, the Defendant unilaterally imposed a penalty of SR50,000.00 for late payments. This is non-contentious; the Defendant admits that. In February 2015, the Defendant repossessed the truck. According to the latter that was because the truck had been left in a bad state of repairs with a broken crane and insurance which the Plaintiff should have paid had lapsed. The Defendant stated that the truck had been abandoned. The Defendant testified that he had to repair the truck, but the Plaintiff argued that in fact the truck was being used commercially. No evidence was adduced to Court to support allegations that the vehicle was abandoned in a bad state and that the Defendant made repairs to it. However, the truck, according to the Defendant was repossessed with the help of the Police, an averment which is not traversed by the Plaintiff. The truck was supposed to be returned when payment was made. This was an attempt by the Defendant to self-resolve the conflict. The Plaintiff argues that after February 2015, all attempts to make payment of the instalment were frustrated by the Defendant.

[10] Kevin Meme's evidence by large corroborated Ah-Tiff's testimony. He acknowledges that due to the fact that the Plaintiff made late payments, they were in breach of the agreement. Such default in making payment on time happened on a few occasions. Therefore, corroborating Mr. Zialor's testimony. However, he agrees with Ah-Tiff that the pickup was in a good state when it was repossessed. When they received letter from the Defendant, they were not informed in that letter as to identity of the Defendant's lawyer, but that letter requested that they contact his lawyer but still refused to indicate to the Plaintiff the identity of that lawyer. So, they were a bit lost as to whom to hand over the cheque too, so they gave the cheque to their lawyer, Mr. France Bonte and he was to make contact with the Defendant to inform of the identity of the Defendant's lawyer. Nonetheless, the remaining instalment remains uncollected.

Nature of Agreement

[11] There appears to be a periodical confusion in evidence as testified by the parties as to whether the agreement was for hire or for sale of the truck. The Defendant maintains that it was for hire whilst the Plaintiff states that it was a sale agreement. The Defendant submits that the initial SR200,000.00 was paid for the rental of the truck (as per paragraph 2 of the Statement of Defence) and a day later the Plaintiff offered to purchase the truck and they were to make payment of a further sum of SR300,000.00 to make a total of SR500,000.00 towards the total price of SR850,000.00. The letter the Defendant sent to the Plaintiff on 15th December 2014 contradicts the statement that the SR200,000.00 was paid as a first instalment, but rather for hire of the truck. In that letter, the Defendant states that whilst the Defendant initially intended to hire the truck, they later decided to purchase the truck and it was later decided that the SR200,000.00 was to be counted towards the first instalment. The Plaintiff denies that it was ever their intention to rent the truck and it was always their intention to buy it. I further note that the Defendant had given the Plaintiff a precise period within which payment of the SR850,000.00 had to be made which suggests that the agreement was one for sale as an agreement for hire would not have had a definite payment date and would not require a payment plan and my understanding is that if it was for rental, then the Defendant would have called for monthly payment until the Plaintiff pays the full price of the truck.

[12] It is important to consider the nature of the agreement so that the intention of the parties could be ascertained and determine whether it was a simple hire agreement, a sale agreement or a hire purchase agreement. However, it is clear from the evidence that the Defendant admits in letter dated 12th December 2014 (exhibit P3) that there was an intention to purchase the truck on the Plaintiff's side, therefore, arguably that was not an agreement simply for hire of the truck. I also note the receipts for payment 18th July 2014 and 5 September 2014 identify the payment as "2-part payment" and 3rd part payment for the truck. Again, that does not suggest a hire agreement nor a hire purchase agreement as such wordings are not common for such agreements because otherwise they would have indicated the duration for payment of rental fee. This suggests that the likelihood is that the agreement was either for sale or for hire purchase.

Hire Purchase Agreement or Credit Agreement

[13] Such agreements are governed by the Hire Purchase and Credit Sale Act 2013 ("the HPCSA"). Section 2 of the Act defines such agreements as follows;

"Credit sale agreement means an agreement for the sale of goods on credit which the dealership in the good passes to the buyer upon sale."

"hire purchase agreement means an agreement: -

(a) for the sale of goods under which the property in the goods shall pass to the hirer upon payment by instalments of the whole amount due;

(b) within the maximum repayment period of 48 months; and

(c) includes an ancillary agreement.

[14] Section 3(2) of the HPCSA provides;

"(2) For the purpose of this section –

(a) any sale of goods or any transaction, other than a leasing contract involving the transfer or an option or agreement for the transfer of property in goods where the

term of payment is by instalments, shall be deemed to be a hire purchase or a credit sale under this Act.”

[15] The agreement of this case could be construed to be a hire purchase agreement as the Plaintiff was paying for the truck by instalment. The agreement could also have been a credit sale agreement if the ownership of the truck had passed to the Plaintiff upon entering the agreement. However, it appears that that was not the case. It appears that throughout ownership remained with the Defendant. The Plaintiff only took physical ownership of the truck, thus the reason why the Defendant was able to repossess the vehicle and in paragraph 1 of the Defence the Defendant avers that the Defendant was the registered owner of the vehicle.

[16] Nonetheless, the agreement could not have been a hire purchase or a credit agreement. This is because section 4 of the HPCSA provides that “*a person shall not carry on a hire purchase or credit sale business, except under and in accordance in agreement with the terms of a valid licence issued by the Authority.*” There is no indication and it certainly was not pleaded that the Defendant was in possession of such a licence. There are penalties for person who engages in such business without a licence.

[17] Furthermore, the agreement cannot have been deemed to be a hire purchase agreement as section 20 of the HPCSA covers a right to recover possession and claim payment. Pursuant to that section the Defendant should not have taken possession of the truck as in February 2015 when the truck was repossessed, the Plaintiff had paid the total amount, namely SR600,000.00 out of the SR900,000.00 (which is the SR850,000.00 plus the SR50,000.00, the sum in penalty fee for tardiness) and that is a substantial part of the total payment..

Sale Agreement

[18] One of the main difference between a sale agreement and a hire purchase agreement is that under the latter agreement, a hirer may choose not to buy at a later stage and decide to terminate the contract. In such case, the money paid by the hirer will not be refunded to him and the goods should be returned to the dealer unless the hirer pays the unpaid

balance. In a hire purchase agreement, the dealer may also repossess the goods in case the hirer's defaults on payment.

[19] The reason why I consider the agreement to have been a sale agreement apart from the pleadings, the letter the 15th December 2014, the receipts of payment and the evidence which clearly shows that it was such, that is because in a sale agreement by instalments, parties create mutual obligations upon entering into the agreement, and in this case that buyer obliges to buy and the seller obliges to sell. In the case of a default of payment, the seller cannot take the goods back, he has an option to sue the buyer. Failure to perform an obligation does not lead to automatic rescission or contract but may lead to termination because of breach and attract damages. However, I also note that in this case, the Defendant condoned the breaches by the Plaintiff by extending the time of payment and giving other payment options to the Plaintiff. **Hoareau v A2B (Pty) Ltd (SCA 34 OF 2012) [2014] SCCA 13**, Domah J presented a good analysis where both parties are in breach of their obligations and consequences thereof.

[20] That case involved a written contract for sale of a business. The Respondent paid a substantial amount upon signature of transfer documents (SR800,000.00 out of SR1,118,000.00) and should have paid the remaining balance by instalments, which he failed to do. The respondent in that case had paid most of the total sale price. However, the appellant was also in breach of certain obligations, defaulting in the transfer of 5 licences to enable the respondent from remaining in operation. The main issue was whether the breach by the appellant could be justified as she was entitled to put an end to the contract in the circumstances where the Defendant was itself in breach. The appellant relied on Article 1612 of the Civil Code which provides;

“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.”

In this case, delivery of good does not come into play. The truck was repossessed and the Defendant had at different intervals condoned late payment and even gave time for payment.

[21] In **Hoareau v A2B (Pty) Ltd** (supra), Domah J was of the opinion that the respondent's default in payment was not sufficiently grave to allow the appellant to refuse the transfer of the licences. Domah J also considered that even if the defence of '*l'exception d'inexécution*' were to be applied, "*such a measure is only a temporary remedy in law*" and further cited Barry Nicholas "The French Law of Contract" (2nd Edition, Oxford University Press 1992 at PP241) which states that;

"[t]he contract and the duties under it remain and the party making use of the exception must be ready to perform if and when the other party does."

Domah J concluded that "*a party cannot simply take it upon himself or herself to repudiate a contract altogether when payments are due.*" And noted that;

"French law resists self help and even in the case of delayed performance, the promise may not reject the performance on the grounds of delay without having the contract formally terminated by judicial sanction."

Unfortunately, the Defendant in this case adopted a self-help approach and repudiated the contract even if the Plaintiff had paid the bulk of the consideration but obviously after default in timely payment. However, the Defendant explained that the reason for repossession of the truck was because he had found the truck in a deteriorated state. It must be remembered that it appears that at that time, property in the truck had not passed and that the truck had not been transferred and payment of insurance was being met by the Defendant. The Defendant testified that he had to make repairs to the truck which averment, I believe, but he provided no proof and no receipts to quantify such repairs. It is further established in **Hoareau v A2B (Pty) Ltd** (supra) that in case of a delay by one party to perform obligations, the other party cannot simply repudiate the contract and has to seek an "*action en résolution*" under Article 1184 of the Civil Code.

Determination

[22] As has been highlighted above, there was confusion between the parties as to what type of agreement they were venturing into. The agreement could have been deemed to be a hire purchase agreement. It could even be interpreted as such as well since it appears that

the Defendant did not pass ownership or title to the Plaintiff and was still paying for insurance. However, Hire Purchase and Credit Sale are regulated by the HPCSA and that Act requires that the dealer/seller have a licence in order to conduct hire purchase agreement. The Defendant did not have such a licence or in the least did not plead that he has.

[18] At best, this was a sale agreement. There is a lot of tangible evidence to support that, in particular, the letter dated 15th December 2014, in which the Defendant admits that initially the agreement was a rental agreement but then that agreement was transformed into a sale agreement. He was in agreement with that. The Plaintiff did in fact default in making timely payment and despite complaining about it, the Defendant condoned some of the late payments, extending the payment time but at one point placed a penalty SR50,000.00 on the Defendant in default of timely payment. The Defendant also pleaded that the truck was abandoned and he had to repossess it and had to incur costs to make it roadworthy again. As I note, that despite believing the same, the Defendant had not filed a counter-claim and since there were no documents nor receipts, I cannot make any awards to compensate for that.

[19] However, the Plaintiff also claimed SR100,000.00 for loss of use of the truck for 30 days at the rate of SR3500.00 per day. I have already stated that I believe the Defendant when he testified that he repossessed the truck after it had found it broken down and needed repairs. The Plaintiff was at the time using alternative mode of transport. I also find it strange that the Plaintiff approached the Defendant to hire the truck for some work after that incident. As per the agreement, the Plaintiff was also to pay for insurance. They did not do that. Therefore, I will not be making that award to them.

[20] Therefore, I enter judgment in favour of the Plaintiff against the Defendant in the sum of SR600,000.00 with interest at the commercial rate from the date of this judgment with interest and cost.

Signed, dated and delivered at Ile du Port on 20 January 2023

Vidot J