SUPREME COURT OF SEYCHELLES

Reportable
[2023] SCSC 56
(CS No. 15 of 2019

In the matter of:
Nizam Uddin Ahmed — **Plaintiff**
(rep by Mr. F. Elizabeth)

Versus

Mr. Serge Larue — **1st Defendant**

Mr. Dave Dine — **2nd Defendant**
(rep by Mr. J. Camille)

Neutral Citation: *Nizam Uddin Ahmed v Serge Larue & Anor* (CS No. 15 of 2019) [2023] SCSC 56 (30 January 2023)
Before: Andre JA (sitting as a Judge of the Supreme Court)
Summary: Breach of contract – Loss, and damages

Heard: 15 November 2022 (last sitting to fix Judgment date)
Delivered: 30 January 2023

ORDER

The Court makes the following orders:

(i) The plaint is hereby dismissed.

(i) No order is made as to costs.

JUDGMENT

ANDRE JA

Introduction

[1] This judgment arises out of a plaint filed by Nizam Uddin Ahmed (hereinafter referred to as the plaintiff) on 21 January 2019 against Serge Larue (hereinafter referred to as the 1st defendant) and Dave Dine (hereinafter referred to as the 2nd defendant) (cumulatively referred to as defendants).

[2] The plaintiff alleges breach of an agreement between the parties of 31 March 2017 (***Exhibit P2)*** and claims loss and damages against the defendants in the sum of Seychelles Rupees Four Hundred and Ten Thousand (SCR 410,000/-) with interests and costs.

[3] The defendant, as per the statement of defence of 2 October 2019, denies the claims and moves for dismissal of the plaint with costs.

Plaintiff's case

[4] The plaintiff and defendants are all directors of DNS Rising Farm (Pty) Ltd, which was incorporated in terms of the laws of Seychelles on 19 April 2017.

[5] In his plaint the plaintiff avers that before the incorporation of DNS Rising Farm (PTY) Ltd, an agreement (Memorandum of Understanding) among the parties was concluded and duly signed by each party on 31 March 2017 (hereinafter referred to as 'the agreement'). The agreement stated the intention of the parties to create DSN Rising Farm, how the business was to be operated, and the shareholding of each party in the company.

[6] It is further averred that clause 1 of the agreement provided that Plaintiff was to invest SCR 500,000. That to-date, the plaintiff has invested SCR 606,137 which can be detailed as follows:

a. House rent for 7 workers for 10 months (from September 2017 to June 2018) –

   SCR 120,000

b. Transport (Bus fare) for 7 workers from February 2018 – July 2018 SCR 34,000
c. Payment of salary for 7 workers on an average for 3 months – SCR 107,137
d. Construction of vegetable sales centre (shop) - SCR 120,000
e. GOP fees, air tickets, and other costs for 7 workers - SCR 90,000
f. Farm excavation work - SCR 30,000
g. Farm expenditure (investment) - SCR 55,000
h. Cash paid to defendant 1 and defendant 2 – SCR 20,000
i. Expenditure for workers' accommodation, furniture, beds, mattress, fans, bed sheets, kitchen equipment, refrigerator, cooking utensils, etc. – SCR 30,000

[7] It is averred that Clause 3 of the agreement provided that the company would open a bank account and all proceeds of vegetable sales will be deposited into the said account. Moreover, those transactions will be made through cheques, and no cash withdrawals shall be permissible.

[8] It is further averred that in February 2018, the farm started its plantation and production of fruits and vegetables. By the end of March 2018, the farm had started full production and sale of its products under the full supervision of the defendants. That the defendants started taking all sale proceeds for themselves without opening a bank account or depositing any sale proceeds into the bank account as agreed.

[9] It is averred that from February 2018 until September 2018 the defendants took between SCR 60,000 to SCR 70,000 per month from sale proceeds. This is averred to total between SCR 450,000 to SCR 500,000 over the said months.

[10] It is also averred that since the opening of the vegetable sales centre at the farm, the centre has generated approximately SCR 3,000 – SCR 4,000 daily sales. That the daily sales were collected by the defendants without paying the plaintiff his share.

[11] It is further averred that there are cassava plants planted in May 2018 and that by January 2019, the plants will come to maturity. The expected revenue from this is approximately SCR 200,000.

[12] The plaintiff also avers that the defendants failed, refused, or neglected to pay the workers' salaries and other employment benefits.

[13] Finally, it is averred that the plaintiff has suffered loss and damages which the defendants are liable to make good. The loss and damages are particularised as follows:

j. 44% of the sales proceeds of SCR 500,000 for eight months from February 2018 to September 2018
k. 44% of sale proceeds of the daily sale of SCR 3,000 at the vegetable sales centre from October 2018 till 17 December 2018 (78 days)
l. 44% share of SCR 200,000 from expected sale proceeds from cassava crops

The total of which amounts to SCR 410,000.

[14] Plaintiff prays that this court gives judgment in his favour for SCR 410,000 together with interest and costs.

The Defendants' case

[15] The defendants filed a joint defence of the 2 October 2019 averring in gist as follows.

[16] To begin, the defendants admit to the fact that there was an agreement to the effect that a company was to be created among themselves and the plaintiff, together with how the business was set to operate and shares allocated to each party. They also admit that the company DNS Rising Farm (Pty) Ltd was incorporated on 19 April 2017 and that the plaintiff was to invest SCR 500,000 as per Clause 1 of the agreement.

[17] The defendants dispute that the plaintiff invested SCR 606,137 and further state that the latter has already removed all the furniture from the house. The said furniture is the one referred to in paragraph [5] of the Plaint, where it was averred by the plaintiff that he spent SCR 30,000 on 'accommodation, furniture, beds, mattress, fans, bed sheets, kitchen equipment, refrigerator, cooking utensils, etc.'.

[18] It is admitted that there was an agreement that a bank account ought to be opened for the business, where all proceeds from vegetable sales were to be deposited, and that all transactions effected through cheques and no cash withdrawals were permissible.

[19] The defendants deny that farm production started in February 2018. They jointly aver that the farm was already in operation when the company was formed. That the company did take steps to open the said bank account, but the efforts were halted following allegations of human trafficking on part of the plaintiff.

[20] The defendants also deny the averment by the plaintiff that sale proceeds between February 2018 and September 2018 range between SCR 450,000 and SCR 500,000. They further state that the plaintiff has not provided any proof of the sale of products and that it was the plaintiff who collected the same. That the SCR 120,000 invested into building the vegetable sale centre is not within the knowledge of the defendants. Moreover, the defendants also purchased building materials and the 2nd defendant did all the carpentry and masonry work.

[21] It is further denied that there are cassava proceeds to be expected because the plantation of the same was abandoned when the plaintiff was accused of human trafficking and the workers stopped working.

[22] The defendants further deny that they failed, refused, or neglected to pay the workers' salary and other employment benefits. It is their averment that since the plaintiff collected the proceeds of vegetable sales; he was responsible for the payment of salaries of the workers. It is further averred that the plaintiff borrowed money from the expatriate workers and refused to repay. Following this, the defendants had to pay the workers for the period between August 2018 and October 2018.

[23] Finally, the defendants deny that the plaintiff suffered loss and damage of SCR 410,000. They argue that the plaintiff has caused a lot of inconvenience and hardship to the defendants and that the latter can hardly make ends meet. That there is no documentary evidence to support the particulars of the loss and damages purported to have been

suffered by the plaintiff. Moreover, it is averred that the record of sales is in fact in the possession of the plaintiff.

[24] With the above, the defendants pray that this Court dismisses the Plaint with costs.

Submissions by the parties

[25] The plaintiff testified similarly to what he averred in his plaint. The same is repeated by his counsel, Mr Frank Elizabeth, in the written submissions filed on 2 February 2022. I thus do not find it necessary to repeat the same, except the legal submissions on the law relied on to support the case of the plaintiff.

[26] It is the counsel's submission that the issues that this Court ought to consider are as follows:

i) Was there an agreement between the plaintiff and the defendants?

ii) If yes, what were the terms and conditions of the agreement?

iii) Did the defendants breach any of the terms of the agreement?

iv) If yes, are the defendants jointly and severally liable to the Plaintiff?

v) If the answer to iv) is in the affirmative, then what is the quantum of damages the plaintiff is entitled to in law?

[27] It is submitted that the law applicable to adjudicate the present matter is article 1134 of the Civil Code which provides that:

> *"Agreements lawfully concluded shall have the force of law for those who have entered into them.*
>
> *They shall not be revoked except by mutual consent or for causes which the law authorises.*
>
> *They shall be performed in good faith"*

[28] It is also the submission of the plaintiff that article 1135 finds relevance in the present case, and the article reads as follows:

"Agreements shall be binding not only in respect of what is expressed therein but also in respect of all the consequences which fairness, practice or the law imply into the obligation in accordance with its nature."

[29] It is submitted that the legal and evidentiary burden of proof has been the subject of several judicial pronouncements. The case of **Suleman & Ors v Joubert and Ors SLR No. 27 of 2010** is made reference to, where Twomey JA emphasized the maxim 'he who avers must prove'. Other cases of **Tirant & Ors v Banane SCA 1977 No. 49; Pirame v Peri SCA 16 of 2005** were also referred to by the plaintiff. Against this backdrop, the plaintiff submits that in the present case, the plaintiff has proved on a balance of probabilities that the defendants were in breach of contract when they failed, refused, or neglected to honour their obligations under the agreement.

[30] The plaintiff contends that having established liability, he is entitled to damages.
Counsel for the plaintiff refers this Court to article 1147 of the Civil Code, which provides:

'The debtor shall be ordered to pay damages if any, either by reason of his failure to perform the obligation or by reason of his delay in the performance, provided that he is unable to prove that his failure to perform is due to a cause which cannot be imputed to him and that in this respect he was not in bad faith.'

[31] Relying on Article 1147 (supra), the plaintiff submits that he has sufficiently proven to the Court that the Defendants acted in breach of contract when they failed to comply with the terms and conditions of the contract.

[32] In addition to the above, it is submitted by the plaintiff that article 1149 of the Civil Code also finds relevance in this case. The plaintiff referred this Court to two cases, namely **Bonham-Carter v Hyde Park Hotek Ltd. (1984) 64 TLR 177** and **Ratcliffe v Evans (1892) 2 QB 524**, both of which emphasize how the plaintiff must prove loss and the corresponding damages thereafter. From this, it is the contention of the plaintiff that he has proved the damages by showing proof of the sums invested and the return on investment he was entitled to. He further argues that the defendants, on the other hand,

cannot prove their investment in the company or provide a plausible explanation of what happened to the proceeds of the sale of vegetables.

[33] The defendants did not file any submissions, whether written or oral. A decision was made by this Court to proceed without their submissions mainly because of the time elapsed since the matter was filed and set for hearing and the continued failure of the defendant's counsel to file the same, albeit being given sufficient opportunities to do so.

Legal analysis and Discussion of evidence

[34] I now turn to the merits of the case.

[35] According to the plaintiff, the defendants failed to open a bank account for the business as stipulated by the 31 March 2017 agreement and thus, are in breach of contract. It is this alleged breach that the plaintiff relies on to claim damages amounting to SCR 410,000.

[36] The defendants, on the other hand, agree that there was an agreement concerning several things, including the opening of the bank account. Notwithstanding the agreement, the defendants testified that the bank account could not be opened because of the criminal case of human trafficking against the plaintiff and thus, they were not in breach of contract. The defendants also reject the averments by the plaintiff that they used money from the proceeds of the sale of the vegetables as opposed to depositing the money into the business account, which they failed to open as agreed.

[37] Noting the above, the issues to be determined in the present case are as follows:

(i) Was there a valid contract between the plaintiff and the defendants?

(ii) If there was one, are the defendants in breach of contract?

(iii) What are the remedies available to the plaintiff should a breach of contract be proven?

[38] I proceed to address each of the defined issues under the headings as they appear in paragraph [37].

i) Was there a valid contract between the parties?

[39] There is an agreement that was made and signed by the plaintiff and the defendants on 31 March 2017 ***Exhibit P2***. This agreement has not been disputed by the defendants, thus unnecessary to go into whether or not the contract was valid or not. Both parties agree there is an agreement, and it is the view of this Court that the agreement carries legally enforceable rights as we see envisaged under article 1134 referred to by counsel for the Plaintiff. Moreover, an agreement binds the parties to perform what is expressed and 'all the consequences which fairness, practice or the law imply into the obligation in accordance with its nature' as per article 1135 of the Civil Code.

[40] Therefore, as this court cogitates on the issues before it, it is guided by both articles 1134 and 1135 of the Civil Code.

ii) Was there a breach of contract?

[41] There are eight breaches of contract that the plaintiff alleges, and each of them is discussed below. I take note that some breaches are read together. For example, breaches (b) and (g) refer to proceeds of sales and what the plaintiff was entitled to.

[42] According to the plaintiff, the defendants are in breach of clause 3 of the agreement. This clause can be dived into three parts. First, clause 3 provides that the company must open a bank account to be operated by two signatories, to be agreed upon among the parties, at any given time.' The second part of the same clause stipulates that 'all monies derived from the activities of the business shall be deposited in the said bank account and no other account whatsoever nor kept in the possession of any of the parties.' Finally, clause 3 of the agreement states that 'all payouts from the account shall be done by cheques, no cash withdrawals shall be permissible.'

[43] The plaintiff submitted that the defendants failed to open a bank account. The defendants in their statement of defence agree that there was an agreement to the effect that a bank account was set to be open. At this juncture, the Court is guided by the common intention

of parties as decided in **Chow v/s Bossy SCA 7/2005**. The parties agreed a bank account ought to be opened. However, it is not clear, on the strict reading of the agreement, who ought to have opened the said account among the parties to the agreement.

[44] Adduced in evidence, there is a letter addressed to Mauritius Commercial Bank, dated 3 March 2018, and signed by all the parties to this case. This letter provides for three matters:

i. the express intention of the parties to create a bank account with MCB;
ii. two signatories to the account, and supposedly giving effect to the second part of clause 3 of the agreement; and
iii. the express mention of farming as the business to be transacted by the company and expected annual revenue of SCR 2 million.

[45] While the plaintiff avers it ought to have been the defendants to open the bank account, there is no actual proof of this being a resolution among the parties. The aforementioned letter seems to suggest that all three parties participated in the attempts to open a bank account. This is why the defendants state in their statement of defence that all efforts to open the bank account were halted by criminal proceedings against the plaintiff. In **Wilmot v French (Seychelles) 1972 SLR 144**, the Court formed the view that how the parties have given effect to or acted upon a deed is one of the best pointers to its interpretation. In the present case, the agreement does not expressly state who among the three ought to have opened the bank account. However, the fact that all parties participated in the opening of the bank account as the aforementioned letter lays out strongly suggests that they all had a duty to open the bank account.

[46] On the above analysis, it cannot be found that there was a breach of contract on part of the defendants because there is nothing to suggest that they had the sole duty to open the bank account. I would imagine a bank account for a business is opened and operated with signatories to the said account. However, with the plaintiff being occupied with criminal proceedings at the time, the process could not have been completed. It must also be emphasized that the plaintiff is the majority shareholder in the company and to my mind,

it would have been logical for him to be one of the signatories to the account. It becomes apparent why the process of opening the bank account would have been frustrating in the circumstances.

[47] The second alleged breach of contract is with respect to the failure of the defendants to deposit all proceeds of vegetable sales into the business account. This too falls under clause 3 of the agreement between the parties. Closely related to this is clause 4 which states that all proceeds collected during the month must be distributed amongst the parties in accordance with the share each of them holds in the company.

[48] The plaintiff alleges that despite having no bank account, the business continued and generated some income between February 2018 and 17 December 2018. This income has been divided into three by the plaintiff and includes the sale proceeds of SCR 500, 000 between February and September 2018; second, vegetable sales at SCR 3, 000 per day from October 2018 until 17 December 2018; and iii. the 'expected sales' from cassava amounting to SCR 200, 000. From each of these, the plaintiff avers that he is owed 44% of the income generated and the defendants are in breach of clauses 3 and 4 of the agreement.

[49] The maxim, 'he who avers must prove' is instructive. The plaintiff must prove his claim on a balance of probabilities **(see generally Suleman & ors v Joubert & ors (SCA 27/2010) [2012] SCCA 38 (31 August 2012))**. Proof is what moves the courts to decide in favour of one person or the other. In **Banane v Banane (SCA 29/2018) [2020] SCCA 40**

(18 December 2020), where Dingake JA said, ' [the] burden of proof lies with he who asserts the existence of certain facts', echoing well-established case law in Seychelles in this regard.

[50] The plaintiff avers the existence of the fact that the farm was operating and generating income from its produce. The burden of proof therefore lies on him to prove to this Court that the amounts he submits to be factual are, in fact, as such, or otherwise closer to the truth on a balance of probabilities. However, there is nothing adduced to assist this Court

to make a finding on this. All the plaintiff has done is aver. And this averment is disputed by the defendants, who rather aver that it was the plaintiff who collected the sales of vegetables and all records of sales are with him. I find the arguments by the defendants plausible in the present circumstances because the plaintiff, as the majority shareholder, would have been more likely to have the record of sales. Yet before this court, no such records exist to support the figures he claims before this Court.

[51] Further, the plaintiff still fails to prove what he is asserting. There is no evidence adduced to support the claims he has made with respect to the amounts of proceeds made by the business and due to him. There are no receipts to show that the figures highlighted in the pleadings before the Court are accurate. The Court cannot be moved by assertions that have not been substantiated by the necessary evidence. Even where the plaintiff could argue (which he has not) that the figures are estimates based on production targets as envisaged in clause 6 of the agreement, there is still no evidence of any agreement of these figures for the court to rely on the same to decide.

[52] The third breach of the agreement which the plaintiff avers is that the defendants failed to keep proper accounting for expenses and expenditures of the company. This is a duty that emanates from clause 9 of the agreement. Yet the same clause fails to unequivocally state who, among the parties to this case, has to keep the proper accounting records. It is curious to me that the plaintiff reads this to mean the defendants. There is no evidence adduced to support this averment. Suppose the minutes of the directors' meetings where such a resolution was made would have supported this claim. The plaintiff still fails to prove what he avers in this regard.

[53] Breaches (d), (e), and (f) in paragraph [11] of the submissions are, in my view, irrelevant to the case before the court. This is because the alleged breaches relate to workers and not to the plaintiff. The plaintiff cannot claim to have *locus standi* in this regard.

[54] Based on the above analysis and findings, I find that the case on breach of contract has not been proven on a balance of probabilities as required by law. Where such a breach is

elusive, the claim for damages becomes futile and need not be explored and I hold it as such.

Conclusion and final determination

[55] Following the analysis of the evidence on the issues which fall to be determined in the present case, this Court orders as follows:

(i) The plaint is hereby dismissed.

(i) No order is made as to costs.

Signed, dated, and delivered at Ile du Port on the 30 day of January 2023.

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ANDRE JA
(Sitting as a Judge of the Supreme Court)