(5)

IN THE SEYCHELLES COURT OF APPEAL

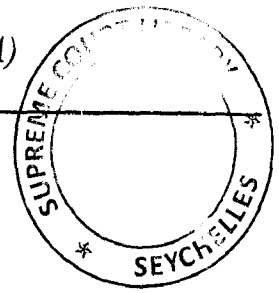
FARM AG. INTERNATIONAL TRADING (PTY) LTD. — *APPELLANT*

VERSUS

BARCLAYS BANK PLC — *1ST RESPONDENT*
BODCO LTD. — *2ND RESPONDENT*

SCA17/02

*(**Before:** Ayoola P, Silungwe & Matadeen JJA)*



Mr. P. Boulle for the Appellant
Mr. R. Valabhji & Mr. K. Shah for the Respondents

JUDGMENT
(Delivered by Matadeen, JA)

The subject matter of this appeal relates to the interest paid on a sum of money in an account with the first respondent bank which the appellant claimed should have been paid to it and not to the second respondent.

The appellant, a non-resident company incorporated in South Africa, exported goods on several occasions during the period June 1997 to December 1998 to the second respondent company in Seychelles. These goods were invoiced in South African Rands (SAR) and, by virtue of the negotiable instruments deposited with the first respondent, were to be paid in South African Rands. The appellant claimed before the trial court that various sums were collected on different occasions by the first respondent from the second respondent in respect of the various importations amounting to 1,385,128/- Seychelles Rupees (SR) and that that sum would have been converted into South African Rands and remitted to it as and when foreign

exchange became available. In August 1999, however, the appellant requested that that sum of SR1,385,128/- be credited to an account with its attorney in Seychelles. It was the contention of the appellant that interest accruing on that sum and amounting to SR65,429.19 was due by the first respondent, but that the latter had unlawfully paid that sum to the second respondent. Consequently it had brought an action claiming from the first respondent the sum of SR65,429.19 as it had unlawfully paid it to the second respondent or, alternatively, from the second respondent as it had been unjustly enriched in that amount.

The case for the first respondent before the trial court was that there was no privity of contract between it and the appellant but that the second respondent had deposited various sums of money in Seychelles Rupees into a suspense account with it pending the availability of foreign exchange for payment of various bills to the appellant and that interest accruing on those sums was paid to the second respondent until it was instructed by the latter on 26th August 1999 to pay those sums to the appellant's attorney.

As regards the second respondent, not only did it contend that the amount of interest accrued lawfully to it but it also counterclaimed for the sum of SR136,079.10 which according to it was overpaid to the appellant as the amount due to the appellant was SAR.1,403,741.80 which on 26th August 1999 amounted to SR1,249,048.90 and not SR1,385,128.

The learned trial Judge, after analysing the evidence placed before him and which consisted of the testimony of a representative of each of the parties as well as of a series of documents, came to the conclusion that the

interest accrued, and was lawfully paid, to the second respondent and dismissed the appellant's claim. He also found that the second respondent had agreed to pay the total sum of SR1,385,128/- standing in the suspense account to the appellant and consequently dismissed the counter claim.

It is against the dismissal of its claim that the appellant is appealing and this on a number of grounds which need not be reproduced here but which essentially claim that the learned trial Judge has misconstrued the transactions between the parties.

The second respondent has also cross-appealed on the ground that the learned trial Judge wrongly dismissed its counterclaim.

It is appropriate to state that there has been some confusion in the terminology used both by the parties in the course of their transactions and in their testimony before the trial court and by the trial court itself. Thus, documents signed by the second respondent have been referred to as bills of exchange when, for all intents and purposes, they were promissory notes. Likewise, words like payments and deposits as well as payments and collections have been indiscriminately used. These no doubt may have prompted the present appeal; but they have not in any way affected the general tenor of the evidence before the trial Judge, the salient features of which are as follows:-

a) the appellant exported goods to the second respondent on the latter's undertaking to pay through the first respondent the amount stated in South African Rands on the invoice on a due

date. This was done by the second respondent signing the promissory note sent by the appellant to the first respondent;

b) no interest is collected and remitted to an exporter in such a situation unless it is so expressly stated. There was no express mention to that effect in the documents exchanged between the parties;

c) the first respondent is a commercial bank trading in Seychelles and is subject to the direction, control and supervision of the Central Bank of Seychelles. The latter's regulations prohibit a non-resident, which the appellant is, from holding a bank account in Seychelles into which Seychelles Rupees may be credited. Moreover, during the relevant period there was a shortage of foreign exchange, and goods exported to Seychelles and invoiced in foreign currency could not be paid for on the due date with the result that the Central Bank had to regulate the processing of requests for foreign exchange. In essence, the Central Bank regulations provided that the local commercial bank would collect the amount due in Seychelles Rupees to be placed in a suspense account in the name of the local importer. The application of the local importer for foreign exchange would then await its turn. As and when the foreign exchange was made available by the Central Bank, the Seychelles Rupees would be debited from the suspense account and credited to the account of the local importer with the local commercial bank. Then the exact amount of Seychelles Rupees equivalent to the amount of the foreign currency to be

paid and calculated at the rate of exchange applicable on the day of the transfer is debited from the account of the local importer. That amount may not necessarily be the same as the amount in the suspense account but would depend on the rate of exchange applicable on that day;

d) the appellant was not only aware of the foreign exchange situation in Seychelles and of the processing of applications for foreign exchange but had also agreed with the first respondent that the procedure outlined above be followed;

e) the local commercial bank is not bound to pay interest on a suspense account although in the present case the first respondent did pay to the second respondent various sums by way of interest over quarterly periods amounting to SR65,427.19 as it had been able to invest the money in treasury bills;

f) in August 1999 the South African Rands had depreciated considerably as against the Seychelles Rupees.

In the light of the evidence, as highlighted above, the only inference that can be drawn is that payment of a foreign bill was only effected on the day the local commercial bank could provide the foreign exchange and the local importer gave the equivalent in Seychelles Rupees at the exchange rate applicable on that day.

Learned Counsel for the appellant has tried to read the various telefaxed letters sent by the first respondent to the appellant as indicative of payment being effected when the Seychelles Rupees were collected in view of the words *"The above-mentioned collection has been made in Seychelles Rupees on ..."* It is clear that the word *"paid"* has to be construed in the light of the word *"collection"* and in the context of the regulations of the Central Bank of Seychelles.

Moreover, the telefaxed letter of 28th March 1998 addressed by the appellant to the second respondent stating:- *"Please ensure that **payment is made in rupees to the bank** on 1.4.98 as we still have to wait another 8 months for forex before the bank transfer the funds to us"* is indicative of the fact that the appellant was fully aware not only of the system introduced by the first respondent under the supervision of the Central Bank to assist foreign suppliers generally and had both acquiesced in such a system and agreed to be paid when foreign exchange was available but also of the fact that payment was only effected after the approval of the Central Bank was obtained for the transfer of the exact sum mentioned in South African Rands in the invoices.

In any event, when in August 1999 the appellant decided to be paid the equivalent of the South African Rands in Seychelles Rupees it was in effect the second respondent and not the first respondent which effected the payment as the evidence accepted by the learned trial Judge shows that it was the second respondent which instructed the first respondent to pay the amount in Seychelles Rupees lying in the suspense account with the first respondent to the person designated by the appellant.

In the circumstances we hold that the learned trial Judge has not misapprehended the various transactions between the parties. Consequently we dismiss the appellant's appeal with costs.

We shall turn now to the cross-appeal. In the light of the evidence as adumbrated above we take the view that the cross-appeal must succeed. We are fortified in our view by the provisions of section 72(d) of the Bills of Exchange Act which pursuant to section 95(1) apply to promissory notes equally and which read as follows:-

> *Where the bill is drawn out of but payable in Seychelles and the sum payable is not expressed in the currency of Seychelles the amount, if the bill is paid in Seychelles and in the currency of Seychelles, shall, in the absence of any express stipulation, be calculated according to the rate of exchange for sight drafts in Seychelles on the day on which the bill is actually paid"* (emphasis added)

We consequently allow the cross-appeal and order the appellant to pay to the second respondent the sum of SR136,079.90 overpaid to it, with interest at the legal rate as from the date of the overpayment and costs.

Dated this 11th day of April 2003