

**Chez Deenu (Pty) Ltd v Seychelles Breweries Ltd
(2008) SLR 67**

Somasundaram RAJASUNDARAM for the plaintiff
Francis CHANG SAM for the defendant

Ruling delivered on 26 March 2008 by:

PERERA ACJ: This Court issued an ex parte interim injunction on 30 November 2007, restraining the defendant company from proceeding against a charge on immovable property, land Parcel V 6922 or any other movable or immovable assets of the plaintiff including bank accounts until a further order was made. The injunction was made returnable on 14 December 2007. On that day, the defendant company filed a motion supported by an affidavit seeking the removal of the injunction for reasons adduced therein.

The defendant avers that the petition is misconceived in law and is an abuse of process. Mr Chang Sam, counsel for the defendant company referred the Court to section 34 of the Companies Act 1972 and contended that in as much as the affidavit seeking the interim injunction was filed by the "Manageress" of the petitioner company, the petition is bad in law, and that hence it should be rejected.

Section 34(3) provides that —

Without prejudice to the generality of the foregoing, the directors of a Company, each director of a Proprietary Company shall, subject to any contrary provision of the memorandum of Articles, have power to do acts specified in the Third Schedule to this Act on behalf of the Company.

Paragraph 2 of the Third Schedule provides inter alia that the said persons could "bring or defend *proceedings in any Court* in the name or on behalf of the Company". The petition has been filed by "Chez Deenu (Pty) Ltd" represented by its Manageress Mrs KV Murthy. The affidavit supporting the motion for the interim injunction was also sworn by her on the basis as Manageress "in overall charge of the business activities of the Company Chez Deenu" and as a person being fully acquainted with the day to day business operations of the company. Although the pleadings do not strictly comply with section 34(3) read with paragraph 2 of the Third Schedule aforesaid, what is sought in the "plaint" does not constitute a "suit" or "action" as defined in the Code of Civil Procedure. The remedy sought in the "plaint" which should properly have been termed "petition" is to restrain the defendant company from executing a charge of an immovable property in satisfaction of a debt owed. Neither the debt nor the right of the defendant to execute the charge is being contested by the plaintiff. What is sought is a

delay up to 30 June 2008, when the debt would be paid. What is before the Court therefore is not a "cause of action" but only a "matter" which is defined as including "every proceeding in the Court *not in a cause*". Hence the present proceedings do not fall under paragraph 2 of the Third Schedule, and consequently, the institution of those proceedings by the Manageress representing the company cannot be faulted.

The petitioner avers that there were several contracts with the respondent for distribution of their products, and that the last such contract was dated 22 July 2004. Paragraph 6.1.1 of that contract provided that the plaintiff would be allowed credit facilities up to 7 days for and in connection with the sale of the product, failing which such facility would be withdrawn. Paragraph 6.1.5 also reserved the right of the respondent not to supply products to the petitioner. It is averred that a dispute arose as regards increasing the percentage of the commission, and that the petitioner unilaterally terminated the contract by letter dated 14 August 2007. However, the petitioner has produced prior correspondence from the year 2005 regarding the commission and also intimating the desire to terminate the contract. The respondent did not agree to terminate the contract and continued with the supply of products to the plaintiff for distribution. However after protracted discussions and negotiations, the respondent company accepted the termination of the contract mooted by the petitioner, with effect from 1 December 2007. That acceptance was subject to four terms, one of which was "to settle in full all outstanding debts owed to Seychelles Breweries immediately". The matter before the Court is the complaint of the petitioner about the "sudden and unexpected acceptance" of the termination, and the consequent inability to pay all outstanding debts immediately. The petitioner avers that the debt in the region of R 2,300,000 cannot be paid until about 30 June 2008, and hence the interim injunction was sought to prevent the sale of Parcel V 6922 which is said to be worth over four million rupees, and also to prevent any other assets being provisionally seized until the disposal of this matter.

The motion for interim injunction was filed on 30 November 2007. The respondent is legally entitled to execute the charge of the property, to recover the debt owed. The circumstances in which the respondent decided to accept the termination and the proprietary of demanding payment of all debts immediately in the context of the nature of the business involved as supplier and distributor, would be matters to be decided in the case. However for limited purposes, the Court considers article 1135 of the Civil Code which provides that -

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.

Hence, the request of the petitioner for a delay up to 30 June 2008 to collect the debts from the retailers to pay the debt he owes to the respondent is fair, and in the circumstances the *ex parte* interim injunction issued on 30 November 2007 is extended up to 30 June 2008.

Ruling made accordingly.

Record: Civil Side No 335 of 2007