

**IN THE SUPREME COURT OF SEYCHELLES**

**Vestalene Investment Ltd**  
(trading as PACTEL)

VS

- 1. Cable & wireless (sey)**
- 2. Kenneth Bisogno**
- 3. Debra lee Bisogno**

*Civil Side No: 197 of 2004*

=====  
Mr. F. Ally for the plaintiff  
Mr. C. Lablache for the 1<sup>st</sup> defendant  
Mr. Hoareau for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants

**JUDGMENT**

The Plaintiff entered this Plaint on 1<sup>st</sup> July, 2004 initially claiming from the 1<sup>st</sup> Defendant the sum of US\$196,372.00 with interest at the commercial rate from 17<sup>th</sup> April, 2003.

On 17<sup>th</sup> October, 2005 the 1<sup>st</sup> Defendant moved the Court in terms of **Sections 112 and 115 of the SCCP** for an order to join Kenneth Bisogno and Debra-Lee Bisogno as co-defendants in this suit.

After due process the Court granted the application of the 1<sup>st</sup> Defendant and ordered that Kenneth Bisogno and Debra-Lee Bisogno be joined as the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants respectively.

The Plaintiff amended the Plaintiff accordingly and the amended Plaintiff was served on the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants on 16<sup>th</sup> December, 2005 and they appeared by Counsel on 20<sup>th</sup> February, 2006.

### **The Plaintiff's claims**

The Plaintiff by its amended Plaintiff prayed the Court for the following orders:

- (i) Ordering the 1<sup>st</sup> Defendant to pay the Plaintiff the sum of **US\$196,372.00** with interest at the commercial rate from 17<sup>th</sup> April, 2003; or
- (ii) Ordering the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to pay the Plaintiff the sum of **US\$196,372.00** with interest at the commercial rate from 17<sup>th</sup> April, 2003; and
- (iii) The whole with costs.

The Plaintiff alleged that in pursuance of an Agreement between itself and the 1<sup>st</sup> Defendant, constituted by exchange of correspondence, it, in November 2002 and December 2002 sold and delivered to the 1<sup>st</sup> Defendant mobile phone handsets to the total value of US\$196,372.00 as follows:

150 Motorola T 191	@ US\$ 242.96	US\$ 36,444.00
100 Nokia 5210	@ US\$385.88	US\$ 38,588.00
400 Nokia 3410	@ US\$ 303.35	US\$ 121,340.00

The 1<sup>st</sup> Defendant was to pay the Plaintiff that sum of **US\$196,372.00** by telegraphic transfers in eight weekly installments.

In breach of the above agreement the 1<sup>st</sup> Defendant failed and refused to pay the Plaintiff the said US\$196,372.00.

Upon the Plaintiff's repeated requests and notices to the 1<sup>st</sup> Defendant to pay the Plaintiff the above sum, the 1<sup>st</sup> Defendant denied the Plaintiff's claim alleging that it has discharged all its payment obligations to the Plaintiff by having paid the sum of SR1,370,087.50 to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants who were trading under the business name of "SoftCell", a business undertaking, whom the 1<sup>st</sup> Defendant took as being the Plaintiff's agents in Seychelles. The first letter of demand from the Plaintiff is dated 17<sup>th</sup> April, 2003.

The Plaintiff averred that it has never appointed the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants or notified the 1<sup>st</sup> Defendant that it has appointed the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant as its agents for the purpose of the said transaction and that if the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants represented to the 1<sup>st</sup> Defendant that they were the Plaintiff's agent for the purpose of the said transaction, then this was done without the Plaintiff's authority.

The Plaintiff also averred that the sum of US\$196,372.00 is still due from the 1<sup>st</sup> Defendant in that despite the 1<sup>st</sup> Defendant's claim that it has paid the Plaintiff the sum of SR1,370,087.50 through the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, the Plaintiff has not, to date, received any or all of the said sum from the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

On the basis of its averments, the Plaintiff claimed to have suffered loss and damage in the sum of US\$196,372.00 with interests at the commercial rate from the 17<sup>th</sup> April, 2003, which the 1<sup>st</sup> Defendant is liable to make good to the Plaintiff.

Alternatively, if it is proved that the 1<sup>st</sup> Defendant has paid the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants the sum claimed herein the Plaintiff averred that it has not received any or all of the said sum from the 2<sup>nd</sup> and/or 3<sup>rd</sup> Defendants and as a result they shall be liable to pay the said sum to the Plaintiff.

### **Defence of 1<sup>st</sup> Defendant**

The 1<sup>st</sup> Defendant denied the Plaintiff's claim alleging that it has discharged all its payment obligations to the Plaintiff by having paid the sum of SR1,370,087.50 to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants who were trading under the business name of "SoftCell", a business undertaking, whom the 1<sup>st</sup> Defendant took as being the Plaintiff's agents in Seychelles.

The 1<sup>st</sup> Defendant contended that:

- (a) The Plaintiff was at all material times represented in Seychelles by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants trading as Soft Cell (Seychelles).

(b)The 1<sup>st</sup> and 2<sup>nd</sup> Defendants' Purchase Order to the Plaintiff was for the following quantities of mobile phones:

330 Motorola T191,

100 Nokia 5210,

420 Nokia 3410, and

300 Nokia 3310

All the above amounting to a total of **SR1,626,783.40**.

(c)It was agreed that the 1<sup>st</sup> Defendant would pay for the mobile phones cash to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in 8 equal weekly installments of **SR203,347.93** each, commencing on the week of arrival in Seychelles of the 1<sup>st</sup> consignment of mobile phones.

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(d)Only the quantities of mobile phones set out in the Amended Plaintiff were delivered in Seychelles to the 1<sup>st</sup> Defendant, amounting to **SR1,046,862.17**.

(e)However, the 1<sup>st</sup> Defendant had paid a total of **SR1,370,087.58** (consisting of 6 installments of **SR203,347.93** and 1 installment of **SR150,000.00**) to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to the credit of the Plaintiff, thus overpaying the Plaintiff by the sum of **SR323,225.41**.

The 1<sup>st</sup> Defendant also contended that it was agreed that the purchase price of all the mobile phones would be paid in Seychelles Rupees to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in Seychelles to the credit of the Plaintiff.

The 1<sup>st</sup> Defendant denied each and every allegation inasmuch as it averred or suggested that it is liable to the Plaintiff for any sum in respect of the purchase of the mobile phones or for any loss or damage as alleged or at all.

### **Counter-claim of 1<sup>st</sup> Defendant**

The 1<sup>st</sup> Defendant repeated its averments and averred that it overpaid the Plaintiff by SR323,225.41 in the purchase of the mobile phones.

At the request of the 1<sup>st</sup> Defendant, the Plaintiff credited a total of **SR.260,725.00** to the trading account of the 1<sup>st</sup> Defendant with 2<sup>nd</sup> and 3<sup>rd</sup> Defendants (for the provision of repair services and phones), leaving a balance of **SR62,500.00**, which remains outstanding and payable to the 1<sup>st</sup> Defendant.

In the premises, the 1<sup>st</sup> Defendant has incurred a loss in the sum of SR62,500.00 and which the Plaintiff is liable in law to make good to the 1<sup>st</sup> Defendant.

### **Reply to 1<sup>st</sup> Defendant's Counter-Claim by Plaintiff**

The Plaintiff denied the counter-claim of the 1<sup>st</sup> Defendant and put it to the strict proof thereof.

### **Request by the Plaintiff**

The Plaintiff requested for better and further particulars of the defence of the 1<sup>st</sup> Defendant but there was no response made.

### **Reply to 1<sup>st</sup> Defendant's Counter-Claim by 2<sup>nd</sup> and 3<sup>rd</sup> Defendants**

The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants did not answer the counter-claim of the 1<sup>st</sup> Defendant.

### **Defence of 2<sup>nd</sup> and 3<sup>rd</sup> Defendants**

The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants entered their joint statement of defence and raised the following pleas in limine litis:

1. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have improperly been joined as Defendants in the proceedings.
2. The pleadings against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants should be struck out, as it does not disclose any reasonable cause of action against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

On the merits, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants denied that the 1<sup>st</sup> Defendant had discharged all its alleged payments obligations to the Plaintiff by having paid the sum of **SR1,370,087.80** to them.

The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants also denied that they ever represented to the 1<sup>st</sup> Defendant that they were the Plaintiff's agent for the purpose of receiving the sum of SR1,370,087.80.

The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants further denied that the 1<sup>st</sup> Defendant has paid the sum of SR1,370,087.80 to the Plaintiff through them.

The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants denied that they are liable to pay the Plaintiff the sum of US\$196,372.00 with interests at the commercial rate from the 17<sup>th</sup> April, 2003.

By way of further answer the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants averred that any sum of money they received from the 1<sup>st</sup> Defendant was a result of –

- (i) a separate contract of sale between the 1<sup>st</sup> Defendant and them trading as soft-cell; and
- (ii) a separate contract for service between the 1<sup>st</sup> Defendant and them trading as soft-cell.

### **Plea in Limine Litis**

The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were joined at the instance of the 1<sup>st</sup> Defendant after following due judicial process. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants therefore have so far been properly joined in accordance with judicial procedures. However, whether they ought to have been made parties to this suit can only be determined at the conclusion of the case after hearing evidence of the parties.

Paragraphs 8, 9, 10, 12 as well as prayer (ii) of the Plaint indeed raise matters related to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants that called for their responses, if any. In fairness to them their presence in Court to defend their interests is a matter of

natural justice. Again, whether the cause of action alleged in this suit against the 2nd and 3rd Defendants can only be determined at the conclusion of the case after hearing evidence of the parties.

### **The issues**

The Plaintiff claimed to have to date not received any, or all, of that sum of US\$196,372.00 either from the 1<sup>st</sup> Defendant or the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants for the phone handsets it had supplied to the 1<sup>st</sup> Defendant hence this sum is still due to the Plaintiff. If that is so, the Plaintiff had suffered loss in the sum of US\$196,372.00.

The Plaintiff is now claiming that sum of US\$196,372.00 from the Plaintiff or alternatively, if it is proved that the 1<sup>st</sup> Defendant has paid that sum to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant, then that sum is due from the 2<sup>nd</sup> and/or 3<sup>rd</sup> Defendants and as a result they should be liable to pay that sum to the Plaintiff.

This Court has to determine whether there is sufficient proof to establish that the 1<sup>st</sup> Defendant has paid that sum of US\$196,372.00 or its equivalent in Seychelles Rupees to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

Who is now liable to make good the sum of US\$196,372.00 or its equivalent in Seychelles Rupees with interests at the commercial rate from the 17<sup>th</sup> April, 2003 to the Plaintiff?

If this Court finds and concludes that the 1<sup>st</sup> Defendant had indeed paid the said sum to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants then the adjudication would end here and judgment would be entered in favour of the Plaintiff as against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. If this Court finds and concludes otherwise, then it will proceed to determine who is liable to pay the Plaintiff.

### **Counter-claim of 1<sup>st</sup> Defendant**

The 1<sup>st</sup> Defendant claimed to have overpaid the Plaintiff the sum of **SR323,225.41** in connection with the purchases of the mobile phones. At its request, the Plaintiff credited a total of **SR.260,725.00** to an ongoing account which the 1<sup>st</sup> Defendant had with 2<sup>nd</sup> and 3<sup>rd</sup> Defendants (for the latter's provision of repair services and phones), leaving an unpaid balance of **SR62,500.00**, which remains outstanding and payable to the 1<sup>st</sup> Defendant.

In the circumstances the 1<sup>st</sup> Defendant claimed to have incurred a loss in the sum of SR62,500.00 that the Plaintiff is liable in law to make good to the 1<sup>st</sup> Defendant.

Who is now liable in law to make good to the 1<sup>st</sup> Defendant for that unpaid balance of SR62,500.00.

### **The Facts**

The Plaintiff is an existing company registered under the laws of South Africa trading under the business name of "**Pactel**". The 1<sup>st</sup> Defendant is an existing company registered under the laws of Seychelles. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants

were members of a business undertaking trading under the name of Soft-Cell (Seychelles) in Seychelles. In the circumstances all parties to this suit are traders and the law applicable in the circumstances is the Commercial Code.

**Mr. Ed Marchand** of South Africa is the Managing Director of the Plaintiff whose main business activity was the selling of cell phones. In November 2002 a Purchase Order (**Exhibit P3**) made out in the name of the Plaintiff trading as “Pactel” for the attention of its Mr. Joe Ndekwe, was received from the 1<sup>st</sup> Defendant employee Mr. Peter Durup, for different models of cell phones. The term of payment, as stated on the Purchase Order was to be by 8 weekly cash installments.

The Plaintiff shipped the goods to the 1<sup>st</sup> Defendant directly from the United Kingdom. The invoices were made out to the 1<sup>st</sup> Defendant.

**Exhibit P4** is an invoice dated 23 November, 2002 for 150 Motorola T 191 Mobile Phones and 100 Nokia 5210 Mobile Phones in the sum of **US\$75,032.00**. It is indicated on that invoice that payment was to be by telegraphic transfer to Vestalene Investments (Pty) Ltd in South Africa. **Exhibits P6 and P7** refer to the same goods but the price is quoted in Seychelles Rupees – both invoices totaling **SR378,445.00** the equivalent of **US\$75,032.00**.

**Exhibit P5** is another invoice dated 13<sup>th</sup> December, 2002 for 400 Nokia 3410 Mobile Phones in the sum of **US\$121,340.00**. Likewise it is stated on the invoice that payment was to be by telegraphic transfer to Vestalene Investments (Pty) Ltd

in South Africa. **Exhibit P8** refers to the same goods but the price is quoted in Seychelles Rupees totaling **SR427,800.00**.

The 1<sup>st</sup> Defendant received a total consignment of 400 x Nokia 3410; 150 x Motorola T191 and 400 x Nokia 5210. The total invoiced amount for these items is **US\$196,372.00** or **SR806,245.00**.

**Exhibit P9** is a letter of demand dated 4<sup>th</sup> April, 2003 from the Lawyer of the Plaintiff Messrs. Bloch Gross & Associates addressed to Mr. Geoff Houston the Chief Executive Officer of the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant responded by letter dated 17<sup>th</sup> April, 2003, (**Exhibit P10**) stating that all telephone hand sets supplied so far have been paid to Soft Cell, the Plaintiff's agent in Seychelles.

On the same date, 17<sup>th</sup> April, 2003 the Lawyer of the Plaintiff wrote back to the Chief Executive Officer of the 1<sup>st</sup> Defendant, (**Exhibit P11**) copied to Mr. Bhatti Naril, the Chief Financial Controller of the 1<sup>st</sup> Defendant (**Exhibit P12**).

Upon receipt of that response, the Plaintiff's Lawyer wrote back to the 1<sup>st</sup> Defendant on 23<sup>rd</sup> April, 2003 (**Exhibit P13**). Again, on 25<sup>th</sup> April, 2003 the Plaintiff's Lawyer wrote to the 1<sup>st</sup> Defendant (**Exhibit P14**). The 1<sup>st</sup> Defendant responded on 29<sup>th</sup> April, 2003 (**Exhibit P15**) inter alia stating –

*“...your assertions that Softcell was not the agent of your client in Seychelles and that we were not entitled to make payment of Softcell are categorically denied. Our*

*business relationship with your client and Softcell dates back to some 2 years ago and involved several purchases; over that period of time payments of all monies due to your client were made to Softcell. As in previous purchases, Softcell was involved in this last transaction as the agent of your client and there never was the slightest of indication that your client had terminated that mandate”.*

The Plaintiff’s Lawyer wrote again on 13<sup>th</sup> May, 2003 (**Exhibit P16**) to Mr. Geoff Houston who replied on 30<sup>th</sup> May, 2003 (**Exhibit P17**) paragraphs 2 and 3 of which reads thus:

*“Your client’s insistence that Softcell was not mandated to act as its agent in Seychelles in respect of the last transaction flies in the teeth of the correspondence emanating from your client. Furthermore, your client’s invoices for that transaction were printed and issued in Seychelles by Softcell.*

*But more importantly, we have confirmation from Mr. Kenneth Bisogno of Softcell that he has paid your client a total of US\$57,139, from funds collected on its behalf in Seychelles in respect of the last transaction. We are informed that a sum of US\$20.76 has been retained by*

*Softcell on account of some dispute with your client! We have details of the payments made by Mr. Bisogno, including the (sic) your client's bank receipts for the payments made by way of bank transfers. We will make them available to you if you so require. We will not give in to what is plainly an attempt by your client to be paid twice for the same transaction."*

The Plaintiff's Lawyer wrote again to 1<sup>st</sup> Defendant on 30<sup>th</sup> June, 2003, **Exhibit P18** paragraphs 2,3, 4, 5 and 6 are relevant and revealing. These are reproduced hereunder.

*"Insofar as you allege that there is correspondence from our client which indicates that Softcell was in fact mandated to act as our client's agents, would you please let us have copies thereof. We have perused the correspondence and cannot find anything which even vaguely supports your contention in this regard.*

*What is of concern to our client, is your allegation that Soft Cell has printed and issued our client's invoices. Will you please let us have a copy of all these invoices since, if your allegation in this regard is correct, Softcell created the invoices fraudulently and our client would then be obliged to take up the matter with the prosecuting*

*authorities in Seychelles. We would therefore be pleased to receive the copies at your earliest.*

*As far as the alleged payments made by Softcell to our client are concerned, our client does not dispute the fact that certain payments were indeed made by Softcell, including the payment referred to in your letter. These payments, however, were made to our client in respect of the outstanding account of Softcell with our client and has no bearing whatsoever as far as your indebtedness towards our client is concerned. It is of course, possible that Softcell may have used your funds to settle their account with our client. However, this has nothing to do with our client and you should take up the matter with Softcell.*

*A matter which we feel you should take cognizance of is that our client had quoted its prices to Mr. Peter Durup prior to the receipt of the purchase order. However, the values reflected in the purchase order, differed significantly from the prices quoted in that the amounts in the order were \$64,420.00 higher than the prices quoted. Mr. Peter Durup then requested our client to prepare invoices, the value whereof would match the value reflected on the order and our client was also*

*requested that no invoices were to accompany any shipment. Our client finds Mr. Durup's conduct in this regard strange and we suggest that, in your own interest, that you investigate the matter immediately.*

*We wish to make you aware that our client received the attached letter from Softcell's local attorneys which contains certain threats and allegations of a serious nature to which we have replied as set out in a copy of our letter in response thereto which is also annexed. It is quite clear from the Attorneys' letter that Softcell wants to avoid at all costs that our client proceeds to the Seychelles and this confirms our client's suspicions that something untoward has been taking place here. Mr. Ed Marchand of our client has accordingly decided to take up the matter with your head office in the United Kingdom. Should you or your representative wish to be present at the meeting which is to be scheduled at Head Office please advise the writer so that the necessary arrangements with our client can be made."*

Letters were again exchanged on 9<sup>th</sup> July, 2003 and 14<sup>th</sup> July, 2003 - **Exhibits 19 & 20** culminating with a letter dated 22<sup>nd</sup> September, 2003 from Plaintiff's Lawyer to Messrs. Pardiwalla Twomey Lablache, Seychelles - **Exhibit P21**.

In effect the 1<sup>st</sup> Defendant did not accept to make payment claiming that it has already paid to Softcell a total of SR1,370,087.58 in 7 consecutive weekly cash installments commencing on the 28<sup>th</sup> September, 2002.

The witness of the Plaintiff asserted that Softcell was never the agent of the Plaintiff in Seychelles and the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were never authorized by the Plaintiff to receive money on its behalf from the 1<sup>st</sup> Defendant. Further the witness asserted that it never authorized the 1<sup>st</sup> Defendant to pay any money to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants on its behalf.

The Plaintiff knew the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. In the year 2001 the Plaintiff started to have a business relationship with the 2<sup>nd</sup> Defendant supplying cell phones to the latter.

On 15<sup>th</sup> March, 2003 (**Exhibit D29**) the 2<sup>nd</sup> Defendant Mr. Kenneth Bisogno wrote to the 1<sup>st</sup> Defendant Cable & Wireless (Seychelles) Ltd regarding payments to Plaintiff Vestalene Investments (Pty) Ltd as follows:

“As per your request, please find below a schedule of purchases and payments in respect of goods purchased from Vestalene Investments (Pty) Ltd.

### **Purchases**

Motorola T191 Mobile Phones	US\$ 13 500.00
Nokia 5210 Mobile Phones	US\$ 16 400.00

Nokia 3410 Mobile Phones	US\$ 48,000.00
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**Payments**

Bank Transfer d.d 27/12/02	US\$ 30 000.00
Bank Transfer d.d 07/01/03	US\$ 10 000.00
Cash & Cheques (approx Jan 03)	US\$ 10 000.00
Cash 18/02/03 (email dated 19 Feb)	US\$ 2 567.00
Bank Transfer d.d 28/01/03	US\$ 2 250.00
Bank Transfer d.d.	US\$ 2 322.00

If you have any further queries, please do not hesitate to contact me.”

Attached to the above quoted letter the 2<sup>nd</sup> Defendant attached a photocopy of a Bank Transfer slip showing that the money was sent to the ultimate credit of Vestalene Investments (Pty) Ltd, Account Number 4052830025 with ABSA Bank in South Africa.

**Exhibit D29** shown above is a written admission by the 2<sup>nd</sup> Defendant that, by 15<sup>th</sup> March, 2003 he had indeed received a total of **US\$77,900.00** from the 1<sup>st</sup> Defendant for the benefit of the Plaintiff.

Matters relevant to this suit started by the initiation of a Purchase Requisition No.1523 dated 9<sup>th</sup> November, 2002. This is a document which is normally created within the 1<sup>st</sup> Defendant’s organization when goods are to be purchased. For ease of reference that Purchase Requisition is replicated hereunder and it speaks for itself.

## PURCHASE REQUISITION

**No. 1523**

Originator's Name : **Peter Durup.** Date: **9<sup>th</sup> November, 2002**  
 Job Title : **Manager** Dept: **Products and Services**  
 Manufacturer/ : **Vestalene Inv. T/A Pactel (Pty) Ltd,**  
 Supplier **P.O. Box 7529,**  
**Midrand, 1685 S A.**

Local Contact: **SOFTCELL** Price obtained from: **SOFTCELL.** Payment Method: **8 weekly cash instalments of SR203,347.93 starting first week that merchandise start arriving.**

Item	Unit				
No.	Quantity	Description	Price	Unit	Value
1.	330	Motorola T191	25530301	1295.24	427,429.20
2.	100	Nokiia 5210	25525100	2057.14	205,714.00
3.	420	Nokia 3410	25525200	1610.71	676,498.20
4.	300	Nokia 3310	25525000	1057.14	317,142.00
				TOTA L	1,626,783.40

Purpose of the above items or services: **B.Ms' requirements to end of FY.**

Other instructions: **Payment in SR to local representative of Vestalene, Softcell.**

**– CEO has given his approval for the purchase.**

Originator's Signature

Authorisor's Signature

Signed

Signed

The next stage of the internal purchasing procedures is that on the basis of the Purchase Requisition, a **Purchase Order** is then drawn up. The following is a reproduced replica of the relevant Purchase Order from the 1<sup>st</sup> Defendant:

### Purchase Order

To:	VESTALENE INV. T/A PACTEL LTD		
	SOUTH AFRICA		
Fax No:	+27 112386058	Order No:	CWS0148/03
Attn:	JOE NDEKWE	Your Ref:	
From:	MANAGER SUPPORT	Reqn No:	1523
	SERVICES		
Date:	13 Nov 2002	Exp Code:	6613

Please supply the following:

<i>QTY</i>	<i>DESCRIPTION</i>	<i>PART NO</i>	<i>VALUE</i>	<i>REQUIRED ON SITE</i>
330	Motorola T191		427429.20	
100	Nokia 5210		205714.00	
420	Nokia 3410		676498.20	
300	Nokia 3310		317142.00	

Despatch Instructions:

Goods must be suitably packed for shipment

Addressed to Cable & Wireless (SEY) Ltd  
Victoria, Mahe Seychelles

Order Total                      1626783.40

Method of delivery:              AIR FREIGHT

Payment Terms:                  8 WKLY CASH INSTALLMENTS

All queries relating to this order please address to Manager Support Services.

All invoices must be sent to Cable & Wireless (Sey) Ltd Financial Accounts department quoting our Purchase Order number.

Please acknowledge receipt of this order and advise delivery in due course.

(sgd). M. AGRICOLE

MANAGER SUPPORT SERVICES

As can be seen, the Purchase Order of the 1<sup>st</sup> Defendants to the Plaintiff was for the following quantities of mobile phones:

- (i) 330 Motorola T191,
- (ii) 100 Nokia 5210,
- (iii) 420 Nokia 3410, and
- (iv) 300 Nokia 3310

and all the above amounted to a total of **SR1,626,783.40**.

In pursuance of an Agreement between the Plaintiff and the 1<sup>st</sup> Defendant, constituted by exchange of correspondence, it, in November 2002 and December 2002 sold and delivered to the 1<sup>st</sup> Defendant mobile phone handsets to the total value of US\$196,372.00 as follows:

150 Motorola T 191	@ US\$ 242.96	US\$ 36,444.00
100 Nokia 5210	@ US\$385.88	US\$ 38,588.00
400 Nokia 3410	@ US\$ 303.35	US\$121,340.00

There is an indication printed on the standard invoice from the Plaintiff that the payment was supposed to be paid by telegraphic transfers into its account with a bank in South Africa. The 1<sup>st</sup> Defendant however did not make any payment directly to the Plaintiff by direct bank transfers.

That was explained by the witness of the 1<sup>st</sup> Defendant that at the material time there was a serious shortage of foreign exchange on the local market. The normal procedure existing then was that all payments had to be done via a local bank where the importer had to deposit the invoiced amount in a “pipeline” with the local bank and applied for the sum due to be paid in foreign exchange to the exporter overseas. Through this process, overseas suppliers may wait for months or even years before payments are received. There was in existence at that time what was called “black” or “parallel” market where importers purchased foreign

exchange outside the banking system and then have that money sent to the overseas suppliers. To obviate the 1<sup>st</sup> Defendant to have recourse to such illegal market, the 1<sup>st</sup> Defendant instead made its purchases through a local supplier. That explained how the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants trading as Softcell came in. The latter was engaged in the business of procuring from overseas suppliers, mobile phone handsets to be sold on the local market. They also had an agreement with the 1<sup>st</sup> Defendant to repair handsets for the latter's clients. The 1<sup>st</sup> Defendant had on previous occasions purchased handsets through the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants and had paid them in local currency.

**Ms. Erica Celeste** worked for the 1<sup>st</sup> Defendant as an Account Officer over the last 15 years and was employed as such in 2002 during the time material to this suit. Her duties included making payment to suppliers. She was aware of the business transactions between the Plaintiff and the 1<sup>st</sup> Defendant and she was the one who made cash payments for the Plaintiff.

She knew the 2<sup>nd</sup> Defendant because the latter had, prior to that, been involved with the 1<sup>st</sup> Defendant in connection with the repair of mobile handset phones as well as supplying the 1<sup>st</sup> Defendant mobile handsets for resale. She was the one who personally made the cash installment payments on each occasion.

On 29<sup>th</sup> November, 2002 the 2<sup>nd</sup> Defendant Ken Bisogno came to the Account Office of the 1<sup>st</sup> Defendant along with one Mr. Patrick Heiss to collect the first cash installment payment. That was when Ms Erica Celeste met Mr. Patrick Heiss

for the first time. On that day the 2<sup>nd</sup> Defendant introduced Mr. Heiss to her and told her that Mr. Heiss would be the one collecting the money for the Plaintiff.

Ms. Erica Celeste made these payments to Mr. Patrick Heiss at the request of the 2<sup>nd</sup> Defendant which the latter made when he came together with Mr. Heiss to collect the first installment. On that day the 2<sup>nd</sup> Defendant introduced Mr. Heiss to Ms. Celeste and he told her that Mr. Heiss will be the one collecting the money for the Plaintiff. Ms. Celeste acted on the instructions of the 2<sup>nd</sup> Defendant because there were certain arrangements that were in place at the time. On one occasion the 3<sup>rd</sup> Defendant accompanied Mr. Heiss when he came to collect the cash installment.

**Exhibit D20** relates to the first cash installment payment for the Plaintiff in the sum of **SR203,347.93** and that amount was collected by Mr. Heiss who signed for it.

**Exhibit D21** is likewise a document dated 5<sup>th</sup> December, 2002, relating to the second cash installment payment of **SR203,347.93** for the Plaintiff collected by Mr. Heiss who signed for it.

**Exhibit D22** relates to the third installment cash payment of **SR203,347.93** for the Plaintiff made on 13<sup>th</sup> December, 2002 to Mr. Heiss who signed for it.

**Exhibit D23** relates to the fourth installment cash payment of **SR203,347.93** for the Plaintiff made on 26<sup>th</sup> December, 2002 to Mr. Heiss who signed for it.

**Exhibit D24** relates to the fifth installment cash payment of **SR203,347.93** for the Plaintiff made on 24<sup>th</sup> December, 2002 to Mr. Heiss who signed for it.

**Exhibit D25** relates to the sixth installment cash payment of **SR203,347.93** for the Plaintiff made on 26<sup>th</sup> March, 2003 to Mr. Heiss who signed for it.

A payment for SR150,000 was made on 26<sup>th</sup> March, 2003, Exhibit D26, on conditions that that was an advance payment.

The amount of money in cash collected from the 1<sup>st</sup> Defendant by Mr. Heiss on the instructions of the 2<sup>nd</sup> Defendant totaled **SR1,220,087.58**.

The 2<sup>nd</sup> Defendant had an ongoing contract with the 1<sup>st</sup> Defendant for the repairs of mobile phone sets. There was a one off payment made by cheque to the 2<sup>nd</sup> Defendant in settlement of his invoice for such repairs. That cheque was made on 18<sup>th</sup> December, 2002 in the sum of **SR405,000.00** and it was collected by the same Mr. Heiss who signed for it. The document relating to the last stated transaction is **Exhibit D31**.

The procedure for making either cash or cheque payment as set by the 1<sup>st</sup> Defendant was that –the respective department head send invoices or other documents to Ms. Celeste with a “request for payment” together with the authority of that head of department endorsed thereon, as well as the Purchase Order etc; Ms. Celeste would then draw up another document which is forwarded to her Manager Ms. Jerina Ah Tive for authorisation.

The first such “request” was forwarded by Ms. Celeste to her Manager Ms. Jerina Ah Tive, in the name of “Soft Cell” as recipient, even the attached documents/invoices from Mr. Peter Durup the department head, were in the name of the Plaintiff. On **Exhibit D20** the words in black ink “please pay cash” followed by the words “Soft Cell” which words were then crossed out and replaced by the words “Vestalene Investment” as she was instructed by Ms. Ah Tive.

Ms. Celeste admitted that there was no documentary authority from the Plaintiff for the 1<sup>st</sup> Defendant to pay the money to Soft Cell or to the 2<sup>nd</sup> Defendant or to Mr. Patrick Heiss, however, she was instructed to give the money to the 2<sup>nd</sup> Defendant by Mr. Peter Durup. This procedure of paying cash is not something normally done by the 1<sup>st</sup> Defendant.

At that time Mr. Peter Durup was the one who initiated the request for payment, passed it to Ms. Celeste, through Ms. Ah Tive, with instruction to make the cash installments payment to the 2<sup>nd</sup> Defendant.

Mr. Durup was at the material time employed as a Manager by the 1<sup>st</sup> Defendant with responsibility which included the purchasing and repairing of mobile phones.

Mr. Durup had stated on the “purchase requisition” (**Exhibit P3**) that the method of payment was to be in 8 weekly cash installments. Mr. Durup had also instructed Ms. Celeste that the cash would be collected by the 2<sup>nd</sup> Defendant who was representing the Plaintiff. When the 2<sup>nd</sup> Defendant told her that it was Mr.

Heiss, an employee of Soft Cell, who would be collecting the cash, Ms. Celeste did not go back to inform Mr. Durup of that arrangement as that was made by the 2<sup>nd</sup> Defendant since the latter was to be out of the country.

**Exhibit D31** is a list of cheques delivered to the Superior of Ms. Celeste during the period 18<sup>th</sup> to 23<sup>rd</sup> December, 2002 and on that list the name of Soft Cell appears as receiving a cheque for **SR405,000.00** for the repair of mobiles. There had been higher sum than that that had been paid to Soft Cell in the past.

Ms. Celeste queried why such large payments were being made in cash to the 2<sup>nd</sup> Defendant but she was told that that were the instructions given by the Manager Mr. Durup on the initial request and she had to follow it.

Before those cash transactions were made by Ms. Celeste, the request was already initiated and signed by the Manager and as such she was of the understanding that approval had already been granted. She then used the cheque to collect the cash from Barclays Bank and which cash was paid to Mr. Heiss.

On the face of all its invoices the Plaintiff had instructed that payment should be by telegraphic transfer direct to its Bank Account. This is standard print on all the invoices from the Plaintiff.

At the material time availability of foreign exchange in Seychelles was not easy and cash was paid instead to the 2<sup>nd</sup> Defendant who would then have these

converted on the local market into foreign exchange and he would then arranged to have these transmitted to the Plaintiff. That was a special arrangement made in that particular prevailing circumstance.

The quantities of mobile phones that were delivered in Seychelles to the 1<sup>st</sup> Defendant, amounted to **SR1,046,862.17** and the 1<sup>st</sup> Defendant paid a total of **SR1,370,087.58**, consisting of 6 installments of **SR203,347.93** and 1 installment of **SR150,000.00**, to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants ostensibly to the credit of the Plaintiff and as such there was an overpayment by the sum of **SR323,225.41**.

The Plaintiff indeed repeatedly requested and sent notices to the 1<sup>st</sup> Defendant to pay that sum but the 1<sup>st</sup> Defendant denied the Plaintiff's claim on the ground that it has discharged all its payment obligations to the Plaintiff by having paid the sum of **SR1,370,087.50** to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants who were then trading under the business name of "SoftCell", a business undertaking, whom the 1<sup>st</sup> Defendant took as being the Plaintiff's agents in Seychelles.

The first letter of demand from the Plaintiff is dated 17<sup>th</sup> April, 2003.

A Senior Immigration Official testified and confirmed that one Mr. **Patrick Heiss** arrived in Seychelles on 23<sup>rd</sup> June, 2001 to work on a Gainful Occupation Permit (GOP) as Director of Softcell, and the GOP was to end on 30<sup>th</sup> January, 2004.

**Ms Jerina AhTive** had been working in Finance Department of the 1<sup>st</sup> Defendant, Cable & Wireless for over 10 years. She started as Manager Financial Accounting

and her current position is Financial Planning Analysis and Reporting and in 2002 she was Account Officer Transaction. She reported directly to the C.F.O. who at that time was Mr. Nabil.

Her testimonies materially corroborated the testimonies of Ms. Celeste. Ms. Ah Tive outlined in detailed the procedures existing within the organization of the 1<sup>st</sup> Defendant and she clarified her role in the process whereby the representative of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, Mr. Heiss, collected money in cash from the 1<sup>st</sup> Defendant on account of the Plaintiff.

### **Findings and Conclusions**

On the basis of overwhelming evidence before this Court I find that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were fully aware that in pursuance of an Agreement between the Plaintiff and the 1<sup>st</sup> Defendant which was constituted by exchange of correspondence, the Plaintiff, in November 2002 and December 2002 sold and delivered to the 1<sup>st</sup> Defendant mobile phone handsets to the total value of US\$196,372.00.

On that same basis, I also find that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were fully aware that the sum of US\$196,372.00 was originally agreed to be paid by the 1<sup>st</sup> Defendant by telegraphic transfers in eight weekly installments as shown on the invoices.

I further find that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were fully aware that the Plaintiff did not and never receive the sum of US\$196,372.00 or all or any part of the sum of

**SR1,370,087.50** directly from the 1<sup>st</sup> Defendant because the 1<sup>st</sup> Defendant had paid that sum to them, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, and after having collected the money from the 1<sup>st</sup> Defendant, they failed to remit it to the Plaintiff.

The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were then trading under the business name of “SoftCell”, a business undertaking, whom the 1<sup>st</sup> Defendant, for reasons stated earlier, took as being the Plaintiff’s representative in Seychelles.

The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants shrewdly, cunningly and acting in bad faith abused the trust of the 1<sup>st</sup> Defendant and passed themselves off as the Plaintiff’s authorized representatives in Seychelles for the purpose of receiving the sum of SR1,370,087.80 from the 1<sup>st</sup> Defendant.

The 1<sup>st</sup> Defendant has established to the satisfaction of this Court that it has indeed paid the total sum of SR1,370,087.80 to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants and/or to their employee upon the request of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants based on the premises that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were indeed the authorized representatives of the Plaintiff.

Having found that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants having passed themselves as the authorized representatives of the Plaintiff and having collected the sum of SR1,370,087.80 from the 1<sup>st</sup> Defendant purportedly on behalf of the Plaintiff, I further find that 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are liable to pay the Plaintiff in the sum of US\$196,372.00 with interests at the commercial rate from the 17<sup>th</sup> April, 2003.

On the basis of the evidence before this Court, I reject the defence of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants that the total sum of SR1,370,087.80 which they received from the 1<sup>st</sup> Defendant was as a result of a separate contract of sale between the 1<sup>st</sup> Defendant and them trading as Soft-Cell, and/or that that money was due to them as a result of a separate contract for service between the 1<sup>st</sup> Defendant and them trading as Soft-Cell. Had there been such contracts or such an amount was due to them from the 1<sup>st</sup> Defendant, the least that they could have done is to adduce such evidence before the Court, and this they failed to do.

### **Conclusions**

Have the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants been improperly joined as Defendants in the proceedings?

The answer is no. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were joined at the instance of the 1<sup>st</sup> Defendant after following due judicial process. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants therefore have so far been properly joined in accordance with judicial procedures.

However, whether they ought to have been made parties to this suit can only be determined at the conclusion of the case after hearing evidence of the parties.

Do the pleadings against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants disclose any reasonable cause of action against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants?

Paragraphs 8, 9, 10, 12 as well as prayer (ii) of the Plaint indeed raise matters related to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants that called for their responses, if any. In fairness to them their presence in Court to defend their interests is a matter of

natural justice. I find that the cause of action against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants is well founded and that they have been properly joined in order that the matter in issue be fully adjudicated among the parties.

Has the 1<sup>st</sup> Defendant paid that sum of US\$196,372.00 or its equivalent in Seychelles Rupees to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant?

The quantities of mobile phones that were delivered in Seychelles to the 1<sup>st</sup> Defendant, amounted to **SR1,046,862.17**.

The 1<sup>st</sup> Defendant made the following payments to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant for the benefit of the Plaintiff:

1<sup>st</sup> cash installment of **SR203,347.93** on 28<sup>th</sup> November, 2002

2<sup>nd</sup> cash installment of **SR203,347.93** on 5<sup>th</sup> December, 2002

3<sup>rd</sup> cash installment of **SR203,347.93** on 13<sup>th</sup> December, 2002

4<sup>th</sup> cash installment of **SR203,347.93** on 26<sup>th</sup> December, 2002

5<sup>th</sup> cash installment of **SR203,347.93** on 24<sup>th</sup> December, 2002

6<sup>th</sup> cash installment of **SR203,347.93** on 26<sup>th</sup> March, 2003

Advance payment of **SR150,000.00** on 25<sup>th</sup> March, 2003

The total amount of money paid out in cash by the 1<sup>st</sup> Defendant and collected by 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, by themselves or through their employee, totaled **SR1,370,087.58**.

The 1<sup>st</sup> Defendant made an overpayment of a sum of **SR323,225.41** to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant. The Plaintiff adjusted that sum by crediting the 1<sup>st</sup> Defendant the sum of **SR260,725.41** against the amount owed by the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant leaving an unpaid balance of **SR62,500.00**.

The 1<sup>st</sup> Defendant made a one off payment on 18<sup>th</sup> December, 2002 in the sum of **SR405,000.00** by cheque to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in respect of repairs of mobile phone sets. That sum is not related to the transaction in dispute.

Who is now liable to make good the sum of US\$196,372.00 or its equivalent in Seychelles Rupees with interests at the commercial rate from the 17<sup>th</sup> April, 2003 to the Plaintiff?

The simple answer to this question, for reasons stated above, is that it is the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants who are liable to make good to the Plaintiff that sum of US\$196,372.00 with interests at the commercial rate from the 17<sup>th</sup> April, 2003.

This Court finds and concludes that the 1<sup>st</sup> Defendant having paid the said sum of **SR1,370,087.58** to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, judgment would be entered in favour of the Plaintiff as against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants jointly and severally.

Who is now liable in law to make good to the 1<sup>st</sup> Defendant for that unpaid balance of SR62,500.00.

The money was collected by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants on behalf of the Plaintiff which they failed to remit. It is my judgment that it is the Plaintiff who should pay that sum of SR62,500.00 to the 1<sup>st</sup> Defendant. However, that sum would be added onto any judgment awards given in favour of the Plaintiff against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant.

Judgment is accordingly entered in favour of the Plaintiff against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants jointly and severally ordering the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to pay the Plaintiff the sums of **US\$196,372.00** and **SR62,500.00** with interest at the commercial rate from 17<sup>th</sup> April, 2003 and the whole with costs; and further judgment is also accordingly entered in favour of the 1<sup>st</sup> Defendant as against the Plaintiff and on the counter-claim of the 1<sup>st</sup> Defendant, in the sum of **SR62,500.00**.

.....  
B. RENAUD  
JUDGE

*Dated this 16 May, 2012 at Victoria, Mahe, Seychelles*