THE REPUBLIC OF SEYCHELLES

IN THE SUPREME COURT OF SEYCHELLES HOLDEN AT VICTORIA

Miscellaneous Application No. 15 of 2011

(Arising from Civil Side No 27 of 2010)

F.B. Choppy (Pty) Ltd Applicant

versus

NSJ Construction (Pty) Ltd Respondent

Basil Hoareau for the Applicant

France Bonte for the Respondent

RULING

Egonda-Ntende CJ

1. This is an application for a mandatory injunction order to compel the respondent to vacate, surrender, and hand over the site situated at Anse Reunion, La Digue, and should he fail to hand over the same order the process server to evict it from the said site. The ground of the application is set out in the supporting affidavit sworn by Mr. Choppy which is to the effect that the applicant is suffering irreparable loss as it has had to store furniture and other accessories intended for the premises at Anse Reunion, La Digue, at 2 other places on Mahe. One is rented accommodation from Gondwana Enterprises Ltd and the other is a business premise at which the applicant has had to close a bar and night club business in order to store the said furniture and

other accessories.

2. The background to this application is that the applicant had some land at Anse Reunion, La Digue and he planned the construction of self catering chalets. He contracted the respondent to be the contractor. A written contract was made. Before completion of the project the applicant came to the Supreme Court seeking to force the respondent to hand over the site on the ground of breach of contract. Basically that the respondent had failed to execute the contract in time. As a result of an agreement between the parties the court referred this matter to an arbitrator agreed upon by the parties and their counsel. The arbitrator heard the matter and made his award. He found, *inter alia*, that the applicant was substantially responsible for the delay of the contract for failing to pay the respondent money as it fell due. He ordered that the applicant do pay the respondent outstanding monies within 7 days from the date of the award including sums wrongly deducted as retention moneys from earlier certificates. The arbitrator also awarded the respondent 4 more months to complete the project.

3. The applicant did not pay the respondent as ordered. He came back to the Supreme Court seeking to set aside the award. That application was unsuccessful and the award was confirmed as a judgment of this court. While those proceedings were pending he brought the present application, seeking the eviction of the respondent from the site.

4. At the hearing of this application I was informed by Mr Basil Hoareau, learned counsel for the applicant, that they intended to appeal the decision that confirmed the arbitrator's award as a judgment of this court and therefore prayed that this application should be allowed. He offered that the applicant is willing to offer bank

guarantee for 2 years until the the appeal is heard and determined. In which case if the applicant is unsuccessful on appeal the respondent would have all his outstanding monies paid. Secondly the applicant was willing to offer the land that has been developed as security for payment of the outstanding sums of money if the appeal is unsuccessful.

5. Mr. France Bonte, learned counsel for the respondent, opposed this application. He submitted that the respondent is a decree holder or judgment creditor at this stage who is entitled to the judgment of this court being satisfied by payment. That would be the only security he would accept.

6. Mr Hoareau did not refer to any provisions of the law in support of this application. I must presume that this application is made under Section 304 of the Seychelles Code of Civil Procedure, hereinafter referred to as SCCP. I shall set it out in full.

> 'It shall be lawful for any plaintiff, after the commencement of his action and before or after judgment, to apply to court for a writ of injunction to issue to restrain the defendant in such action from the repetition or continuance of the wrongful act or breach of contract or injury of a like kind, arising out of the same contract or relating to the same property or right, and such writ may be granted or denied by the said court upon such terms as to the duration of the writ, keeping an account, giving security, or otherwise, as shall seem reasonable and just.'

7. Under this provision a plaintiff must allege as his ground for the application that the defendant is continuing or repeating the wrongful act or breach of contract or injury of a like kind, arising from the same contract, relating to the same property or right. The affidavit in support of this application does not aver that the defendant is in breach of any contract. All it claims in paragraph 6 thereof is that there has been a delay of more than one year and it has suffered irreparable damage. It is not articulated whether this delay is a breach of contract or not. Neither is it articulated

what the delay is all about. It is left to the court to presume.

8. It is clear to me that the applicant has failed to bring itself within the provisions of section 304 of the SCCP. It has not made out a ground upon which this court should consider whether or not an injunction should issue. It has failed to state both on the motion and the affidavit in support the wrongful act that the defendant /respondent has committed that would give rise to the issue of a writ for an injunction. I know that the applicant has alleged irreparable loss. This is relevant only after the applicant has put forward a wrongful act committed by the defendant either as a breach of contract, injury to property or violation of a right which is continuing or is being repeated by the defendant. It is only after this wrongful act has been put forward that a court would consider the consequences of such wrongful act. Whether or not that wrongful act would lead to irreparable loss.

9. Notwithstanding the foregoing, turning to the ground advanced by the applicant that it is suffering irreparable loss I am satisfied that this has not been made out. Irreparable loss is loss that cannot be atoned for by monetary damages. Clearly the loss he has referred to in this case is loss that can be atoned for by monetary damages. He knows what he has lost by closing up his business of bar and disco hall. He has accounts. He will be able to claim this money should he wish to do so. Likewise he has hired a building to act as a warehouse. He is spending money that is ascertainable. If this is the loss it has suffered it will be able to claim this loss. It is not an irreparable loss.

10. With regard to issue of irreparable loss, the words of Lord Diplock, in American Cyanamid Co v Ethicon Ltd, 1975 (1) All E R 504, at page510, are instructive. He states,

> '… the governing principle is that the court should first consider whether if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared at that stage. If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If the damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in such a financial position to pay them, there would be no reason this ground to refuse an interlocutory injunction.'

11. I adopt this reasoning. Damages that the applicant may suffer in event that this application is not successful are in the first place measurable or quantifiable in monetary terms. There is no allegation that the respondent would not be able to pay the applicant should the applicant succeed on his intended appeal. As I write this ruling, there is no evidence that an appeal has been lodged. In the result I see no merit in this ground.

12. In light of the foregoing I am satisfied that this application is without merit. It is dismissed accordingly with costs.

13. Before I take leave of this matter, it would appear that the applicant has paid the respondent less than 50% of what the respondent has expended on the construction of the project at Anse Reunion, La Digue. He was ordered to pay the outstanding sums of money within 7 days by the Arbitrator so that the respondent would be able to

complete the works in question within 4 months, on the expiry of which, the respondent would hand over the premises. He did not do so. It appears to me that all the applicant has been interested since this suit was commenced was the hand over to him of the project works without him meeting any part of his obligations. This application is one other application in that line of action.

14. The award, and now judgment, provided the parties with the procedure to bring their relationship to an end, and there are several other steps that the applicant and respondent, both of them, must take together to bring their relationship to an end. One of them is to retain a quantity surveyor to value the final works at hand over. The applicant can participate in all these steps without giving up his right to appeal and vindicate the rights he wants vindicated on appeal. In my view it will be the only way that brings this contract, or their relationship, whatever its nature in law, to an orderly end.

Signed, dated and delivered at Victoria this 3rd day of May 2011

FMS Egonda-Ntende
Chief Justice