

IN THE SUPREMECOURT OF SEYCHELLES

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**Reportable**

[2019] SCSC 297

CS 27/2010

CS 29/2010

**F.B CHOPPY (PROPRIETARY) LIMITED**

*(rep by Elvis Chetty)*

**Plaintiff**

and

**NSJ CONSTRUCTION PTY. LTD.**

**1<sup>st</sup>Defendant**

And

**GREGOIRE PAYET**

*(both rep. by Frank Elizabeth and France Bonte)*

**2<sup>nd</sup> Defendant**

And in the matter of

**NSJ CONSTRUCTION PTY LTD**

**Plaintiff**

and

**F.B CHOPPY (PROPRIETARY) ALIMITED**

**Defendant**

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**Neutral Citation:** *F.B (Proprietary) Limited v NSJ Construction Pty. Ltd* CS 27 of 2010 and *NSJ Constriction Pty Ltd v F.B Choppy Proprietary Limited* CS 29 of 2010 (08 April 2019)

**Before:** Vidot J

**Summary:** Breach of Contract for construction, Plaint no disclosing a cause of action and public policy

**Heard:** 9-10-17, 10-10-17, 12-10-17, 13-10-17, 06-02-18, 27-02-18, 17-07-18, 13-09-18

**Delivered:** 08<sup>th</sup> April 2019

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**JUDGMENT**

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## VIDOT J

### Background

[1] These cases are rather protracted, partly caused by the Court and partly by the parties. It was filed in 2010. Upon consent of the parties, the matter was set for arbitration pursuant to section 205 of the Seychelles Code of Civil Procedure (“the SCCP”). On 21<sup>st</sup> September 2010 the arbitrator made an award “in full settlement and satisfaction of all claims and counter claims submitted to arbitration.” However, in terms with section 206 of the SCCP, on 05<sup>th</sup> November 2010 F.B Choppy (Proprietary) Limited filed objections to this award, despite parties having agreed that the award would be final and binding. On 04<sup>th</sup> March 2011 the Supreme Court dismissed objection to the award and accordingly entered judgment in terms of the award. The decision was appealed against to the Court of Appeal and it was decided that in the interest of justice, the case will be submitted back to the Supreme Court for fresh trial. The Judge to whom the case was original assigned did not make a real effort to have this matter resolved. In fact he spent 6 years just mentioning the cases. On behalf of the Judiciary, I apologise to the parties for that. The cases were subsequently reassigned to the undersigned Judge. The case file was in bad shape and difficult to assess its status, as at some point it appears that the case filed by NSJ Construction (Pty) Limited was dismissed for non-representation and application for reinstatement filed but there was no Ruling to such application. The parties were given time to reconstruct the file so that we agreed as to the pleadings that were relevant. However parties agreed that in terms with section 106 of the SCCP agreed that both case CS27 of 2010 and CS29 of 2010 that were before Court should be consolidated.

[2] F.B Choppy (Proprietary) Limited (Plaintiff / Defendant) (hereafter “Choppy”) entered into a contract with NSJ Construction Pty Ltd (Defendant / Plaintiff) (hereafter “NSJ”) for the construction of self-catering chalets on property owned by Choppy situate at La Digue, known as parcel LD 167. The agreement is dated the 11<sup>th</sup> April 2008 (exhibit P2). The construction was to comprise of the building of 6 one bedroom chalets, 2 two bedroom chalets, 1 “grand Kaz”, 1 workers house (2 bedrooms) and a reception room (including office). The scope of works included electrical and plumbing installations and

provisions of fixtures such as toilets and water tanks. The contract was allegedly extended later to include a laundry and additional room in the workers' house. However that is matter of dispute between the parties. The contract price was Seychelles Rupees Five Million Five Hundred (SR5.5M). That sum was also subsequently revised to Seychelles Rupees Six Million Five Hundred and Fifty Six thousand (SR6,556,000.00) due to a devaluation in the rate of the rupee vis a vis other major currencies. It was a term of the contract that the contract price was payable 60% in Seychelles Rupees and 40% in Euros.

[3] It was further terms of the contact that Choppy would make a payment of 25% of the contract price amounting to SR825,000.00 and € 45 , 833.00 before commencement date which was set on 02<sup>nd</sup> May 2008. The completion date was 12 month thereafter that is 01<sup>st</sup> May 2009. That completion date was later revised, but the parties disagree as to the revised date of completion. The revised completion date, it was argued, was extended to 13<sup>th</sup> July 2009 and Choppy agreed to abandon and forgive any penalty leviable for this delay for that period. This was because the scope of work was extended to include a laundry and staff quarters. In his testimony Benjamin Choppy for the Choppy argued that construction of these buildings is disputed. Choppy argues that they never gave consent for such for construction of such buildings. However in his defence it is alleged that these were extra works and to be paid separately at the completion of the contract. The payment of the balance was to be settled every 3 months in the sum of SR960,000.00 which was to reflect the value of work carried out during that period but subject to NSJ making a claim to be supported by a valuation report of the quantity surveyor (QS) employed by Choppy. It was a further term of the agreement that a retention fee of 5 % of the contract price amounting to SR375.800.00 (of the revised contract price) would be retained until the end of the defects liability period. The penalty for late finish of the works was set at SR2,111.00 and €272 per day.

[4] It is averred by Choppy that the 2<sup>nd</sup> Defendant is the director of and the personal guarantor for NSJ' s obligations under the said contract. It is averred that he provided guarantee that he would therefore make himself ipso facto a party to the contract and discharge the obligations of NSJ until same was fully discharged.

[5] NSJ filed case CS 29 of 2010 whereby they allege that they were not paid to the full of all invoices and that they completed to 99% of the contract and that there is an outstanding of SR 3,137,748.66 (60% in Seychelles Rupees and 40% in Euros) which Choppy is indebted to them.

**Causes of Action**

[6] First it is important to note that Choppy filed a plaint seeking damages in the sum of SR2,376,013.00 and €81,669.24 against the NSJ and the 2<sup>nd</sup> Defendant. In terms with clause 6 (2) of the Agreement and claiming breaches of the contract that by letter dated 14<sup>th</sup> January 2010 (exhibit P6), Choppy terminated the contract. NSJ was requested to hand over the site but that was not complied with despite a Court of Appeal order. The keys were not handed over. Choppy had to take possession by getting a carpenter to break the locks. In view of that breach as alleged by Choppy, they had to engage Ascent Project (Seychelles) (Pty) Ltd to complete the works at additional cost of SR600,000.00. Therefore, Choppy is suing NSJ and the 2<sup>nd</sup> Defendant, as guarantor, for failure to complete the work and for some defects in the works.

[7] Their particulars of claim are as follows;

	SR	Euros
Penalty for late completion (July 14 <sup>th</sup> 2009 to January 28 <sup>th</sup> of 2010 at SR2,111 and Euro 270 (per day) and Continuing.	417,978	53,460
Loss of business and profit at SR300 per room 12 months Per day from 1 <sup>st</sup> August 2009 to 28 <sup>th</sup> January 2010 and Continuing.	475,200	
Penalty interest on the loan at 18% from the 1 <sup>st</sup> November 2009 to 28 <sup>th</sup> January 2010 and continuing (SR27,500 monthly).	82,500	16,059.24

Remobilization costs of new Contractor from Mahe to La Digue	75,000	
Further delay in completion as per estimate of new Contractor (45 days x Sr.2111 and Euro 270)	94,995	12,150
Warehouse storage of furniture and imported Movables for the business	211,390	
Prejudice, inconvenience, extra travelling and Professional cost as result of the delay in Completion	150,000	
Cost of completion of the unfinished construction Works and remedying the defective works	868,950	
Total	2,376,013	81,669.24

[8] NSJ too filed a case against Choppy (CS29 of 2010) and sues the latter for SR3,173,784.66 with interest at the commercial rate of 10% and for an order of inhibition against parcel LD 167 to prevent any dealing with it, against Choppy. It appears that NSJ,s contention was that they found themselves in difficulty due to cash flow problems caused by Choppy making payment late and that at times there was a short fall in payment which did not reflect the threshold value of the works on site. It is alleged that Choppy always settled the invoices in a lesser amount than the sum invoiced.

[9] In its Defence to Choppy’s Complaint (CS27/2010), NSJ also raised a plea in limine litis. This relates to the complaint not disclosing any reasonable cause of action against the 2<sup>nd</sup>

Defendant, Mr. Gregoire Payet and that the action filed against the 2<sup>nd</sup> Defendant being frivolous and vexatious and therefore should be struck out.

- [10] They further argue that the extension of time was allowed at least until 13<sup>th</sup> July 2010 and that Choppy was not making payment and that it took Choppy, unreasonable time to accept the proposal to revise the price of the contract. Choppy came up with a proposal only on 17<sup>th</sup> February 2009 (exhibit P2(a)). It also averred that through Gibb (Seychelles) Ltd, (hereafter “GIBB”) consulting engineering employed as its consultant company for the project by NSJ issued letters for additional works, namely laundry and staff quarters, requesting extension by 62 days for effecting additional works. The completion date was subsequently extended to 13<sup>th</sup> July 2009.

## **Evidence**

- [11] Mr. Benjamin Choppy testifying on behalf of Choppy stated that works were facilitated by a loan from Barclays Bank as per Facility Letter (exhibit P5) produced to Court. The loan was for Seychelles Rupees four million (SR4,000,000/-) and Euros four hundred thousand (€400 000/-) and an overdraft of Seychelles Rupees two hundred thousand (SR200,000). That is not in dispute. The Rupee loan had a 7 year term facility expiring on 31<sup>st</sup> December 2014, the Euro loan, 6 year facility expiring on 31<sup>st</sup> December 2014 and the overdraft, 1 year facility expiring on 31<sup>st</sup> December 2008. The Bank was to make payment upon presentation of invoices supported by a Quantity Surveyor approving the threshold of the progress of work, save for the 25% of the total contract price that was payable in advance. There was also a retention fee of 5% of the contract to be retained until 12 months after the completion date provided that there were no defects to the construction.
- [12] The works started slightly late, on the 08<sup>th</sup> May 2008. This according to NSJ was due to the late payment of the advance payment. Choppy claimed that they made payment and even in excess of the 25 percent (25%) of the total price that was due. Mr. Choppy avers that initially Choppy advance payment made payment of the following amount; €3,542/-,

€32,000/-, €15,709/- and €18,766,28 making a total of €70,017.28. For the rupee component the advance payment was settled and thereafter as with the Euro component was paid an instalment.

[13] Mr. Gregoire Payet, director of the NSJ and the 2<sup>nd</sup> Defendant was not called as witness. There was agreement that the Court would rely on an affidavit he had provided early on in the case but provided that he was made available for cross-examination to Counsel for Choppy. However, due to ill health it was agreed that Mr. Payet would not be called. That being the case, this Court could not rely on his affidavit. Counsel for NSJ and Mr. Payet, tried to present the case for his clients through rigorous cross examination and by calling Mr. Gerard Lafortune of GIBB as the only witness for them.

[14] Mr. Lafortune testified that the NSJ encountered delay because payment was being settled late and there was always a shortfall. That caused shortages in cash flow for NSJ, thereby occasioning delays. He said that they had some meetings with Mr. Choppy regarding that issue but the matter was not resolved. He produced correspondence such as exhibits D13 and D16 requesting that payment be done on time and in full. However, he complained that despite such reminders, the status quo remained. He also referred to additional works that needed to be done. He stated that it took some time for Choppy to agree to the same and to the price. I however have no document to show that there was agreement as to the price. Neil Mederick, the QS on his part testified that he observed a slow down and a reduction in the number of workers on site.

[15] It was further argued by Choppy that works that were ordinarily part of the contract, contrary to reasonable expectations were termed and billed excessively by the NSJ as extra works which work was yet to be completed allegedly due to non-payment by the Choppy. NSJ caused its representative to issue an additional request of SR4,994,150 for what it termed as extra works and a unilateral extension of completion date of 4 months.

[16] On 14<sup>th</sup> January 2010 after final evaluation of works by the Quantity Surveyor, the Plaintiff terminated the contract on account of the breach by NSJ in terms of clause 6 of

the contract. NSJ failed to surrender the site to Choppy and threatened legal action for non-payment of invoices. On the 28<sup>th</sup> of January 2010 in terms of Clause 6 of the contract, the Choppy determined the contract due NSJ's breach and made formal demand under the contract and for damage and loss.

- [17] After termination of the agreement, NSJ failed to surrender possession and control of the site to the Choppy. It necessitated the Court of Appeal to make an order that Choppy be given possession of the site.

### **Delay in Completing the Works**

- [18] The delay in completing the works as per allegation was due to lateness and inadequacy of payment and the non performance of the work to the maximum. Gerard Lafortune of gave various examples of that. Invoice number 2 was issued in February 2009 and was paid on 17<sup>th</sup> March of 2009. It was for the sum of € 17,000/- and SR576,000/-. The sum paid was €15,709 and SR581,453/-. Invoice number 3 was issued paid in 17<sup>th</sup> July 2009 was too settled sometime after the invoice was issued, and a sum of SR1,556,759,- and only the sum of SR518,400/- was paid. There were other examples that were highlighted. In fact NSJ was concerned by this situation that on 18<sup>th</sup> May 2009, GIBB addressed a letter (Exhibit D12(a)) to Choppy expressing concerns of their clients. Invoice number 3 was attached to that letter. There was demand that outstanding amount on Invoice number 2 and payment for additional works for the housing unit for staff and laundry are settled. On invoice number 3 the amount due was SR1,556, 750.00 and €30,614.55. However, I note from exhibit D15(a) which is a letter dated 02<sup>nd</sup> Of November 2009, to which Invoice No. 4 was attached, there is no mention of any late or insufficient payment. However, exhibit 15(b) gives a breakdown of payment made and the balance due which sum at that time stood at SR2,461,003.66

- [19] Mr. Lafortune also testified about meetings he had as representative of NSJ with Mr. Choppy on behalf of Choppy. Mr. Choppy on his part does not recall many of these meetings but was clear that they met on at least 2 occasions at Aartii Chambers where the



office of GIBB is situated. At one of those meetings Mr. Choppy stated that he was delivered a letter on behalf of Mr. Payet, Director of NSJ. The letter refers to a meeting that Mr. Lafortune had with Mr. Choppy had on the 4<sup>th</sup> August 2009. That is evidenced by exhibit D16. Again in that letter Mr. Lafortune draws attention to the fact that Choppy had been notified before that payments have not been made within a reasonable time and are not up to date and as a result performance of the works by the contractor which has witnessed delays. This was followed by another letter on the 16<sup>th</sup> November 2009, whereby NSJ acknowledges that there has been delays and that they undertake to complete works by December 2009, but that was on condition that Choppy “*making full payments of works according to contract plus the adjusted sums which was agreed (due to escalation in prices) as well as the sums for additional works.*” This was so despite Lafortune testifying that initially Choppy extended the date of completion to 15<sup>th</sup> October 2009. Nonetheless, I note that on 21<sup>st</sup> August 2009 Choppy wrote a letter (exhibit D14) expressing concerns about the delay.

[20] Mr. Mederick, QS for Choppy, testified that he noticed a slowdown in the rate of works by SNJ after the 2<sup>nd</sup> and 3<sup>rd</sup> invoices but that Choppy had given an extension of 3 months on the completion date that would extend the contract to 13<sup>th</sup> July 2009 (exhibit D1). Such extension did not arise under clause 5 of the Agreement but the fact that it was agreed upon makes it valid.

[21] There were also further allegations that there was delay in Choppy agreeing to the revised contract price due to the devaluation of the Rupee vis a vis other major currency. On 28<sup>th</sup> November 2008, well after the 2<sup>nd</sup> instalment was due, Mrs. T. Lecordier, project engineer for GIBB had by letter written to Choppy (exhibit D8) suggested a revision of the contract price.

[22] I find that there were delays in the works occasioned by both parties. It took some time before NSJ complained of late and insufficient payment as being the cause for the delays when obviously they could have taken action against Choppy for breach of the Agreement. In any case payment was done through the bank after an invoice is submitted

and the QS has approved the threshold of the works performed. That in my mind could have been the reason for the delay in payment getting through. Payment was to be made pursuant to the QS's approval, so I do not understand why there was a shortfall. If the QS approves as per invoice, then there is no reason for the bank not to have made payment in full. It would make no sense for Choppy to delay and not make payment in full when he had borrowed a loan from the bank, when obviously in making payment late and inadequate would cause works to delay. A delay in completion of works would translate in late opening of the hotel which would be detrimental to Choppy as his interest would start to accrue and as a whole earning would be delayed and cause additional burden in Choppy servicing the loan. However, Choppy should have notified the bank of this anomaly when it was brought to their attention. I further don't believe that the delay on behalf of NSJ was solely due to the lateness in and making inadequate payment. There would have been other factors contributing towards that. Neil Mederick clearly stated that, subject to no challenge, from the time the 2<sup>nd</sup> instalment was made there was a reduced number of workers on site.

### **The Absence of a Valid Licence**

[23] The Agreement was signed on 11<sup>th</sup> April 2008 and the work was to commence on 2<sup>nd</sup> May 2008, at which time SNJ had a valid licence. However, on 23<sup>rd</sup> June 2008 that licence lapsed and was not renewed until the 24<sup>th</sup> June 2009. NSJ operated without a licence for a year. This is contrary to clause 2 of the Agreement.

[24] Article 1108 of the Civil Code provides that there are four conditions essential for validity of a contract. These are (1) the parties have to consent to the contract, (2) they must have capacity to contract, (3) there must be a definitive object which forms part of the subject matter of the contract and (4) the agreement must not be against the law or contrary to public policy. We are here concerned with (4) and particularly whether the agreement was against public policy.

- [25] The law attaches several prerequisites to a building or maintenance contract. These prerequisites are extensive and can be found, inter alia, in the Licences Act 2010 (Building and Maintenance Contract) Regulations.
- [26] In order for one to engage in business activity, one requires a licence. The Licences Act specifically prohibits persons from engaging in carrying out activities, professions, trades or business, which are licensable activities without a licence. (see section 209(1)(a)) and to do so is an offence contrary to section 24(4) of the said Act, which provides that a person who contravenes section 20(1) or contravenes any of the regulations is guilty of an offence.
- [27] The above shows that the Licences Act: (a) makes licensing a prerequisite for certain licensable business activities; (b) prohibits the performance of licensable business activities without a license; and (c) allows the creation of regulations to regulate specific licensable businesses such as building and maintenance.
- [28] Clearly then, these instruments guide the building and maintenance licensing regime, and make it illegal for persons to perform work without a licence. The regulations especially limit the kind of work licence holders in the various classes may do. It would seem contrary to the law, and public policy, to permit an unlicensed person who did build work, or a building contractor who has done work of a class higher than the one he had a licence for, to claim damages in respect of loss suffered for work done. This is because public policy is engrained in Seychellois contract law.

### **Public Policy**

- [29] Article 6 of the Civil Code of Seychelles stipulates that ‘it shall be forbidden to exclude the rules of public policy by private agreement. Rules of public policy need not be expressly stated.’

- [30] Other provisions which contain provisions on public policy are articles 1131, 1132 and 1133 of the Civil Code of Seychelles:
- [31] Article 1131 states that an obligation which is against public policy shall have no legal effect.
- [32] Article 1132 provides that an agreement shall be valid although the reason for not making is not stated.
- [33] Article 1133 provides the object of an agreement is unlawful when it is prohibited by law or when it infringes the principles of public policy.’
- [34] NSJ did not possess a ‘Building Contractor’ licence as required by the Licences Act as per the Licences (Building and Maintenance Contractors) Regulations. They possessed at the time of the agreement a class 4 licence that only permits carrying out of maintenance works. That was a misrepresentation of NSJ.
- [35] Despite this entrenched status, the Civil Code does not provide a definition of public policy. As a result, what constitutes public policy has largely been left to the courts to determine. For example, the Court of Appeal in **Monthy v Buron (SCA 06/2013) [2015] SCCA 15 (17 April 2015)** para 14 defines public policy as “*denoting a principle of what is for the public good or in the public interest.*” But the court agreed with Chloros’ view that the concept of public policy is constant and changes in accordance with the needs of society. (See AG Chloros, *Codification in a Mixed Jurisdiction: The Civil and Commercial Law of Seychelles* North Holland Publishing (1977) at 17).
- [36] In **Monthy v Buron** (supra), the court went into a detailed discussion about the place of public policy in Seychellois law, its relationship with the ‘cause’. It looked at older cases, like **Jacobs and anor v Devoud (1978) SLR 164** where Sauzier J stated that where the

cause of an agreement is against the law or against public policy, the obligation is invalid under article 1108. **Corgat v Maree (1976) SLR 109**, where Sauzier approximated cause to the reason for making an agreement. (see para 14 of **Monthy v Buron**).

[37] **Monthy v Buron** was about an agreement for the construction of a three-bedroom house. Although the contract price was expressed in Seychelles rupees there was an agreement between the parties that the contract price would be paid in pound sterling, at a rate obtained on the black market, and not the legal bank rate. So in effect, the dispute concerned a black market deal. The court found that the object of the contract between the parties was the construction of a house, but that the reason for the agreement was that payment for the contract would be made in foreign exchange at the black market rate. Dealing with currency at the black market rate cannot be a valid reason for entering into a contract, the court said, as it offends against the Foreign Exchange Act 2009. The agreement, therefore, was found to be against public policy.

[38] A court cannot endorse an agreement that is against public policy (See **Monthy v Buron** para 16). The rule is contained in the maxim of *ex turpi causa* which is also a concept known to the English common law.

[39] The fact that for at least an entire year, June 2008 to July 2009, NSJ was not in possession of a valid licence. The Court cannot condone such disregard for the law that in order to carry out business as a building contractor a licence is needed, In operating without a licence NSJ was acting against public policy. However, we also learn that for the period that it had a licence, under which it operated, that licence was for a building class that did not allow him to undertake such construction as building a hotel. He had only a maintenance contractor's licence. Again that was against public policy. However, Mr. Rajesh Pandya of Ascent Projects testified that the works was of good workmanship and in fact Choppy has not made any serious complaints that the works was not of good

standard and neither had they encounter any major problems regarding the quality of construction. Therefore, I will not penalise NSJ for that. Nonetheless any averments or claims made for any works done by NSJ at the time it operated without a licence shall not be considered or granted.

[40] The court explained the ex turpi defence as follows (**Euro-Diam Ltd v Bathurst** at 35 – 36.):

‘(1) The ex turpi causa defence ultimately rests on a principle of public policy that the courts will not assist a plaintiff who has been guilty of illegal (or immoral) conduct of which the courts should take notice. It applies if in all the circumstances it would be an affront to the public conscience to grant the plaintiff the relief which he seeks because the court would thereby appear to assist or encourage the plaintiff in his illegal conduct or to encourage others in similar acts: see (2)(iii) below.

The problem is not only to apply this principle, but also to respect its limits, in relation to the facts of particular cases in the light of the authorities.

(2) The authorities show that in a number of situations the ex turpi causa defence will prima facie succeed. The main ones are: (i) where the plaintiff seeks to, or is forced to, found his claim on an illegal contract or to plead its illegality in order to support his claim: see e.g. **Bowmakers Ltd. v. Barnet Instruments Ltd. [1945] K.B. 65, 71**. For that purpose it makes no difference whether the illegality is raised in the plaintiff's claim or by way of reply to a ground of defence, see **Taylor v. Chester (1869) L.R. 4 Q.B. 309**, Other illustrations are **Gascoigne v. Gascoigne [1918] 1 K.B. 223** and **In re Emery's Investments Trusts [1959] Ch. 410**, approved by the Court of Appeal in **Tinker v. Tinker [1970] P. 136**.

(ii) Where the grant of relief to the plaintiff would enable him to benefit from his criminal conduct: vide **Cleaver v. Mutual Reserve Fund Life Association [1892] 1 Q.B. 147, 156**, per Fry L.J., **In the Estate of Crippen [1911] P. 108**; **Beresford v. Royal Insurance Co. Ltd. [1938] A.C. 586** and **Geismar v. Sun Alliance and London Insurance Ltd. [1978] Q.B. 383**.

(iii) Where, even though neither (i) nor (ii) is applicable to the plaintiff's claim, the situation is nevertheless residually covered by the general principle summarised in (1) above. This is most recently illustrated by the judgment of **Hutchison J. in Thackwell v. Barclays Bank Plc. [1986] 1 All E.R. 676**, in particular at pp. 687, 689, as approved by this court in **Saunders v. Edwards [1987] 1 W.L.R. 1116**,

[41] Reverting to **Monthy v Buron**, and with the above principles in mind, it seems clear that a claim for damages resulting from a contract that has been tainted by some illegality ought to fail. But, the other contracting party has to come to court 'with their hands clean'. In other words, where they engaged the build service with the full knowledge that the person is unlicensed, or has a licence in a lower class but nevertheless engaged them for works of a different class, they may not rely on the contractor's illegal or immoral acts to get out of payment for works done. Choppy had no knowledge of the misrepresentation or that NSJ operated without a licence.

#### **Plea in limine litis; the Plaintiff not disclosing a cause of action against the 2<sup>nd</sup> Defendant**

[42] In its Amended Statement of Defence filed on 10<sup>th</sup> October 2017, NSJ raised a plea in limine in that the Plaintiff discloses no cause of action against the 2<sup>nd</sup> Defendant and ought to be struck out and that the action filed against the 2<sup>nd</sup> Defendant is frivolous and vexatious and should therefore be equally be struck out.

- [43] The 2<sup>nd</sup> Defendant is being sued as guarantor of NSJ under the Agreement dated the 11<sup>th</sup> April 2008. Clause 8 of the Agreement states thus; *The undersigned person, Gregoire Payet, acting for and behalf of NSJ Construction (Pty) Ltd, as a director, agrees to the offer of personal guarantee, as a guarantor to the contractor’s obligation under this agreement until those obligations are fully discharged.*”
- [44] In its Amended Complaint of 26<sup>th</sup> September 2017, Choppy actually sues the 2<sup>nd</sup> Defendant in that capacity and in fact they plead that the 2<sup>nd</sup> Defendant has made himself ipso facto a party to the agreement by virtue of offering a personal guarantee to the NSJ obligation until fully discharged.
- [44] Unfortunately, Counsels from both sides did not address me on that issue. Indeed, Counsels did not file any submissions despite being granted extended time periods for so doing. This is a disappointment. Nonetheless, since pursuant to clause 8 of the Agreement the 2<sup>nd</sup> Defendant had to offer a personal guarantee, as a guarantor to the Agreement, I hold that he has been correctly joined as a party and therefore shall bear liability should this Court decides in favour of Choppy.

### **NSJ’s Complaint**

- [45] I’ve had serious concern with the Complaint filed on behalf of NSJ in case number 29 of 2010. The complaint despite rehearsing and pleading aspect of the Agreement between the parties falls foul of section 71 of the SCCP, see **Gallante v Hoareau** [1988] SLR 122. That is because no cause of action is specifically pleaded therein. It does not talk of and breach which would have been necessary when one is claiming or sues under contract. As such, due to this irregularity I have no option but in terms with section 92 of the SCCP strike out and dismiss that Complaint, vide **Sylvette Monthy v Seychelles Licencing Authority & Anor. SCA 37/2016** (delivered on 14<sup>th</sup> December 2018) It is worth noting that in the aforementioned case, the Court of Appeal cited **Tex Charlie and Marguerite Francoise, Civil Appeal No. 12 of the 1994** (unreported) in which that Court of held that *“the system of Civil justice in this country does not permit the court to formulate a case for the parties after listening to the evidence”*.



## Termination Of Contract

[46] Choppy's claim is listed above but before I consider the claim, I consider that there was a breach of the Agreement and I find that some of the breaches cannot be attributable to NSJ only. Article 1142 of the Code provides that "*Every obligation to do or refrain from doing something shall give rise to damages if the debtor fails to perform it*" On 14<sup>th</sup> January 2010, then Counsel for Choppy, Mr. Charles Lucas, wrote to the 2<sup>nd</sup> Defendant as Director of NSJ informing that apart from the delay that has marred progress of work, that the contract is being determined in terms with clause 6 of the same. He further agrees that there were payments to be made on both side and that the computation was being made.

[47] However, on the 28<sup>th</sup> January 2010 the same lawyer wrote another letter, stating that the Agreement is being terminated and provides that NSJ was indebted to them in the sum of Seychelles Rupees One Million Three Hundred and Ninety Five Thousand and Six Hundred and Seventy Three (SR1,395,673/-) and Euros Sixty Five Thousand and Six Hundred and Ten (€65,610/-) That said, that though there was semblance of giving notice through some of the correspondence between the parties, to have the work completed on time, no notice in terms with Article 1139 of the Code was ever given, vide **Attorney General v Armitage [1956 – 1862] SLR No. 8**. The correspondence even if they refer to lateness in completing the works dealt with other issues such as short payment. Therefore, I would take everything that matters as to delay in delivering the works and matters associating therewith happening before was 28<sup>th</sup> January 2010 as being condoned.

## Extra Works

[48] Whilst being rigorously cross examined by Mr. Elizabeth, Counsel for NSJ, Mr. Choppy was adamant that Choppy did not agree to additional works being done. That it was unilaterally decided by NSJ. He remarked that that he asked Gerard Lafortune not to do any additional work and to do work as per contract and as per the plans. However, no plan was exhibited but I take it that unless the buildings to be so constructed are on the plans, there will be no possibility of so building as to do so would be against Seychelles planning regulation. Mr. Choppy also stated that it was not mutually approved that it

would cost Four Million Nine Hundred Thousand (SR4.9M). Choppy produced a letter (exhibit P7) from Mr. Lucas in which he stated that there is a need to reach an agreement as to what should constitute extra works and expressed concern that the plans were not explicit as to what would constitute the terms of the contract. There was a further letter (exhibit P8) dated 17<sup>th</sup> November 2009 from Mr. Lucas in which it is protested that the sum quoted for extra works is excessive and unjustifiable and in actual fact do not constitute extra works.

[49] By letter dated 28<sup>th</sup> November 2008, (exhibit D3), Gerard Lafortune had written to Choppy and sent a summary of additional work done in the sum of SR339,220/-. There does not seem to have been a reply to that letter. However, on 17<sup>th</sup> November Mr. Charles Lucas, on behalf of Choppy had by exhibit P8, afore mentioned, stated that *“the construction of the laundry and of staff quarters building have been the principal reason for the delay”*. There was to be a staff quarters and a laundry as part of additional work. Indeed, in evidence (proceedings of 27<sup>th</sup> February 2018 (a.m)) Mr. Choppy stated that he agreed to the laundry and staff quarters to be built, though he maintained that he told NSJ to build according to his approved plan. He also agreed to the site clearing. He further added that these works were separate from the contract and that at that time it was agreed that the revised completion date would be 13<sup>th</sup> July 2009. Nonetheless,

[49] It is unfortunate that NSJ did not produce any documentary proof that the price of SR4.9 was agreed upon as costs of extra works. There is no doubt that from the correspondence and evidence given and under cross examination by Mr. Choppy above referred, that there was some form of agreement for the same. Choppy always disputed the proposed contract price. I would think it absurd that they would accept that quote which amounted to about two thirds of the price for the hotel project as per the agreement. However, the extra work was done and Choppy benefitted from that and these are matters I shall consider in the award to be made.

### **Other works and Expenses**

[50] Choppy had to hire Ascent Projects in order to complete the works after determination of the contract. They charged SR600,000/- for which they were paid. Mr. Pandya from that

company also made clear that the works that they performed was to do with incomplete works and not from the “snagging” list. So Choppy should be entitled to that head of damages.

[51] Furthermore, Mr. Bernard Lucas gave evidence that he did some painting, varnish and changing locks for Choppy for the sum of SR150,000/- He produced a receipt which he said was prepared by Mr. Choppy. In evidence he stated that he had two other workers and they were paid SR500/- daily and that it was Choppy that bought all materials. They also worked 5 to 6 days per week. Therefore, SR500/- for 3 months (6 days) for 3 men would amount approximately SR117,000/- for which NSJ will be liable.

### **The Claim**

[52] Choppy is claiming the sum of SR 2,376,013/- and €81,669.24. The Agreement was terminated on 28<sup>th</sup> January 2010. The certificate of occupancy was obtained on 22<sup>nd</sup> March 2012 (exhibit P2) and the Licence to operate the hotel on 2<sup>nd</sup> April 2012. Ascent Project only provided a quote for completion of the works on 31<sup>st</sup> August 2011, approximately 7 months from the date of termination and completed on 29 December 2011.

[53] According to NSJ the sum due and owing is SR3,137,784.66. Choppy on their part alleges that payment was made according to the threshold of the approved work. The invoice needed the approval of its QS, Mr. Mederick. However payment was done through the bank but not all payment was made to NSJ. Some of the payment was made directly to Mr. Gregoire Payet upon his instructions. I do believe Choppy on that but unfortunately that makes it to difficult assess that is not clear from the Bank Ledgers (exhibit P3 and P4). I stated that since NSJ was for 1 year operating without a licence, I will deem the 2<sup>nd</sup> and 3<sup>rd</sup> invoices to have been settled in full. Therefore payment as per exhibits P3 and P4 total to SR2,454,200.00 (783,750 + 576,050 + 576,000 +518,400) and €111,875 (43,542 + 32,000 +17,445 +18,879). It was agreed the exchange rate would be SR15 to the Euro. That is a total is SR1,678,125. That gives a grand total of SR4,132,325

- [54]. Choppy also paid SR600,000.00 to Ascent Projects and SR117,000.00 to Bernard Lucas. That amounts to SR717,000.00. Add that to the above mentioned total, it gives a total of SR4,849,325.00. Based on the contract, Choppy would have owned NSJ SR1,707,675.00. (SR6,556,000 – SR4,849,325) However, I have not factored in the cost of paint and varnish which cost was not made available to me and the cost of extra works.
- [55] Choppy claims SR417,728.00 and €53,460.00 for late completion. I will consider that the sum would have been a lot more since the date of practical completion is 29<sup>th</sup> December 2011 when Ascent Projects completed the work. That sum is therefore allowed.
- [55] I consider the loss of business to be calculated from the date of letter of termination to the date of practical completion. But Choppy is claiming less at SR475,000.00. However, I shall be deducting 20% from that as there was no guarantee that all rooms would have been occupied daily. Therefore, I award SR380,000.00.
- [55] I allow the penalty interest of SR82,500 and €16,059.24.
- [56] No evidence was led as to the cost of remobilization of new contractor from Mahe, Therefore that claim of damages is denied.
- [57] Loss for further delay in completion as per new contractor of SR94, 996 and €12,150,00 is allowed.
- [58] I award only SR190,000 storage. That is SR10,000.00 x 19 months.
- [59] There was no evidence adduced to establish prejudice, inconvenience extra travelling and professional cost.
- [60] The claim adds a total of SR1,165,224 and €81,669.24 (x 15 = SR1,225,038.06). Therefore, subtracting the rupee sum from the sum Choppy would have owned NSJ that would leave a SR542,443.00 and to subtract the Euro component therefrom would make NSJ indebted to Choppy in the sum of SR682,595.06.
- [61] NSJ claims that there was extra or additional works carried out. They quoted SR4.5 million as the price. Choppy disputes that though they admit that indeed there were extra

or additional works. There is no documentary proof of the acceptance of that price for extra works. NSJ carried out works for one year without a licence contrary to public policy. They were nonetheless paid. Therefore, as a penalty I assign these amount paid during that period when NSJ operated without a licence as payment for extra and additional works.

[62] I make no order to order NSJ to vacate and surrender the site to the Plaintiff since the Choppy is already on the site. I further make no order to refund to order the replacement cost and materials as no evidence was adduce for the same.

[63] I enter judgment in favour of F.B Choppy (Proprietary) Limited against NSJ Construction (Pty) Limited and Mr. Gregoire Payet , jointly and severally, in the sum of SR682,595.06

[63] Choppy did not make any claim as to interest and cost of the suit. Therefore, I make no such order.

Signed, dated and delivered at Ile Du Port on 08<sup>th</sup> April 2019

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VidotJ