JUSTINA LENNEA *(Trading as Variety Smart)* -V- MR. AND MRS JONATHAN ZAMA

HIGH COURT OF SOLOMON ISLANDS
(KABUI, J.).

Civil Case No.157 of 2002

Date of Hearing: 5th August 2003
Date of Judgment: 12th August 2003

Mr A. Raddyffe for the Plaintiff
Mr G.K. Suri for the Defendants

JUDGMENT

KABUI, J. The Plaintiff claims the sum of $51,421.60 as monies owing to her from the Defendants under an agreement signed by them on 29th June 2001. This claim is contained in a Statement of Claim filed by the Plaintiff on 21st June 2002 together with a Writ of Summons filed on that same day. The Plaintiff also claims interest and costs.

The Facts.

The Plaintiff used to trade as Variety Smart. In that respect, she was a sole trader in that her business was not an incorporated entity under the Companies Act (Cap. 175). On 29th June 2001, the parties signed a sale agreement under which the Plaintiff agreed to sell and the Defendant agreed to buy the stock and improvements in the business being operated by the Plaintiff. The agreement took effect on the date of signing and to last for 10 months. The total sale price was $75, 100.00. The sale price was to be paid over the duration of 10 months at the rate of $8,000.00 per month. The payments of the monthly installments were to be made from the trading proceeds of the business. The management of the business was to be the responsibility of the Defendants. The Defendants have so far paid to the Plaintiff only $13,500.00 of the sale price.

The question of liability by the Defendants.

From the outset, the Defendants do not deny liability under the sale agreement but do deny liability for the full amount of $51,421.60. Jonathan Zama gave evidence to prove certain payments that he said he had made on behalf of the Plaintiff to meet pre-existing liabilities of the Plaintiff prior to the date of the signing of the sale agreement. The sale agreement is silent as to which of the parties was to meet pre-existing liabilities up to the date of the signing of the sale agreement. In his evidence, Mr. Zama, said that he made the following payments for and on behalf of the Plaintiff, namely-

1. June wages in the sum of $525.00 for 3 former employees of the Plaintiff up to 29th June 2001, being the date of the sale agreement. He said Kemuel Satu had approached him and told him that the Plaintiff had not paid them their wages up to the end of June. He said he paid their wages claim on behalf of the Plaintiff. Kemuel Satu in his evidence supported the evidence of Mr. Zama. He said Mr. Lennea was in a hurry to board a ship for Auki on 29th June 2001. He said Mr. Lennea took the sum of $1574.00 from him and left for Auki and failed to pay wages due to the employees. Mr. Lennea of course denied this. He said in evidence that he paid wages up to 29th June 2001. Whilst neither side produced documentary evidence to prove this fact, the balance of probability clearly lies in favour of the Defendants. I do not think Kemuel Satu would have asked for wages on the 29th June 2001, if Mr. Lennea had already paid wages. The impression I have from the evidence as a whole of the atmosphere surrounding the signing

of the sale agreement was that Mr. Lennea was rather overbearing in his attitude towards the Defendants in the whole arrangement for the sale of the Plaintiff's business. It is probable that he did not pay any wages at all on 29th June 2001 before he left for Auki that day.

2. Telekom bill in the sum of $1584.40 was paid by Mr Lennea by cheque No.007406 to Telekom cashier on 29th June 2001 at 9.48 am in the morning. This bill was for the month of May, 2001 due for payment on 27th June 2001. When the cheque was presented to Telekom on 29th June 2001, the Plaintiff's bank account was in deficit in the sum of $8,053.72. This was probably the reason why Mr. Lennea was unable to pay wages on 29th June 2001. On that day, Mr. Zama made a deposit in that account of $26,000.00 enabling Mr. Lennea's cheque to be cleared. That bill clearly belonged to the Plaintiff and Mr. Lennea.

3. SIEA bill in the sum of $584.59 was paid by Mr.Zama on 24th July 2001 for the month of June, 2001.

4. Rental in the sum of $400.00 was paid by Mr. Zama to Kemuel Satu for the month of April, 2001 whilst working for the Plaintiff.

5. Lunch in the sum of $12.00 had by Mr. Lennea was paid for by Mr Zama. This was admitted in evidence by the said Mr Lennea.

6. Telephone bill in the sum of $15.85 for call to Canada was paid for by Mr. Zama. This was admitted in evidence by Mr. Lennea.

7. Transfer of telephone bill from the Plaintiff's account in the sum of $1173.78 was paid for by Mr. Zama. The transfer had been authorized by Mr. Lennea. The bill seemed to have been associated with a man called John Asiwini.

8. The taking away of the sum of $1574.00 by Mr. Lennea being the purchase of goods by a customer on 29th June 2001.

These payments have come to $12,747.89. The Defendant has asked that the claim by the Plaintiff be reduced by this amount. The sum of $4,000.00 lease rental for June, 2001 was paid by Mr. Zama on 3rd July 2001 pleaded in the defence filed by the Defendant on 24th July 2002 was not raised at the trial by the Defendant. The same applies to the sum of $4,348.72 ANZ overdraft cleared by Mr. Zama on 4th July 2001. I do not understand why these sums were pleaded by the Defendants and left in the pleadings without amendment. These sums were already reflected in clause 4 of the sale agreement as part payment of the agreed sale price. These sums should have deleted by way of amendment of the pleadings.

The Defendants'counter- claim.

The Defendants' claim as regards the sum of $12,747.89 is that the sum should be regarded as part payment of the Plaintiff's claim so as to reduce their liability towards the Plaintiff. The way it was put in the defence was to suggest that the sale agreement be varied by a court order to the extent of $12,747.89. That is the understanding I have of paragraph 6 of the Defendants' defence filed on 24th July 2002. This paragraph state-

"... **The Defendants have made payments to the Plaintiffs thereby reducing the net balance payable to the Plaintiff and her husband and agent...** " If this was the intention of the Defendants, it cannot be done. Any variation of the sale agreement must be done by and with the mutual consent of both the Plaintiff and the Defendants. The Court has no power to do this for the parties. To do otherwise would run counter to the principle of privity of contract. Clearly, the repossession of the fax

machine by Mr. Lennea on behalf of the Plaintiff with the consent of the Defendants was a slight variation of the sale agreement resulting from the mutual consent of the parties. In my view, the Defendant should have counter-claimed for the sum of $12,747.89 and invited the Plaintiff to file her defence to the counter-claim. This omission became apparent at the trial when Mr. Lennea was trying to deny liability for the payments in cross-examination by Counsel for the Defendants, Mr. Suri. The Plaintiff had not been given the opportunity to file a defence in answer to the counter-claim by the Defendants. The Plaintiff could have been given that opportunity to file a defence if the Defendants' claim had been in the form of a counter-claim for the reimbursement of $12,747.89. The form of defence filed by the Defendants seemed to have asked for a variation order of the Court to off-set the sum of $12,747.89 against the Plaintiff's claim of $51,421.60. As I have said, I cannot do this by order unless there is fraud or mistake of some sort which calls for setting aside the sale agreement. This is not the case here. The most generous approach I can apply to the defence filed by the Defendants is to regard it as a counter-claim for variation of the sale agreement because that is what paragraph 6 of the defence says in no uncertain language. There is therefore no counter-claim for the reimbursement of the sum of $12,747.89 to the Defendants as monies due and payable to them. If this were the case, I would consider the evidence and consider my verdict on that basis. If I found for the Defendants on the counter-claim, they would then negotiate with the Plaintiff to have the benefit of that verdict off-set against the Plaintiff's claim. This, I, believe is the correct way for the Defendants to pursue their claim against the Plaintiff. An order for variation of the sale agreement is not the right way to go in this case.

Assorted and unsaleable goods delivered to the Plaintiff at Auki by the Defendants.

There is no dispute that boxes of goods had been delivered to the Plaintiff at Auki in December, 2001 on the instruction of the Defendants. The delivery of the goods was not by agreement of both parties. Mr. Zama said in evidence that he decided to send the goods to the Plaintiff in Auki because of Mr. Lennea's insistence for payment from the Defendants. He said the goods had not been selling well in Honiara. He said he thought it was alright for the Plaintiff to sell the goods in Auki and kept the sale proceeds to reduce the sale price. Mr. Lennea, in evidence, said that he was surprised to receive the goods as he was not expecting any goods to come to him from the Defendants. He said the goods came in as he and the Plaintiff were on their way out to go to Honiara. He said he put the goods in a room and left them there. He said some of the goods had been sold to the value of $2,000.00 and that had been taken into account in the Statement of Claim. The goods had been recorded as being valued at $48,151.00. However, Kemuel Satu said in evidence that the sale of the part of the same stock in Honiara was being done at discount price up to 50% discount. However, the point in issue is whether the action taken by the Defendants in delivering the goods to the Plaintiff in Auki was a variation of the sale agreement. I do not think it was a case of variation at all because according to Mr. Zama's evidence, his thinking was that Mr. Lennea would sell the goods and keep the sale proceeds in payment of the sale price. Mr. Lennea was expected to sell the goods and pay the Plaintiff in a joint effort to reduce the sale price for the Defendants. Clearly, the book value of $48, 151.00 cannot be the yard-stick for measuring the amount of benefit derived by the Plaintiff from the goods sent to Auki. The sale proceeds of $2000.00 disclosed by Mr. Lennea in his evidence, according to him, had already been reflected in the Plaintiff's Statement of Claim. This must necessarily mean that the sum had already been discounted before the Statement of Claim was filed. The balance of the goods sent to Auki unsold remains unknown. It remains difficult to quantify that part of the goods in monetary value. It must be taken to be a loss. What the Defendants did in this regard was outside the terms of the sale agreement. The Plaintiff was forced to sell the stock at Auki in an open-ended manner obviously at the risk of the Defendants. The title to the stock seemed to have passed to the Defendants on 29th June 2001, the date of the sale agreement. This is why Mr. Lennea was rather surprised when the Plaintiff received the goods in December, 2001 in Auki. Mr. Lennea said in evidence that he had spoken to the Defendants about the goods but said nothing about the arrangement being binding on him in anyway. Mr. Zama also said nothing about the same arrangement being binding on the Plaintiff. This confirms Mr. Zama's own evidence that the sending of the goods to Auki was really an effort on his part to pay

off part of the Plaintiff's sale price. Unfortunately, the arrangement did not serve him well. The Defendants will have to bear their loss in the arrangement. They cannot enforce it against the Plaintiff as it obviously had the hallmarks of a gentleman's arrangement to it. In the result, I find that the Defendants have not made out a successful counter-claim against the Plaintiff. The counter-claim therefore fails. I find in favour of the Plaintiff and enter judgment for the sum of $51,421.60 accordingly.

Interest and costs.

The Plaintiff has asked for interest and costs. The amount of $13,500.00 paid so far to the Plaintiff is just below 2 installments payment. The Plaintiff has been waiting for payment for 2 years. Clause 2 of the sale agreement stipulates that the purchase of the business is to be carried out by the Defendants for a period of 10 months. Clause 3 stipulates that the payment for each month is to be $8,000.00. This works out to be $80,000.00 at the end of 10 months. However, the sale price was reduced to $75,000.00 but the monthly installment remains the same at $8,000.00. This means that the purchase will be completed in less than 10 months. The claim in the Statement of Claim when filed was $59,100.00. The fact that the Plaintiff has reduced her claim to that sum means the sum of $15,900.00 had been paid. Whereas only $13,500.00 cash had been paid by the Defendants by 7th August 2002, leaving a shortfall of $2,400.00. When the claim was further reduced to $51,421.60 at the trial, it means the sum of $7678.40 had been paid. There is a shortfall of $10,078.40. Is this sum represented by assets as part payment of the purchase price? If it was cash payment, Exhibit 3 may be the explanation. Or, is it a further concession by the Plaintiff? In any case, as it is pleaded, it will take a little over 6 months for the Defendants to clear the balance of the purchase price currently standing at $51,421.60. Is it the intention of the parties for this sum to be paid over a period of 10 months? If it is the case, the installment payment per month may have to be reduced in amount for this period to be maintained. Clause 3 of the sale agreement may also have to be amended to effect such reduction. If not, clause 2 of the sale agreement must also be amended by consent of the parties in order to maintain the $8,000.00 monthly installment. There seems to be a need for adjustments of the relationship between the parties in order to set their respective positions in clear terms for the performance of their respective obligations under the sale agreement. The text of the sale agreement and the conduct of each party have produced discrepancies in the figures. Whilst I have entered judgment for the Plaintiff in the sum of $51,421.60, the sum of $12,747.89 may later be claimed by the Defendants in a fresh action and perhaps with mutual agreement of the parties, is off-set against the Plaintiff's claim, if the claim is successful in Court. It is rather unwise for me to award interest on a sum that may be subject to future court action. I would refuse the Plaintiff's claim for interest. As to costs, the Defendant will pay costs to the Plaintiff.

F.O. Kabui
Judge