

23/04/19

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IN THE SUPREME COURT OF TONGA
CIVIL JURISDICTION
NUKU'ALOFA REGISTRY

CV 80 of 2015

BETWEEN:

CHARLETT MILLEN

Plaintiff

AND:

ISLAND MANAGEMENT LTD

First Defendant

SHYLA KALI

Second Defendant

ISILELI KALI

Third Defendant

BEFORE LORD CHIEF JUSTICE PAULSEN

Counsel: Mrs C Millen in person
No appearance for the defendants

Date of Hearing: 18 March 2019

Date of Ruling: 18 March 2019 with reasons given in writing on 11 April 2019

RULING

[1] This case concerns an agreement dated 27 February 2015 for the sale by the defendants to the plaintiff of a business, assets and undertaking known as the

rec'd 23/04/19

Coconet Café. The plaintiff sues the defendants alleging that they have failed to perform the said agreement.

- [2] The first defendant has been struck off the Register of Companies and accordingly it is no longer a legal entity capable of being sued. The plaintiff is however entitled to proceed against the second and third defendants.
- [3] In a written ruling of 23 June 2016, I held that the agreement of 27 February 2015 was a valid contract between the plaintiff and the defendants, that the plaintiff had honored the terms of the agreement and was ready, willing and able to complete and that the defendants were in breach of the agreement in that they had refused to deliver up possession of the business or assets as agreed. I ordered the defendants to specifically perform the agreement within seven days on terms. At the same time I dismissed a counterclaim brought by the defendants against the plaintiff.
- [4] Despite being required to complete and lengthy negotiations to bring that about the defendants did not complete the agreement as ordered. The plaintiff then applied to discharge the Order for specific performance.
- [5] In a written ruling of 7 June 2017, I discharged the Order for specific performance and made a timetable for the future conduct of the case anticipating that the plaintiff would seek to cancel the agreement and damages.
- [6] There followed a series of procedural skirmishes between the parties requiring further rulings of the Court, changes of Counsel, ill-advised applications and tardiness of the parties which together led to considerable delays.
- [7] The latest pleadings before the Court are the plaintiff's second amended statement of claim dated 20 April 2018 (the statement of claim) and the defendants' statement of defence to the statement of claim dated 12 May 2018 (the statement of defence).
- [8] In the statement of claim the plaintiff pleads, *inter alia*, that since the Order for specific performance was made the defendants have refused to comply with the Order and have failed to complete the agreement. She has sought a declaration that the agreement is cancelled and an award of damages.

- [9] The statement of defence is unsatisfactory. Whilst the statement of claim is a comprehensive document running to more than 30 paragraphs, the statement of defence is just four curt paragraphs denying the statement of claim in its entirety, alleging the statement of claim is an abuse of process and denying that the statement of defence reveals any cause of action.
- [10] On 19 June 2018, the defendants' lawyer Mrs Tupou gave notice that the second defendant had left Tonga and that, with the knowledge of the other defendants, she wished to withdraw as the defendants' Counsel.
- [11] In a minute of 22 June 2018, I gave Mrs Tupou leave to withdraw on the basis that her office would remain the address for service of the defendants until such time as a notice of change of lawyer was filed. I recorded that Mrs. Tupou had undertaken to forward all documents received relating to this action to the defendants at the second defendant's email address. No notice of change of lawyer has been filed.
- [12] The case was set down to be heard on 3 August 2018 but it did not proceed on that day. The third defendant did appear and he advised the Court that the defendants did not object to the case being heard in the second Vava'u circuit of 2018 (the second circuit). He was advised that there would be a call over of cases for the second circuit on 12 September 2018. I advised him also that if the case could not be dealt with during the second circuit it would be heard in the first circuit of 2019 (the first circuit).
- [13] I issued a minute on 3 August 2018 setting all of this out and this was forwarded to the third defendant.
- [14] Since that time the defendants have taken no part in the proceeding whatsoever. Notices and minutes of the Court were served upon Mrs. Tupou by placing them in her rack at the Court offices. At least some of the notices and minutes were also sent directly by the Court to the email addresses of the second and third defendant.
- [15] The case could not be heard in the second circuit. There was on 1 March 2019 a call over of cases for the first circuit. There was no appearance by or on behalf of the defendants at the callover.

- [16] I issued a minute on 1 March 2019 setting the case down for hearing on 18-19 March 2019 at Vava'u. This was accompanied by a notice of hearing. The plaintiff and the second and third defendants ordinarily reside at Vava'u. The minute and notice of hearing were served upon Mrs Tupou and also sent to the first and second defendants' email addresses.
- [17] When the case was called in Vava'u on 18 March 2019 Mrs Millen appeared for herself (her Counsel having also earlier withdrawn). There was no appearance by or on behalf of any of the defendants.
- [18] At the hearing Mrs Millen sought to introduce a further amended statement of claim increasing the amount of her damages claim. I did not give her leave to file that document. In the absence of the defendants the case proceeded on the basis that Mrs Millen sought only a declaration that the agreement was cancelled by reason of the defendants' breach. She also sought leave to file a further amended claim and to have the quantum of her damages assessed at later sitting of the Court.
- [19] Mrs Millen gave her evidence and confirmed the contents of the statement of claim along with a written affidavit which she had previously sworn and which had been filed and delivered to Mrs Tupou's offices. She produced a bundle of documents also.
- [20] Mrs Millen's uncontested evidence was that upon the Court granting specific performance of the agreement the defendants failed to comply with the Order. She detailed attempts made to negotiate with the defendants and their failure to comply with agreed terms pursuant to which the agreement might be completed. She stated also that it was discovered that settlement could not proceed as the defendants no longer had a lease of the business premises and that no lease would be provided by the owner of the premises. The location of the business was unique and the principal reason why the plaintiff had agreed to purchase it.
- [21] I am satisfied on the basis of Mrs. Millen's statement of claim, the content of her affidavit and the documents that she produced in her bundle of documents that the defendants repudiated the agreement and have no intention, and now no ability, to complete it. Mrs Millen is entitled to a declaration cancelling the agreement with an award of damages to be assessed.

Result.

[22] The Orders that I make are the following:

- (a) There shall be a declaration that the agreement between the plaintiff and the defendants dated 27 February 2015 for the sale and purchase of the business, assets and undertaking of the Coconet Café at Vava'u is cancelled by reason of the repudiation of that agreement by the defendants.
- (b) Mrs Millen is entitled to an award of damages against the second and third defendants consequent upon their breach of the said agreement, which damages will be quantified at a later sitting of this Court.
- (c) Mrs Millen shall file and serve upon the second and third defendants (whose address for service remains the offices of Mrs Tupou) a further statement of claim, setting out full particulars of the amounts that are claimed along with all relevant documents she intends to rely upon to support her claim. This shall be filed and served no later than 9 August 2019.
- (d) Mrs Millen shall file and serve upon the second and third defendants (at the offices of Mrs Tupou) any briefs of evidence of witnesses she proposes to call in support of her claim to damages by no later than 2 September 2019.
- (e) If the second and third defendants, or either of them, wish to call any evidence in opposition to Mrs Millen's damages claim then they must serve any briefs of evidence of their witnesses upon Mrs Millen at her address for service no later than 23 September 2019.
- (f) This case is to be called for mention at the call over for the next Vava'u circuit with a view to it being set down for hearing during that circuit in October 2019. The date of the call over shall be advised to the parties by the Court.

[23] No party is now represented by Counsel and to assist them I direct the Magistrate at Vava'u to allow any party who makes written request to have access

to the Law Library at Vava'u on such dates and times as is convenient to the Court to undertaken legal research. I note however that they are not to remove any texts from the library nor is the Court responsible to provide photocopying services.

- [24] The plaintiff is entitled to her costs of the proceeding (in so far as they have not already been subject to an award) against the second and third defendants which are to be fixed by the Registrar if not agreed. In this respect Mrs. Millen should have regard to O. 47 of the Supreme Court Rules for the procedure to be followed for the assessment of costs.

NUKU'ALOFA: 11 April 2019.

