

## SECOND DIVISION

[ G.R. No. 154106, June 29, 2004 ]

**D.M. WENCESLAO AND ASSOCIATES, INC., AND/OR DOMINADOR S. DAYRIT, PETITIONERS, VS. READYCON TRADING AND CONSTRUCTION CORP., RESPONDENT.**

### D E C I S I O N

**QUISUMBING, J.:**

This petition for review assails the decision<sup>[1]</sup> of the Court of Appeals, dated January 30, 2002, as well as its resolution<sup>[2]</sup> dated June 20, 2002 in CA-GR CV No. 49101, denying petitioners' motion for reconsideration. The appellate court affirmed the decision<sup>[3]</sup> of the Regional Trial Court of Pasig City, Branch 165, in Civil Case No. 61159, ordering petitioners to pay the sum of P1,014,110.45 with interest rate of 12% per annum (compounded annually) from August 9, 1991, the date of filing of the complaint, until fully paid to Readycon Trading and Construction Corp., plus damages.

Petitioner D.M. Wenceslao and Associates, Inc. (WENCESLAO, for brevity) is a domestic corporation, organized under and existing pursuant to Philippine laws, engaged in the construction business, primarily infrastructure, foundation works, and subdivision development. Its co-petitioner, Dominador Dayrit, is the vice-president of said company.<sup>[4]</sup> Respondent Readycon Trading and Construction Corporation (READYCON, for brevity) is likewise a corporate entity organized in accordance with Philippine laws. Its primary business is the manufacture and sale of asphalt materials.<sup>[5]</sup>

The facts of this case are not in dispute.

WENCESLAO had a contract with the Public Estates Authority (PEA) for the improvement of the main expressway in the R-1 Toll Project along the Coastal Road in Parañaque City. To fulfill its obligations to the PEA, WENCESLAO entered into a contract with READYCON on April 16, 1991. READYCON agreed to sell to WENCESLAO asphalt materials valued at P1,178,308.75. The contract bore the signature of co-petitioner Dominador Dayrit, as signatory officer for WENCESLAO in this agreement. Under the contract, WENCESLAO was bound to pay respondent a twenty percent (20%) downpayment, or P235,661.75, upon delivery of the materials contracted for. The balance of the contract price, amounting to P942,647, was to be paid within fifteen (15) days thereof. It was further stipulated by the parties that respondent was to furnish, deliver, lay, roll the asphalt, and if necessary, make the needed corrections on a prepared base at the jobsite.<sup>[6]</sup>

On April 22, 1991, READYCON delivered the assorted asphalt materials worth P1,150,531.75. Accordingly, WENCESLAO paid the downpayment of P235,661.75 to

READYCON. Thereafter, READYCON performed its obligation to lay and roll the asphalt materials on the jobsite.<sup>[7]</sup>

Fifteen (15) days after performance of said work, READYCON demanded that WENCESLAO pay the balance of the contract price. WENCESLAO, however, ignored said demand.

On May 30, 1991, the counsel for READYCON wrote a demand letter to WENCESLAO asking that it make good on the balance it owed. Again, WENCESLAO failed to heed the demand. It did not even bother to reply to the demand letter.<sup>[8]</sup>

In view of this development, on July 19, 1991, READYCON filed a complaint with the Regional Trial Court of Pasig City for collection of a sum of money and damages, with prayer for writ of preliminary attachment against D.M. Wenceslao and/or Dominador Dayrit, docketed as Civil Case No. 61159. READYCON demanded payment of P1,014,110.45 from petitioners herein with P914,870.75 as the balance of contract price, as well as payment of P99,239.70, representing another unpaid account.<sup>[9]</sup>

As READYCON timely posted the required bond of P1,150,000, its application for the writ of preliminary attachment was granted.

On September 5, 1991, the RTC Sheriff attached certain assets of WENCESLAO, particularly, the following heavy equipments: One (1) asphalt paver, one (1) bulldozer, one (1) dozer and one (1) grader.<sup>[10]</sup>

On September 16, 1991, WENCESLAO moved for the release of the attached equipments and posted its counter-bond. The trial court granted the motion and directed the RTC Sheriff to return the attached equipments.

On September 25, 1991, the Sheriff released the attached heavy machineries to WENCESLAO.<sup>[11]</sup>

In the proceedings below, WENCESLAO admitted that it owed READYCON P1,014,110.45 indeed. However, it alleged that their contract was not merely one of sale but also of service, namely, that respondent shall lay the asphalt in accordance with the specifications and standards imposed by and acceptable to the government. WENCESLAO also alleged that since the contract did not indicate this condition with respect to the period within which the balance must be paid, the contract failed to reflect the true intention of the parties.<sup>[12]</sup> It alleged READYCON agreed that the balance in the payments would be settled only after the government had accepted READYCON's work as to its quality in laying the asphalt. By way of counterclaim, WENCESLAO prayed for the payment of damages caused by the filing of READYCON's complaint and the issuance of the writ of attachment despite lack of cause.<sup>[13]</sup>

On December 26, 1994, the RTC rendered judgment in this wise:

WHEREFORE, judgment is hereby rendered ordering the defendant D.M. Wenceslao & Associates, Inc. to pay plaintiff as follows:

1. The amount of P1,014,110.45 with interest at the rate of 12% per annum (compounded annually) from August 9, 1991, date of filing of the complaint, until fully paid.
2. The amount of P35,000.00 as and for attorney's fees and expenses of litigation.
3. Costs of suit.

The counterclaim of the defendants is dismissed for lack of merit.<sup>[14]</sup>

Dissatisfied with the decision, the petitioners appealed to the Court of Appeals. The appellate court, however, affirmed in toto the decision of the lower court.<sup>[15]</sup>

In denying the appeal, the appellate court found that contrary to WENCESLAO's assertion, malice and bad faith in obtaining a writ of attachment must be proved before a claim for damages on account of wrongful attachment will prosper, citing *Philippine Commercial International Bank v. Intermediate Appellate Court*, 196 SCRA 29 (1991). The CA stressed that the trial court found neither malice nor bad faith relative to the filing of the complaint and the obtaining of the writ of attachment. Also, according to the CA, petitioners did not adduce evidence to show that the attachment caused damage to the cited pieces of heavy equipment.<sup>[16]</sup>

The appellate court also found that the trial court correctly interpreted the period for payment of the balance. It held that the text of the stipulation that the balance shall be paid within fifteen days is clear and unmistakable. Granting that the sales contract was not merely for supply and delivery but also for service, the balance was already due and demandable when demand was made on May 30, 1991, which was a month after READYCON performed its obligation.<sup>[17]</sup>

Hence, the instant petition, wherein petitioners raise the following issues:

1. WHETHER OR NOT QUESTIONS OF FACTS ARE RAISED IN THE APPEAL BY CERTIORARI;
2. WHETHER OR NOT THE HONORABLE COURT OF APPEALS ERRED IN NOT HOLDING RESPONDENT LIABLE FOR COMPENSATORY DAMAGES FOR THE WRONGFUL ISSUANCE OF THE WRIT OF PRELIMINARY ATTACHMENT;
3. WHETHER OR NOT THE HONORABLE COURT OF APPEALS ERRED IN NOT HOLDING THE OBLIGATION [AS] NOT YET DUE AND DEMANDABLE.<sup>[18]</sup>

We find proper for resolution two issues: (1) Is respondent READYCON liable to petitioner WENCESLAO for damages caused by the issuance and enforcement of the writ of preliminary attachment? (2) Was the obligation of WENCESLAO to pay READYCON already due and demandable as of May 30, 1991?

On the first issue, petitioners rely mainly on *Lazatin v. Twano and Castro*, 112 Phil. 733 (1961), reiterated in *MC Engineering v. Court of Appeals*, 380 SCRA 116 (2002). In *Lazatin*, we held that actual or compensatory damages may be recovered

for wrongful, though not malicious, attachment. *Lazatin* also held that attorney's fees may be recovered under Article 2208 of the Civil Code.<sup>[19]</sup> Petitioners contend that *Lazatin* applies in the instant case because the wrongful attachment of WENCESLAO's equipment resulted in a paralysis of its operations, causing it to sustain a loss of P100,000 per day in terms of accomplishment of work. Since the attachment lasted 19 days it suffered a total loss of P1.9 million. Aside from that, it had to spend P50,000 on the pullout of the equipment and another P100,000 to repair and restore them to their former working condition.<sup>[20]</sup>

Respondent counters that inasmuch as a preliminary attachment is an available ancillary remedy under the rules, a penalty cannot be meted out for the enforcement of a right, such as in this case when it sought such relief. It stresses that the writ was legally issued by the RTC, upon a finding that READYCON sought the relief without malice or bad faith. Furthermore, WENCESLAO failed to show concrete and credible proof of the damages it suffered. The issuance of a writ and its enforcement entail a rigorous process where the court found that it was not attended by malice or bad faith. It cites *Mindanao Savings and Loan Association v. Court of Appeals*, 172 SCRA 480 (1989), to the effect where a counter-bond is filed, the right to question the irregularity and propriety of the writ of attachment must be deemed waived since the ground for the issuance of the writ forms the core of the complaint.<sup>[21]</sup>

We find for the respondent on this issue. However, its reliance upon *Mindanao Savings and Loan Association* is misplaced.

It is to be stressed that the posting of a counter-bond is not tantamount to a waiver of the right to damages arising from a wrongful attachment. This we have made clear in previous cases, e.g., *Calderon v. Intermediate Appellate Court*,<sup>[22]</sup> where we ruled that:

Whether the attachment was discharged by either of the two (2) ways indicated in the law, i.e., by filing a counterbond or by showing that the order of attachment was improperly or irregularly issued, the liability of the surety on the attachment bond subsists because the final reckoning is when "the Court shall finally adjudge that the attaching creditor was not entitled" to the issuance of the attachment writ in the first place. The attachment debtor cannot be deemed to have waived any defect in the issuance of the attachment writ by simply availing himself of one way of discharging the attachment writ, instead of the other. Moreover, the filing of a counterbond is a speedier way of discharging the attachment writ maliciously sought out by the attaching party creditor instead of the other way, which in most instances like in the present case, would require presentation of evidence in a fullblown trial on the merits and cannot easily be settled in a pending incident of the case.<sup>[23]</sup>

The point in *Mindanao Savings*, alluded to by respondent, pertained to the propriety of questioning the writ of attachment by filing a motion to quash said writ, after a counter-bond had been posted by the movant. But nowhere in *Mindanao Savings* did we rule that filing a counter-bond is tantamount to a waiver of the right to seek damages on account of the impropriety or illegality of the writ.