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Editor

John M R Renaud, LLB (Lond)
Certificate in Legislative Drafting
of Lincoln's Inn, Barrister
Chairman of the Public Service Appeal Board
Practising Attorney-At-Law

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JUDGES OF THE SUPREME COURT

CHIEF JUSTICE

Hon V Alleear

OTHER JUDGES

Hon AR Perera
Hon D Karunakaran
Hon N Juddoo

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and

Rene v Seychelles National Party & Ors

Constitution – jurisdiction of the Supreme Court – fundamental rights and legal rights – defamation – presidential immunities – independence of the judiciary

Newspaper articles were published implying that the Plaintiff, the President of the Republic of Seychelles, had misappropriated monies from a children's fund. The Plaintiff filed defamation suits against the Defendants, a media company and, an opposition political party. The Defendants claimed in limine litis that the Plaintiff's suit contravened article 27 of the Constitution as the Defendants were not able to issue similar proceedings against the Plaintiff or seek costs against him if they successfully defended the suit. The Defendants also averred that they would not be guaranteed a fair trial because the judiciary was appointed by the Plaintiff on recommendation of the Constitutional Appointments Authority chaired by counsel for the Plaintiff. The Defendants further averred that the suit could not be heard until judgments were made on other constitutional issues currently before the Courts.

HELD:

(i) The Supreme Court has jurisdiction in constitutional matters under Article 46 of the Constitution;

(ii) The exercise of the constitutional jurisdiction by the Supreme Court must be by no fewer than 2 judges (see Article 129 of the Constitution);

(iii) A single judge of the Supreme Court may determine in limited circumstances a constitutional question where it arises in the course of trial or before trial just as any other point of law raised under section 90 of the Code of Civil Procedure;

(iv) The Constitutional Court is a division of the Supreme Court;

(v) Vindication of private rights against private individuals does not involve the State therefore the Defendants have no recourse to fundamental constitutional rights in this case;

(vi) There is no breach of the right to equal protection of the law by the provision of immunities of office to the President. The immunities flow from the office and do not represent preferential treatment solely on the grounds of political opinion;

(vii) To stay the action would be vexatious to the Plaintiff;

(viii) The possibility of judicial bias has to be proved beyond speculative possibility;

(ix) The test for judicial bias is an objective one. The onus is on the Applicant to prove reasonable apprehension that the judge will not be impartial. The reasonableness of the apprehension will be assessed in light of the judicial oath and the judge's legal training and experience. It is assumed that judges will not be influenced by irrelevant personal beliefs or predispositions;

(x) The right to apply for recusal does not give the Defendant the right to object to cases being heard by a particular judge simply on the ground that that person may be less likely to give a favourable judgment than a judge drawn from a different sector of society; and

(xi) Challenge of a judge must not be general but must be particularised.

Judgment for the Plaintiff.

Legislation cited
Constitution of the Seychelles, arts 19, 27, 46, 59, 67, 129, Sch 2 s 8
Seychelles Code of Civil Procedure, s 96

Foreign legislation noted
Constitution of Kenya, Art 67
Constitution of Nigeria, S 259
Constitution of Zambia

Cases referred to
Gervais Aimee v Government of Seychelles Const case 4/1997
Roger Mancienne v A-G Const case 9/1995
Seychelles National Party v Government of Seychelles Const case 6/1999

Foreign cases noted
Githunguri v Republic of Kenya [1986] LRC (Const) 618
Hill v Church of Scientology of Toronto (1996) 3 CHRLD 335
M'membe & Or v The People (1998) 2 CHRLD 28
President of the Republic of South Africa & Ors v South African Rugby Football Union & Ors (2000) 2 CHRLD 382
Ukaegbu v A-G of Imo State [1989] LRC (Const) 867

France BONTE for the Plaintiff
Bernard GEORGES for the Defendants

Ruling on plea in limine litis delivered on 15 November 2002 by:

PERERA J: Three defamation suits have been filed by Mr France Albert Rene. In case nos. 9 and 10 of 2001, the Defendants are Regar Publications, Roger Mancienne, Jean Francois Ferrari and X-Press Printing. In case no. 11 of 2001, the Defendants are 1. The Seychelles National Party, and Regar Publications (Pty) Ltd.

The alleged defamation relates to Articles published in "The Regar" newspaper and “Nouvo Vizyon" under licence of the said newspaper, entitled “why Government did not negotiate with Seybrew"? It is averred that the statements made thereunder in their natural and ordinary meaning and/or by innuendo meant and were understood to mean that the Plaintiff had used and sues money in the children's fund recklessly and without regard to the purpose for which the fund was created and has on some occasions given part of it to persons other than deserving children. The Plaintiff avers that these statements are false and malicious and, constitute a grave libel on him and that consequently his character, credit, reputation, and office as the President of the Republic of Seychelles and as President of the Seychelles Peoples' Progressive Front have been injured.

Article 59 of the Constitution, provides inter alia that –

> …..no civil proceedings shall be instituted or continued in respect of which relief is claimed against the person (holding office of President) in respect of anything done or omitted to be done in such private capacity.

The Defendants in the said suits, have filed statements of defence and raised three points in limine litis. They are –

1. The action of the Plaintiff contravenes Article 27 of the Seychelles Charter of Fundamental Rights and Freedoms and the Constitution in that the Defendants are unable to take the same, or similar, proceedings against the Plaintiff, or seek costs if they are successful in defending this action.

2. The hearing of his action by any of the judges of the Supreme Court currently in post contravenes Article 19 of the Seychellois Charter of Fundamental Human Rights and Freedoms and the Constitution, in that the Defendants cannot be guaranteed a fair trial given that the said judges have been appointed by the Plaintiff from candidates proposed by an authority chaired by the Plaintiffs Attorney in the suit, or in one case, re-appointed by the Plaintiff on the recommendation of an authority chaired by the Plaintiff's Attorney in the suit: or who may be re-appointed by the Plaintiff on the recommendation of an authority chaired by the Plaintiff's Attorney in this suit.

3. The action in this suit cannot be heard until such time as the Constitutional issues herein raised and raised in Constitutional Side 2/2001, 3/2001, 4/2001 and 5/2001 on 26th February 2001.

As regards the third point, there has been filed before the Constitutional Division of the Supreme Court, four petitions on

26 February 2001, as averred. In cases nos. 2 of 2001 and 3 of 2001, the petitioners seek a declaration that the hearing of the defamation cases brought by Mr France Albert Rene, by any of the judges appointed by him in his capacity as President, contravenes Articles 19 which guarantees the right to a fair hearing by an independent and impartial Court established by law. In cases nos. 4 of 2001 and 5 of 2001 it is alleged that the bringing of the defamation cases by Mr France Albert Rene contravenes Articles 27 of the Constitution which guarantees the right to equal protection of the law. These cases are pending hearing before the Constitutional Court, and the petitioners have not pursued them despite a notice being sent to them that those cases would be mentioned in Court on 27th March 2001. The Cause List however, does not show that they were listed that day. However, Counsel for petitioner in those cases had appeared before the Constitutional Court that day in the case of *Wavel Ramkalawan v The Republic* (Const Case no 1 of 2001). The petitioners had thereafter taken no steps since that day to prosecute their petitions before that Court.

The provisions relating to the scope and ambit of references of Constitutional issues arising in judicial proceedings, to a Constitutional Court, differs in various Constitutions. They depend on where the original jurisdiction or determining Constitutional questions is vested. The provision, as contained in Article 67(1) of the Constitution of Kenya is as follows-

> Where a question as to the interpretation of this Constitution arises in proceedings in a subordinate Court, and the Court is of opinion that the question involves a substantial question of law, the Court may, and shall if a party to the proceedings so requests, refer the question to the High Court.

In the case of *Githunguri v.\ The Republic of Kenya (1986)*

LRC (const.) 618, the High Court of Kenya was satisfied that the Respondent had impliedly agreed with the grounds urged by the Applicant for a referral. There, the High Court is vested with the original jurisdiction in Constitutional matters.

Section 259(3) of the Constitution of Nigeria (1979) provides that "any question as to the interpretation or application of the Constitution which involves a substantial question of law shall be referred to the Supreme Court". However in the case of *Ukaegbu v Attorney General of Imo State* (1989) LRC (Const) 867, the Federal Court of Appeal referred such a question to the Supreme Court. In doing so, one of the questions referred was already decided by that Court. The Supreme Court held inter alia that "a decision already made by the Federal Court of Appeal cannot be referred to the Supreme Court for "another decision" under that Section. Once a decision on the substantial question of law" is given by the Federal Court of Appeal, the only way to obtain a review of that decision is by way of Appeal to the Supreme Court".

Mr Georges, submitted that, I, sitting as a single judge of the Supreme Court, did not have, jurisdiction to determine any of the Constitutional issues raised in the plea in limine litis. With respect, this is not a correct submission.

Article 129(1) of the Constitution is follows –

> The jurisdiction and powers of the Supreme Court in respect of matters relating to the application, contravention, enforcement or interpretation of the Constitution shall be exercised by not less than two judges sitting together.

Article 46(7) is as follows-

> Where in the course of proceedings in any Court,

> other than the Constitutional Court or the Court of Appeal, a question arises with regard to whether there has been or is likely to be a contravention of the Charter, the Court shall, if satisfied that the question is not frivolous or vexations or has already been the subject of a decision of the Constitutional Court or the Court of Appeal, immediately adjourn the proceedings and refer the question for determination by the Constitutional Court.

The Court consisting of not less than two judges of the Supreme Court exercise jurisdiction in Constitutional matters, is not a separate Court, but a division of the Supreme Court. Hence in terms of Articles 129(1) and 46(7), a bench of not less than two judges should determine Constitutional questions arising in the course of proceedings in a case only if the Court is satisfied that those questions are not frivolous or vexations or they have already been the subject of a decision of the Constitutional Court or of the Court of Appeal. If the Court is satisfied that they are otherwise, a single judge of the Supreme Court is not precluded from determining such question in the course of the trial or at any time before the trial as any other point of law raised under Section 90 of the Code of Civil Procedure. Hence it is not every Constitutional question that should be referred to the Constitutional Court.

The provisions of Article 46(7) give a discretion to a trial judge to decide whether a Constitutional question arising in the course of the proceedings should or should not, be referred to the Constitutional Court for determination, as the Constitutional jurisdiction is vested in the Supreme Court, but where such question is not frivolous or vexatious or has already been judicially settled, it should be exercised by not less than two judges of the Court. Therefore, it is not a question of lack of jurisdiction of the Court, but merely a question of composition of the bench to exercise that jurisdiction. The Constitution Court does not exist as a

separate Court.

Are the questions sought to be referred to the Constitutional Court frivolous or vexatious?

Basically, the first and second points raised in plea in limine are already before the Constitutional Court. The raising of the same issues in the pleadings of the present cases are vexatious to the Plaintiff who has pleaded a valid cause of action. They do not arise from the pleadings.

This is so as the Plaintiff seeks redress, not in his capacity as the President of Seychelles, but in his Private, Civil and Political capacity. The Fundamental Rights are a guarantee against state action, as distinguished from violation of such right by private parties. Therefore, while ordinary legal Rights are available against private individuals, a Fundamental Rights action is available only against the state, and not for the violation of any such right by a private individual. Hence as the present actions involve Private parties, the Defendants cannot allege contravention of any Fundamental Right as Private Parties owe each other no Constitutional duties (*Hill v Church of Scientology of Toronto* (1996) 3. CHRLD - 335).

It is an accepted principle of Constitutional interpretation that the Constitution cannot ever be in conflict with itself. Section 8 (b) of Schedule 2 of our Constitution provides that the "Constitution shall be read as a whole". Ground 1 of the plea in limine litis is that, while the President in his private capacity has instituted the present action, the Defendants are unable to take the same or similar proceedings against him, or seek costs if they are successful in defending the action. This is averred to be a contravention of the right to equal protection of the law, guaranteed in Article 27.

A similar application for a referral was made in *M'membe and Or v The People* (1998) 2 CHRLD 28. Two cases of criminal defamation were filed by the Attorney-General against two

Defendants in respect of defamation of the president of Zambia. The Defendants sought a referral to the High Court to determine whether Section 69 of the Penal Code which contained the provision that defamation of the President was an offence, contravened the Constitutional Rights of Freedom of expression (Art 20) and freedom from discrimination (Article 23). The trial judge refused the referral and ruled that Section 69 did not contravene any provision of the Constitution. In appeal, the Supreme Court upheld the decision of the trial judge and held that –

> Favourable treatment attributable solely to the office of President cannot be described as attributable wholly or mainly to his political opinions within the meaning of Article 23 (freedom from discrimination). Moreover, it is self-evident that the election of any person to the office of President has legal and Constitutional consequences. It cannot be argued that the President should stand before the law equally with everyone else when for example Article 43 of the Constitution grants him immunity from Civil or Criminal Suit while he occupies office.

The position under the Constitution of Seychelles would be similar, and hence the staying of the present actions and referring ground 1 of the plea to the Constitutional Court would be vexatious to the Plaintiff.

Moreover, on the second leg of Article 46(7), the immunities and benefits, granted to certain persons or groups, and special burdens imposed on them under the doctrine or reasonable classification have already been the subject of the decision in the cases of *Roger Mancienne v The A-G (Const. Case 9 of 1995)* and *Gervais Aimee v The Government of Seychelles* (Const Case no. 4 of 1997) In the case of *Mancienne (supra),* the Constitutional Court ruled that the granting of immunities and privileges to investors under the

Economic Development Act, did not contravene the right protection of the law as contained in Article 27. In the case of *Gervais Aimee* (supra) it was held by the Constitutional Court that the provision of a shorter limitation period for actions against the State Officers was not a contravention of Article 27. A referral of the same Constitutional issue which arises in the present matter is therefore unnecessary, as both decisions have been upheld by the Seychelles Court of Appeal, and the jurisprudence is well settled.

As regards the second ground relating to the independence of the judges of the Supreme Court who would be hearing the defamation cases filed by the Plaintiff the Constitutional Court, in the case of the *Seychelles National Party v The Government of Seychelles (Const. Case no 6 of 1999)* decided what the concept of “independence" implied, in Article 168(1) of the Constitution. That Court ruled thus:

> In the present case the petitioner avers that "there can be no guarantee" that Public Servants will remain outside- the influence of the State or that of the President who is the head of the executive, the husband of one of their fellow members (of the Seychelles Broadcasting Corporation Board) and the Minister effectively in charge of three of them. This is not a real risk of contravention of Article 168, but a "speculative possibility" which is inadequate to maintain a complaint under Article 130(1) of the Constitution.

The Constitutional issue that where a party is apprehensive of the impartiality or independence of the judges, a reasonable apprehension of bias, must be proved by the Applicant was directly considered by 10 judges of the Constitutional Court of South Africa in the case of the *President of the Republic of South Africa & Ors v South African Rugby Football Union & Ors* (2000) 2 CHRLD 382. The High Court had set aside a

Presidential Commission of inquiry into the affairs of the Football Union. The President filed an appeal before the Constitutional Court. One of the Respondents made an application to the Constitutional Court alleging that he had a reasonable apprehension that several judges of that Court would be biased against him in favour of the President and that he might not receive a fair trial as guaranteed by Article 34 of the Constitution. This objection centered inter alia on their appointment to the bench by the President.

The Court dismissed the application unanimously on the following grounds.

1. The test to be applied in applied in cases of this nature is objective and the onus of establishing it rests on the Applicant The question that would arise his whether a reasonably objective and informed Pierson would, on the correct facts, reasonably apprehend that the judge has not or will not bring an impartial mind, open to persuasion by the evidence and the submissions of Counsel, to bear on the adjudication of the case.

2. The reasonableness of the apprehension must be assessed in the light of the oath of office prescribed in the Constitution, together with the judge's ability to carry out that oath as a result of legal training and experience. It must be assumed that judges can disabuse their minds of any irrelevant personal beliefs or predispositions.

3. Litigants have the right to apply for the recusal of judicial officers where there is a reasonable apprehension that they will not decide a case impartially. However, this does not give litigants the right to object to their cases being

> heard by particular judicial officers simply because they believe that such persons will be less likely to decide the case in their favour than would other judicial officers drawn from a different segment of Society.

In ground 2 of the plea in limine in the present case, the four judges of the Supreme Court have been specifically mentioned for the purpose of the averment that the hearing of the defamation cases by any one of them contravenes the right to a fair hearing by an independent and impartial Court as guaranteed in Article 19 of the Constitution. This challenge is an exercise in futility as under Article 128 of the Constitution any acting appointment, or ad hoc appointment of judges, must be made by the President from among those proposed by the Constitutional appointments authority, in which the Counsel or the Plaintiff is the Chairman. That is the Constitutional Procedure for all appointments of judges. Hence, unless the instant challenge is personalised to the present panel of judges, which Mr Georges submitted was not the case, this ground is frivolous and vexations.

Accordingly, as both grounds 1 and 2 of the plea in limine litis are frivolous and vexatious, and also as the Constitutional questions raised therein have already been the subject of decisions of the Constitutional Court and of the Court of Appeal, I exercise the discretion vested in me under Article 46(7) of the Constitution and refuse the application for a referral to the Constitutional Court.

Consequently, the defamation suits filed by the Plaintiff in cases nos. 9 of 2001, 10 of 2001 and 11 of 2001, shall proceed for hearing in due course.

Costs in the cause.

Record: Civil Side No 10 of 2001

Adrienne v Pillay

Equity jurisdiction – injunction

The Plaintiff was a tenant on land of the Defendant. The Defendant obtained an eviction order against the Plaintiff. The Plaintiff sought a declaration that he had a right to remain in possession until reimbursed money spent on construction on the house and an injunction against eviction until determination of the reimbursement claim. The Defendant argued that the Rent Board had determined the rights between the parties which were therefore res judicata.

HELD:

(i) The jurisdiction to issue an injunction is to be exercised when there is no other legal remedy available to prevent an irreparable injury. The Court will balance convenience and hardship for both parties;

(ii) The question in the Equity jurisdiction is not whether there is power to countermand or effect the order of authority but primarily whether an injunction is necessary to meet the ends of justice in the specific circumstances of the case. The parameters for the exercise of the jurisdiction are well developed in the English cases. To deny the ability to issue an injunction that would affect the order of any authority would be to negate the equitable jurisdiction of the Court; and

(iii) Refusal of the injunction would cause more injustice to the Plaintiff than the grant would to the Defendant.

Judgment for the Plaintiff. Injunction granted.

Legislation cited
Civil Code of Seychelles, art 555
Code of Civil Procedure, ss 304, 305

Foreign cases noted
Anton Piller KG v Manufacturing Processes Limited [1976] Ch 55
Mareva Compania Naviera SA v International Bulkcarriers SA [1980] 1 All ER 213
Watson & Sons v Daily Record (Glasgow) Ltd [1970] 1 KB 853

Charles LUCAS for the Plaintiff/Applicant
Philippe BOULLE for the Defendant/Respondent

Ruling delivered on 16 May 2002 by:

KARUNAKARAN J: This ruling relates to the motion dated 22 February 2002 filed on behalf of the Plaintiff in this matter.

It transpires from the pleadings that since 1989 the Plaintiff has been and is in occupation of a dwelling house situated at Cerf Island. The land, on which the house stands, previously belonged to one Jeanne Annette Wilson. In July 2000, the Defendant herein purchased the said land from its previous owner presumably, subject to the tenancy in favour of the Plaintiff. Soon after the purchase, the Defendant, the new owner applied to the Rent Board and obtained an order of eviction against the Plaintiff, whereby the Board ordered the Plaintiff to vacate the house on or before 30th of April 2002. However, the said eviction order has not yet been complied with or executed. In February 2002, the Plaintiff instituted a suit before this Court seeking inter alia, a declaration that the Plaintiff has a right to remain in possession of the said dwelling house until such time that the Defendant pays the Plaintiff R100, 000 towards the value of the investments the

Plaintiff has allegedly made on renovation and reconstruction of the said house. This suit is still pending for determination.

Following the commencement of the suit, the Plaintiff has now -by way of motion-applied to this Court for an interlocutory injunction ordering the Defendant not to evict the Plaintiff from the house pending the determination of the suit. According to the Plaintiff, he has a "droit de superficie" on the Defendant's land and hence has a right of retention of the house until the Plaintiff is reimbursed for his investments. The Plaintiff now fears that the Defendant may at any time before the determination of the suit, evict him from the house in dispute as the former has already obtained the eviction order in his favour. Therefore, the Plaintiff seeks in his motion a writ of injunction against the Defendant pendente litem. The Defendant on the other side vehemently resists this motion in essence, on two grounds namely:

1. The Rent Board has already made an order of eviction against the Plaintiff the suit-house and therefore, this Court has no jurisdiction to countermand that eviction order; and

2. The Plaintiff's claim of ownership of the house has already been settled before the Rent Board. Hence, the Plaintiff cannot raise this issue again in this suit as he is estopped by the principle of res judicata.

In support of his contention on ground No: 2, the learned counsel for the Defendant Mr Boulle argued that the question of ownership of the house should have been determined by the Rent Board, the competent forum when it heard the application for eviction but not now by this Court particularly, in this suit. In the same breath, however, he contended that the issue of ownership becomes res judicata, since the Board has already made an order for the eviction of the Plaintiff from

the house. Further, Mr Boulle submitted that article 555 relied upon by the Plaintiff to base his claim in this matter, can be pleaded only in defence as a shield but not as sword to prosecute a claim in a plaint. Moreover, he contends that "droit de superficie" claimed by the Plaintiff in this suit has nothing to do with article 555 of the Civil Code and hence the suit is according to him, misconceived. Therefore, he urges this Court to dismiss the Plaintiffs motion for interlocutory injunction.

I gave careful thought to the arguments advanced by the counsel on both sides, for and against this motion. For the sake of convenience, I shall first deal with ground No: 2 above. To my mind, the points canvassed by Mr Boulle under this ground, with due respect to his views do not seem to be relevant to the merits or otherwise of the motion under consideration. Besides, it is also not proper for this Court to consider them in this motion as any finding thereof at this stage, would in effect dispose of the main suit pending before the Court for determination. Therefore, I do not wish to take up ground No: 2 into consideration for the purpose of the determination of this motion.

Now, I will move on to the issue of jurisdiction raised underground No: 1 above.

Starting from first principle, though the procedural aspect of granting or refusing an interlocutory injunction is set out in Section 304 and 305 of the Seychelles Code of Civil Procedure, it is a trite law that the power to grant such injunction has been jurisprudentially inherited from the jurisdiction of the High Court of England. The principles that govern the exercise of this jurisdiction in this respect be summarized as follows:

> The interlocutory injunction is a discretionary remedy and falls within the equitable jurisdiction of this Court in terms of section 6 of the Courts

> Act. It is a prerogative power that may be exercised by this Court though sparingly, when no other legal remedy is available to a person in order to prevent an irreparable injury, which is substantial and could not be adequately remedied or atoned for by damages. Moreover, he who comes before this Court for equity should come with clean hands and bona fide claim. In matters of such injunction, the Court for granting or refusing it, should also equally consider the balance of convenience and hardship of the parties. Where the Plaintiff's legal right is doubtful, the burden is on him to show that the inconvenience he will suffer by a refusal is greater than that which the Defendant will suffer by the grant of the injunction. Finally, I shall add that the exercise of equitable jurisdiction is subject to equity, justice and good conscience and the Court whilst exercising it, acts as a "Court of Equity", whereas the exercise of legal jurisdiction is subject to laws and laws only and the Court acts as a Court of Law.

Therefore, the question as to jurisdiction underground No: 1 is to be determined not on the basis, whether granting of such injunction would countermand or affect the order of any authority but primarily on the basis whether granting of such injunction is necessary for the ends of justice in the given set of facts and circumstances. At the same time, the claim for injunction must be one of substance and not made speciously for the purpose of founding the jurisdiction of the Court. See *Watson & Sons v Daily Record (Glasgow) Ltd* [1970] 1 KB 853. However, the Court ought to exercise that jurisdiction within the parameters of the governing principles and practice, which have evolved from precedent to precedent as well as without losing sight of the recent developments in *Anton Piller* [1976] Ch 55 to *Mareva* [1980] 1 All ER 213. Therefore, I find that this Court has unfettered jurisdiction under equity and

grant injunction even to countermand or stay the order of the Rent Board or any other tribunal for that matter, provided the governing principles are observed and no error of law is committed in the exercise of this jurisdiction. On the other hand, if a narrow interpretation is given to the equitable jurisdiction of this Court stating that this Court has no jurisdiction to issue an injunction that would affect or countermand the order of any authority, then in my view, the very purpose of conferring equitable jurisdiction on this Court would be defeated. Therefore, I decline to agree with the submission of the learned counsel Mr Boulle in this respect.

In any event, whatever be the arguments advanced by the Defendant against the motion, the fact remains that the main relief sought by the Plaintiff in the pending suit is to retain his possession of the house until he is reimbursed for his alleged investments. A clear danger now faced by the Plaintiff is that the Defendant may dispossess him of the suit-house by executing the eviction order at any time- during the inevitable interval between now and the determination of the suit- and so prevent the Plaintiff from realizing the fruits of any judgment the Court may give in his favour. In that event, the suit becomes anfractuous and the Plaintiff will undoubtedly, put to irreparable loss, hardship and inconvenience. Therefore, refusal of injunction in this matter would in my view, cause more injustice to the Plaintiff than the one caused to the Defendant by granting it. Hence, I allow the motion and grant a writ of injunction ordering the Defendant not to evict the Plaintiff from the suit-property – the dwelling house situated at Cerf Island – until the determination of the suit in Civil Side No: 36 of 2002 in this matter.

Record: Civil Side No 36 of 2002

Albert v Jorre de St Jorre

Unjust enrichment – contribution to land – de facto spouses

The parties lived together for many years and separated in 1996. The Defendant owns immovable property to which the Plaintiff claims he contributed R1,000,000. Having received no share of rent or compensation from the Defendant, the Plaintiff claims that the Defendant was unjustly enriched at his expense to the extent of his contribution to the property. The Defendant was evicted from the property in 1992. In 2001 the present claim was made. The Defendant pleaded that the claim was time barred. The Plaintiff claimed the benefit of the prescription period available for immovables.

HELD:

(i) The claim for compensation for money paid is an action for unjust enrichment. It is not an action in respect of ownership of land; and

(ii) The claim is time barred as it falls outside the 5 year prescription period.

Judgment for the Defendant. Case dismissed.

Legislation cited
Civil Code of Seychelles, arts 2262, 2265, 2271

Foreign cases noted
Kish v Tailor [1911] 1 KB 364

Karen DOMINGUE for the Plaintiff
Charles LUCAS for the Defendant

Ruling delivered on 9 May 2002 by:

KARUNAKARAN J: This ruling relates to a point of law as to prescription. The Defendant herein has raised this point as a plea in limine litis in his defence. Before the case was heard on the merits, the parties have agreed that the point of law should be determined first and hence is this ruling.

By a plaint dated 6 April 2001, the Plaintiff in this case claims a sum of R1 million from the Defendant, his former common law wife as compensation for unjust enrichment. The facts averred in the plaint are these:

The parties lived together as man and wife for about 27 years. They separated in 1996. Since then, the Plaintiff has no fixed place of abode. On the other hand, the Defendant owns two parcels of land and four apartments built thereon - hereinafter called the property - situated at Beau Vallon. According to the Plaintiff, he has contributed a total sum of R1 million towards the purchase of both parcels of land and for the construction of the said apartments. Despite such contribution, the Plaintiff states that he never received either a share from the rentals of the apartments or any compensation from the Defendant. In the circumstances, the Plaintiff alleges that the Defendant is unjustly enriched in the said sum and he is correspondingly impoverished to the extent of such enrichment. Therefore, the Plaintiff claims compensation from the Defendant for his contribution.

The Defendant now resists the Plaintiff's claim pleading prescription in limine litis. It is not in dispute that the alleged cause of action in this matter is grounded on unjust enrichment. According to the Defendant, the cause of action if any,had arisen from an act of unjust enrichment, that should have arisen in 1992, as and when the Plaintiff was evicted from the property of the Defendant following the Court order, made at the instance of the present Defendant (then Applicant) in Civil Side No: 164 of 1992. Therefore, the Defendant contends that the Plaintiffs claim in this matter is now time barred in terms of Article 2271 of the Civil Code of

Seychelles as all rights of action are prescribed after a period of five years. Hence, the Learned Counsel for the Defendant Mr C Lucas submits that this action is not maintainable in law and liable to be dismissed. On the contrary, the Plaintiff contends that cause of action in this matter arose only in 1996 as and when the parties ceased cohabitation, not in 1992 as submitted by the Defendant. Therefore, according to the Plaintiff, the plaint has been filed within the five-year period of the statutory limitation. Moreover, the learned counsel for the Plaintiff Miss Domingue submits that eviction order made by the Court in 1992 in favour of the Plaintiff and against Defendant does not mean that the parties separated. Further, she went on to submit that since the subject matter involved in this claim is immovable property, the period applicable to attract prescription is 10 or 20 years, not 5 years as canvassed by the Defendant. Therefore, she urges this Court to dismiss the plea in limine raised by the Defendant and to proceed with the hearing of the suit on the merits.

I gave diligent thought to the submissions made by the counsel on both sides. I carefully perused the pleadings and the documents produced by the Defendant in support of his contention. Now, the question before this Court for determination is this:

> When did the cause of action arise on the alleged unjust enrichment in this matter?

Admittedly, the Plaintiff and the Defendant had been living in concubinage for a period, more than two decades. Therefore, both should have been in joint possession, use and occupation of the property during that period. It is not in dispute that the Defendant during their concubinage, came before this Court in 1992 and applied for a writ of habere facias possessionem seeking the eviction of the Plaintiff from the property. Accordingly, the Court on 22 September 1992, made an order of eviction against the Plaintiff, which reads thus:

> This is an application for a Writ habere facias possessionem. The Court is informed that the Respondent (now the Plaintiff) has left the premises but as a precautionary measure, I will grant the application and order that the Respondent should not return to the premises.

Therefore, the Plaintiff has in the eye of law, parted with his joint possession, use and occupation of the property as from 22 September 1992 and the Defendant thereon has acquired exclusive possession, use and occupation. Thus, the Plaintiff has suffered a detriment whereas the Defendant gained a benefit from the event of eviction. Suffice it to say that if the Plaintiff had contributed towards the purchase of the property, then he should have been unjustly impoverished and the Defendant should have been correspondingly enriched as from the day of eviction. Therefore, as I see it, the cause of action on unjust enrichment if any had arisen, it did so as from the day of eviction that is, 22 September 1992 and so I find. Evidently, the plaint has been filed in April 2001 that is, nearly 8 years after eviction. In the circumstances, it is clear that the Plaintiffs claim herein is time barred. Therefore, I uphold the submission of Mr C Lucas in this respect.

Indeed, all rights of action are subject to prescription after a period of five years except as provided in article 2262 and 2265 of the Civil Code. The Plaintiff's claim herein is not a real action in respect of rights of ownership of land or other interest therein in order to attract article 2262 or 2265. The instant action is simply based on unjust enrichment Therefore, as rightly pointed out by the learned counsel Mr C Lucas, I too find that articles 2262 and 2265 are not applicable in this matter. Even if one assumes for the sake argument that the Plaintiff had continued to occupy the property until 1996 as canvassed by the learned counsel Miss Domingue, in my view, such occupation is wrong and illegal, as the Court had already ordered eviction against the Plaintiff in 1992. In any event, the Plaintiff or anyone for that matter is not allowed to

take advantage of his own wrong or self-created necessity and plead the same in his own interest to acquire the right of action or any other benefit in his favour - vide *Kish v Tailor* [1911]1 KB at 364. Therefore, the argument advanced by Miss Domingue in this respect, does not appeal to me in the least. In the circumstances, I conclude that the present suit is not maintainable in law as it is time barred. Accordingly, I uphold the plea in limine litis raised by the Defendant and dismiss the suit with costs.

Record: Civil Side No 121 of 2001

Calixte v Nibourette

Wills – testate succession – provision for child – disposable portion

The Plaintiff is one of three acknowledged natural children of the deceased. By will the deceased left all his property for his parents, the Defendant (executor of the will) and the siblings of the Plaintiff whose mother was the executrix. The Plaintiff claimed a share to the succession equal to that of his siblings. The Defendant failed to appear. The Court granted an order for the case to proceed ex parte.

HELD:

(i) There were 3 children surviving the deceased. The disposable portion was therefore 1/4 of the estate;

(ii) The Plaintiff is entitled to 1/3 of 3/4 of the estate; and

(iii) The executor shall distribute the succession in accordance with the rules of intestacy.

Judgment for the Plaintiff.

Legislation cited
Civil Code of Seychelles, arts 745, 913, 915-1, 1027

Bernard GEORGES for the Plaintiff
Frank ALLY for the Defendant

Judgment delivered on 14 November 2002 by:

KARUNAKARAN J: The Plaintiff in this suit Master Jean-Christophe Nathanael Calixte is a minor natural child. One

Miss Maryse Roberts is his mother and guardian whereas one late Mr Vilner Calixte hereinafter called the *"deceased"* was his father. In fact, the deceased has acknowledged paternity of the Plaintiff by virtue of a declaration before a notary dated 15 September 1997. The deceased has also acknowledged paternity in respect of two other natural children namely, Anne Sophie Calixte and Jean-Philippe Calixte, whose mother is one Miss Maryse Nibourette, who is non-else than the Defendant in this matter.

On 21 January 2000, before he died the deceased made an authentic will in terms of Article 971 of the Civil Code whereby made dispositions bequeathing all his properties in favour of his own parents, Defendant and her two children, without making any provision or disposition in favour of the Plaintiff. The Plaintiff claims that in law, although the deceased was obliged to leave an equal share to the Plaintiff along with the other two natural children he left nothing in the said Will for the Plaintiff to inherit. Following the death of the deceased, the Court appointed the Defendant as the executrix to the estate of the deceased in order to effect disposition and distribute the legacy presumably, as per the testament of the deceased. In the circumstances, the Plaintiff has now come before this Court for an order that:

a. the dispositions made in the Will of the deceased be changed to add a bequest to the Plaintiff of an equal share, along with the other two children of the deceased; and

b. the Defendant to give effect to the changed disposition in the Will.

On the other side, the Defendant despite several adjournments and notices, defaulted appearance and failed to file her defence. The Court therefore, granted leave for the Plaintiff to proceed ex parte in this matter. The mother of the Plaintiff testified and produced a number of documents, in

support of the case for the Plaintiff. The Learned Counsel for the Plaintiff Mr B Georges also filed his written submission on points of law bringing to the notice of the Court the relevant provisions of law under our Civil Code. This indeed, has been of much assistance to the Court to ascertain in this particular case the disposable portion of the property by Will. On the strength of the evidence on record, I find the following facts have been proved more than on the preponderance of probabilities to my satisfaction.

1. The Plaintiff is a minor natural child of late Mr Vilner Calixte, the deceased.

2. The Defendant is the executrix of the estate of the deceased for having been appointed by this Court.

3. The deceased left an authentic Will made on 2first January 2000, in which he made bequests to the Defendant and to his natural children Anne Sophie Calixte and Jean-Philippe Calixte by the Defendant.

4. In the said Will the deceased made no bequests in favour of the Plaintiff.

5. In law the deceased was obliged to leave Plaintiff an equal share of his estate along with the other two children of the deceased in terms of Article 913 of the Civil Code, which reads thus:

> Gifts inter vivos or by will shall not exceed one half of the property of the donor, if he leaves at death one child; one third, if he leaves two children; one fourth, if he leaves three or more children. There shall be no distinction between legitimate and natural children except as provided by Article 915-1.

In view of the above provision in law, it is obvious that the deceased, who had three children, could dispose of only one quarter of his estate by Will to whoever he wanted. This is the only disposable portion, which the Plaintiff is entitled to bequeath in his Will. Since he deliberately left out the Plaintiff from his will, the deceased must have wished his disposable portion of one-quarter to be left to his parents or anyone he wanted leaving the remainder, the three-quarter intact. This reminder in accordance with Article 745 of the Civil Code should have obviously gone to his three children including the Plaintiff. Therefore, as I see it, the only way to achieve an equitable distribution is to bring all the assets of the estate into the hotchpotch and distribute the value among the heirs, including the Plaintiff. This should be carried out by the executor, the Defendant herein who has the duty under Article 1027 of the Civil Code, to distribute the succession in accordance with the rules of intestacy.

Wherefore, the Court makes the following declaration and orders:

1. The Plaintiff being a legal heir of the deceased Vilner Calixte he is entitled to inherit a 1/3 (one-third) share of the estate after deduction of the ¼ (one-quarter) disposable portion.

2. The executor, the Defendant herein should distribute the estate of the deceased in order that the Plaintiff obtains 1/3 (one-third) of the value of the estate after deduction of the ¼ (one-quarter) disposable portion.

Accordingly, I enter judgment for the Plaintiff and make no order as to costs.

Record: Civil Side No 122 of 2000

Atkinson & Or v Seychelles Government & Ors

Usufructuary rights – time limit for delictual claims – prescription

The first petitioner's company in 1981 sold a hotel and its surrounding land to the first Defendant. The transfer was subject to a usage agreement allowing the petitioners to maintain a small private chamber and to have discounted use of the hotel's services for the rest of their lives. In 1982 the first Defendant sold the hotel to the second Defendant who held title until December 1990 when it was transferred to a third party. The petitioners used the private chamber until March 1991 when the then management removed the petitioner's belongings. The hotel in 1992 was leased to the third Defendant. The petitioners continued to receive complimentary accommodation and discounted services until April 1998 when the second Defendant refused to settle the bill. The petitioners sued for damages on the basis that the usage agreement created usufructuary rights that were binding on the first Defendant and their successors in title. The Defendants all averred that the claims were time barred.

HELD:

(i) A usufructuary right is a right to enjoy the property of another as if the holder were the owner. Any limitation placed on the right to full enjoyment of the property of another does not create a usufructuary right but instead creates a limited usage right;

(ii) The intention to create a usufructuary right will be clearly indicated by the registration of that interest on the instrument of transfer;

(iii) The registration requirement for a usufructuary interest under the Land Registration Act does not prevent the Court from recognising that such an interest exists and the judgment being registered;

(iv) A non-registered transaction is binding only on the parties as it is only by registration that third parties will be put on notice;

(v) A foreign national cannot directly or indirectly acquire rights in immovable property without ministerial approval; the lack of proper approval prevents the creation of any real right in immovable property;

(vi) All tort suits against the Government of Seychelles must be lodged with 6 months of the date when the claim arises;

(vii) Companies in which the State has a shareholder interest are not representatives of the State nor do they exercise any State functions or powers on behalf of the State. Therefore the 6 months limitation period for the State does not apply to such companies;

(viii) A delictual claim is directed at an act or omission or an error of conduct of the Defendant which forms the basis of the claim. The claim arises at the date that the delictual event causes the damage or injury to the petitioner;

(ix) The conduct of a third party with a legitimate interest would only be actionable

in tort if its dominant purpose was to cause harm to the use and occupation of the petitioner;

(x) The acts by the second Defendant in its capacity as assignee of the first Defendant bind the first Defendant to its obligations under the usage agreement with the Plaintiffs. The second Defendant was aware of the usage agreement and by its conduct it honoured those obligations until April 1998. The conduct of the second Defendant is independent of the third Defendant and does not bind it; and

(xi) The prescription period of 6 months has expired for all claims against the first Defendant. The prescription period of 5 years has expired for all claims against the third Defendant. The prescription period of 5 years has expired for all but the claim relating to the April 1998 incident against the second Defendant.

Judgment (partial) for the Petitioner against second Defendant. Damages awarded for pecuniary losses R9,348.35 and moral damages: R10,000 each. All other claims are time barred.

Legislation cited
Civil Code of Seychelles, arts 578, 1320, 1382, 2271
Immovable Property (Transfer Restrictions) Act, ss 2, 4
Land Registration Act,ss 25, 40, 46
Public Officers (Protection) Act, s 3

Cases referred to
Contoret v Government of Seychelles & Anor Civil Side 101/1992 (Unreported)

Contoret v Government of Seychelles SCA 2/1993
Simon Emmanuel & Anor v E Joubert SCA 49/1996
Hoareau v Gilleaux (1978-82) SCAR 158
Labrosse v Allisop & Anor Civil Side 285/1996 (Unreported)
Malvina v Louise Civil Side 47/1995 (Unreported)
Port Glaud Development Co Ltd v A-G and Port Glaud SCA 20/1994

Philippe BOULLE for the Petitioners
Lucy POOL for the first Defendant
Kieran SHAH for the second Defendant
Jacques HODOUL for the third Defendant

Judgment delivered on 30 October 2002:

JUDDOO J: The 1St Plaintiff (John Henry Atkinson) and his current wife (Beulah Atkinson) claim for loss and damages as a result of the “faute” of the first, second and third Defendants. The claim is resisted on behalf of all three Defendants.

There is no denial that an "agreement to transfer" and an instrument of transfer were signed on 29 May 1981 between the company Northolme Limited (represented by the first Plaintiff) and the Seychelles Government pertaining to the acquisition of two plots of land and a hotel complex known as Northolme Hotel. The agreement was produced as exhibit P2 and the instrument of transfer of the two plots of land (parcels H202 & H344) was produced as exhibit D1.

Under the agreement, exhibit P2, the first Defendant agreed as follows:

> NOW THEREFORE the parties of this agreement have agreed as follows:
>
> ...5. The government undertakes for itself, or any person or body corporate to which the ownership, possession or management of the

hotel may be, transferred or assigned that Mr John Henry Atkinson and his wife shall at all times during their natural lives be entitled to:-

a. to keep their own personal belongings, but not including any material or thing of a combustible or other nature likely to be detrimental to the hotel in their existing private premises next to the suite named Curiouse and to have sole access and use of the said premises for this purpose,

b. upon giving reasonable notice in writing to the Hotel to use the bedroom-suite named "Curiouse" for their own use free of charge,

c. a discount of 15% on the normal prices of food, drink, boutique or other goods or services consumed or acquired at the hotel,

d. to use without charge a motor vehicle and boat from the hotel provided the hotel has one reasonably available at the time.

Provided that the facilities aforesaid are to be utilised solely by Mr and Mrs John Henry Atkinson in person during any visit they make to Seychelles.

Thereafter, by a deed dated 11 May 1982, exhibit P4 (registered on 12 May 1982, the Seychelles Government transferred parcels H202 and H344 to COSPROH (the second Defendant). By deed dated 31 December 1990, exhibit D4 (registered 8 March 1991) COSPROH transferred the parcels of land to Northolme Hotels Limited. Thereafter, under a lease dated 17 January 1992, exhibit P1, Northolme Hotels Limited leased the hotel premises on plots H202 and H344 with all facilities and amenities to the Compagnie l'Habitation

des Iles the (third Defendant) for a period of ten years starting from 1 February 1992.

On behalf of the Plaintiffs, it is averred that "they have been unable to exercise their rights ... as the Defendants have refused to recognize their rights and the third Defendant is unlawfully occupying and using the premises mentioned ... since February 1992." It is further averred that "the second Defendant, during the time it owned and managed the hotel, removed the following (listed) personal belongings of the Plaintiff from the premises mentioned ... and appropriated same..."

On behalf of the first Defendant, it is pleaded that "No usufructuary interest or any other rights or interest were granted or created in favour of the Plaintiffs". It is averred that the first Defendant purchased Northholme Hotel by virtue of a deed of transfer dated 29 May 1981 and registered on 1 September 1981.

On behalf of the second Defendant, it is denied that "The Plaintiffs have any rights in Northolme Hotel as alleged or at all. The second Defendant avers that the deed of transfer between Northolme Ltd (as transferor) and the Government of Seychelles (as transferee) is silent as to any alleged rights, whether real or personal to the Plaintiffs". It is further contended that the second Defendant is not privy to any alleged agreement creating or granting any alleged rights to the Plaintiffs in or about Northolme Hotel. It is further averred that the second Defendant did not manage Northolme Hotel as alleged or at all and that it sold title H202 and H344 by a deed of transfer dated 31 December 1990 and that Northolme Hotel was managed by Seychelles Hotels Ltd. during the time that it owned the hotel.

The third Defendant admits having been the lessee of the hotel until 31 January 2002. It is averred that the third Defendant is not privy to any alleged agreement and is not

bound by any term thereof creating any alleged right in favour of the Plaintiffs. It is added that the third Defendant lawfully occupied the totality of the premises of the hotel under a lease agreement without any reservation and had, thereunder, no obligation to the Plaintiffs.

All three Defendants raised the issue that the Plaintiffs' claims are prescribed. Whilst it is submitted on behalf of all Defendants that the prescription raised is under Article 2271 of the Civil Code of Seychelles (5 years), it is additionally submitted on behalf of the first Defendant that the Plaintiffs' claims against the Government of Seychelles are statutorily barred under the Public Officers (Protection) Act (Cap 192).

The first Plaintiff gave evidence that Northolme Ltd purchased the land and hotel in about 1970. The said property was thereafter acquired by the Government of Seychelles in 1981 following the agreement reached between the parties, exhibit P2. The hotel constituted of about 7 luxury suites. Attached to one of the suites “Curieuse suite” there was an attached 'combined etude, salon and storeroom' which the first Plaintiff had been using. The witness adds that it was agreed that he would be allowed to keep his personal belongings in the 'attachment' and would be allowed the use and occupation thereof together with “Curieuse suite” during his visits to Seychelles with the other facilities mentioned in the agreement.

The witness explained that he had no difficulties with enjoyment of the above mentioned privileges for a number of years after Northolme Limited had sold the property to the Government of Seychelles. In his own words "The Government honoured its side of the bargain and I did not abuse". Until one day:

> I arrived with only my hand luggage and I discovered that somebody had broken the lock in the etude room and to the storage area and the

> doors were open and the dehumidifying machine and fax (were interfered with), the fan was running but the compressor had burnt out. Most of my things were gone. I called the manager and I was shocked and devastated as I had only my hand luggage and nothing else. I called the manager and he told me he had broken in because I was finished. ... I was in a state of shock. I could not stay. I went to Mombassa immediately. I am not sure I spent the night or not....

This incident happened on 10 March 1991. The Plaintiffs did not make any further use of the private premises which was eventually converted into an extra room for hotel guests.

Under cross-examination, the first Plaintiff agreed that in 1997 he informed the second Defendant that he had potential investors who were interested to purchase the 'hotel'. However, he denied that the arrangements the second Defendant had made to pay for his hotel accommodation in 1997 and 1998 were pursuant to the investment prospects of perspective buyers. The first Plaintiff added that after April 1998, the second Defendant refused to settle his accommodation bills at the hotel. As for the vehicle and boat the witness added that:

> the clauses of the car states subject to availability'. When Cosproh took over they said it was not acceptable because they no longer provided the vehicle or the boat because the management had their own vehicles. I agreed and I never asked them to pay anything. In fact I never used the boat. I never had the time ... Northolme did not have vehicles and I accepted that I would not expect Cosproh to provide a car. They did pay one time and without comments...

Mrs Beulah Atkinson, the second Plaintiff, gave evidence that

she married the first Plaintiff on third January 1994, as per exhibit P6. She had accompanied her husband to Seychelles and stayed at the hotel during her visit.

Basil Soundy gave evidence on behalf of the Plaintiff. He represented the first Plaintiff when the latter was away Seychelles and made arrangements for his visits to Seychelles. He gave a detailed description of the “Curieuse from Suite” at the hotel, the private room adjoined thereto and the content thereof. During the first Plaintiff's absence from the Seychelles, the witness added that he "used to regularly visit the hotel to ensure that the machinery i.e. dehumidifier air-conditioning etc continued to operate." At one time he had made arrangements for the first Plaintiff and his wife to stay at the hotel whilst it was managed by one Mr Dagostini. In his own words:

> I had made arrangements with the manager of the hotel for Mr and Mrs Atkinson to occupy the suite which arrangement was fulfilled. And on his arrival I obviously took him from the airport to the hotel and his wife, on the arrival, of course they immediately went to the suite and opened the communicating door to the private area and to his horrors and to my horror because I was questioned about this, there was nothing there, none of his personal belongings were there. He immediately contacted the management of the hotel demanding where are his personal possessions, why has the lock on the door been removed and what has happened to the kitchen, where is the stove, the fridge and where are the cookeries and other items? Where are my clothes, where is my typewriter, where is my filing cabinet, where are my papers? And the manager was apparently unable to offer an adequate explanation...

The witness added that the first Plaintiff accompanied by the second Plaintiff continued to travel to Seychelles for business purposes and used the accommodation provided by the hotel although "he no longer used the private area because all his possessions had gone..." Under cross-examination, Mr Soundy denied that it was against the background of the first Plaintiff bringing in investors that he was given accommodation and other facilities at the hotel.

Mr Dagostini gave evidence that he managed the hotel from first April 1989 until August 1991 on behalf of Seychelles Hotels Ltd. He remembered that Mr Soundy and the first Plaintiff and his wife had called to the hotel. He accompanied them to the Curieuse suite and to the private annex:

> The first room I remember I went inside and Mr Atkinson went to open the curtains, I saw that there was a room that was a little bit dusty around ... On the right hand side I noticed there was a table, a manual typewriter and there was a chair. Then we went inside the other room and I remember Mr Atkinson saying “look there is something missing”.

On behalf of the second Defendant, Mr Bible gave evidence in his capacity as General Manager. He explained that in 1990 COSPROH transferred the land parcels where the hotel is situated to Northolme Hotels Ltd. To his knowledge, the first Plaintiff was granted complimentary accommodation as he was the previous owner of the hotel on a first occasion and as he intended to bring investors to negotiate the purchase of the hotel on a second instance. The witness denied that any facility was granted to the first Plaintiff or second Plaintiff by virtue of the agreement exhibit P2. In essence, the witness added that the second Defendant is not bound by any of the terms of the said agreement.

Mr Bibile added that it was only after the second Defendant

had granted Mr Atkinson “free stay” during his first visit that he was made aware of the agreement between the first Plaintiff and the first Defendant. The witness agreed that 15% discount was given to the first Plaintiff on his consumption bills as per his request. The witness added that although the hotel was owned by Northolme Ltd and the premises leased to the third Defendant, the second Defendant, COSPROH, had control over its affairs.

As confirmed in the submissions made on behalf of the Plaintiffs - "the main issue before the Court is the issue of a usufructuary interest, which arises under the contract dated 29 May 1991 i.e. (exhibit P2)..." The said contract is a document under the private signatures of Northolme Limited and the first Defendant. No objection was raised to its production and by virtue of Article 1320 of the Civil Code of Seychelles, the document stands as proof between the parties.

A preliminary issue which arises is whether the term of the agreement includes the second wife of the first Plaintiff, Mrs Beulah Atkinson (second Plaintiff). The undertaking is that "Mr John Henry Atkinson and his wife shall at all times during their natural lives be entitled ... provided that the facilities aforesaid are to be utilised solely by Mr & Mrs John Henry Atkinson in person during any visit which they may make to Seychelles…”. The former wife of Mr John Henry Atkinson passed away in 1991 and Mr Atkinson re-married the second Plaintiff in 1994. My reading of the clause is that the benefit, if any, has been granted jointly to Mr John Henry Atkinson "and his wife during their natural lives". No benefit was granted individually to the former Mrs Atkinson. As long as there is John Henry Atkinson he is to benefit and as long as John Henry Atkinson has a lawfully wedded wife, both are to benefit during "their" natural lives.

The first determination is whether the term of the agreement created a usufructuary interest in favour of both Plaintiffs. On

behalf of the Defendant, it is submitted that "clause 5 of the agreement does not create a usufructuary interest ..." It is added that any such usufructuary interest is void under Section 40 of the Land Registration Act for lack of registration in the prescribed form (Form LR6) and would necessitate the requirement of sanction under the Immovable Property (Transfer Restrictions) Act as both Plaintiffs are foreign nationals.

On behalf of the Plaintiffs, whilst acknowledging that "the question is does this (the term of the agreement) create a usufructuary interest?" it is further submitted that the Plaintiff had an overriding interest by being in possession and actual occupation under section 25(g) of the Land Registration Act. Furthermore, it is contended that the government being itself a party to the agreement is either taken to have granted sanction to the transaction or is estopped from raising the issue of lack of sanction.

Suffice it to say what has been pleaded is the Plaintiffs' entitlement to a usufructuary interest under clause 5 of the agreement vis-à-vis the private premises annexed to curieuse suite and not any rights acquired by way of being in possession or actual occupation. Under Article 578 of the Civil Code of Seychelles, usufruct is defined as "the right to enjoy property which belongs to another, in the same manner as the owner himself, but subject to the obligation to preserve its substance." In *Dalloz Codes Annotes* Art 1-70, under title "De L'usufruit de l'usage et de l'habitation" Art. 578, it is stated:

> 1. D'apres la definition qu'on donne à l'article 578, l'usufruit est le droit de jouir, or le mot jouir comprend ici l'usage et la jouissance, usus et fructus
> …
> 6. Il se distingue des servitudes réelles en ce qu'il forme dans le patrimoine de l'usufruitier un

> bien particulier qui peut être vendu ou loué, etc –
> …
>
> 9. l'usufruit etant, d'apres la definition donnée par l'article 578, le droit de jouir des choses dont un autre a la propriété comme le proprietaire lui-même, les droits de l'usufruitier ne se bornent pas à la perception des fruits, mail ils s'etendent ... à tous les droits perçu comme inherents à la jouissance de fonds.
>
> 10. Et aussi à tous les avantages matériels ou intellectuels qui peuvent résulter de la possession de la chose ..

In Amos and Walton second edition, p 119, it is observed that:

> the general rules as to usufruct are expressed in Article 578 ... and article 582. The usufruct has the right to enjoy all manner of fruits, natural, industrial and civil which the object of which he has the usufructuary may produce...

The term of the agreement (clause 5) allowed the first Plaintiff and his wife to keep their own personal belongings in the existing private premises next to the suite named Curieuse and to have sole access and use of the said premises for this purpose provided that the facility is to be utilized solely by Mr & Mrs John Henry Atkinson in person during any visit which they may make to Seychelles. They were prohibited from keeping any material or thing of a combustible or other nature likely to be detrimental to the hotel in the said premises. I do not find therefrom that Mr John Atkinson and his wife had been granted a usufructuary interest in the premises but rather a limited use of the premises in order to keep their own personal belongings and excluding all items of a combustible or other nature likely to be detrimental to the hotel and to have sole access and use of the premises for this limited purpose.

This is in contrast with the case of *Malvina v Louise* C/S 47 of 1995 cited on behalf of the Plaintiff whereby the Plaintiff was by notorial deed expressly granted the right to live on a parcel of land "to enjoy it exclusively as if it were her own ... " which it was held amounted to a 'usufruct'.

Furthermore, it is evident that at the material time, the parties did not deem it fit to preserve any alleged usufructuary interest in favour of the first Plaintiff and his wife in the instrument of transfer, exhibit D1. Had the intention of the parties been to preserve such create a usufructuary interest, such a term would have been made part and parcel of the instrument of transfer and would necessarily have required the grant of the appropriate sanction beforehand.

Were it to be held otherwise and the clause 5 found to provide for a usufructuary interest, I will go further to examine the remaining submissions. I do agree with the submission of Learned Counsel for the Plaintiffs that the requirement of registration of a usufructuary interest In the subscribed form under the Land Registration Act does not prevent the Plaintiffs claiming for the recognition of their right by virtue of a determination of the Court on the issue and a judgment delivered which could then be registered. This procedure was averted to in *Hoareau v Gilleaux* (1978-82) SCAR 158 wherein pertaining to a transfer of land, the Court of Appeal as per Sir M. Hogan (at 168) stated that the requirement of registration in the prescribed form is not fatal as S46 (applicable to transfers) "is framed in enabling and not restrictive terms...". The reasoning is equally applicable to the requirement of registration of an interest in land under the Land Registration Act. However, a non-registered transaction is only binding on the parties thereto since it is only by way of registration in the prescribed form or registration of the judgment that provides notice to third parties. The delictual conduct of a third party is to be viewed in that light.

As far as the requirement of sanction is concerned, under

Section 2 of the Immovable Property (Transfer Restriction) Act land is defined as including any interest in land or immovable property. Under Section 4 thereof, a non-Seychellois may not directly or indirectly acquire rights in immovable property without the prior sanction of the Minister. It is admitted, in the submissions made, that no Minister's sanction was granted to any term of an agreement whereby the first Plaintiff and his wife were to benefit of an interest in immovable property. Accordingly, the lack of sanction would prevent the creation of any real right in immovable property in favour of the first Plaintiff and his wife. The grant of sanction under the Act is the prerogative of the Minister subject to the requirements set under the Act. Accordingly, I do not find the issue of estoppel to arise as against the first Defendant.

With the above in mind, I shall now consider the prescription issues raised. It is submitted that the Plaintiffs' claim are prescribed under the 6 months limitation period under Section 3 Public Officers Protection Act.

It has not been contended that the above limitation period does not cover the first Defendant. Indeed as found in *Labrosse v Allisop and Government of Seychelles* C/S285 of 1996 - Ruling 3/9/97*, Contoret v Government of Seychelles & Anor* C/S 101 of 1992 Ruling 17/3/93 and *Contoret v Government of Seychelles* Civil Appeal 2 of 1993 (Judgment 31 March 1994), the limitation period of 6 months is applicable to tort suits brought against the Government of Seychelles. Accordingly, any of the Plaintiffs' claim is time barred against the first Defendant where the plaint is lodged after 6 months from the date upon which the claim arose.

The status of the second Defendant (COSPROH) was elaborated upon in *Port Glaud Development Co Ltd v A-G and Port Glaud* CA20/94 (Judgment delivered on 6 June 1995) wherein it was held:

> It is evident that by no stretch of the imagination

> can COSPROH or Port Glaud Hotels be described as public authorities or bodies or departments of the State charged with any public duty or possessing any special power. They exercise no power over and above what companies exercise in the management of their affairs ... By their respective memorandum of association, they were purely trading concerns subject to company law and the Companies Act both in regard to their existence and dissolution and to their activities, rights and obligations. These two companies were merely companies in which the State has interest as shareholder...

Accordingly the statutory limitation period of six months is not applicable as regards the second Defendant, COSPROH. A similar finding pertaining to SHDC was reached in *Auguste v Hoareau* CA 1 of 1995 - reasons judgment delivered on 1 March 1996 - wherein the Court of Appeal held that the time limit under Section 3 could not have been successfully raised by SHDC. The statutory limitation period is not applicable to the third Defendant which is not involved in any public office, either directly or indirectly.

It has been found earlier that Clause 5 of the agreement did not create any usufruct in favour of the Defendant but rather a limited right of use of the private premises. Alternatively, it has been found that the agreement between Northolme Limted and the first Defendant could not create any real rights in immovable property in favour of the first Plaintiff and his wife, for lack of appropriate sanction. In either instances (where the claim is for an alleged “faute” on behalf of each Defendant) the 5 year prescription period under Article 2271 of the Civil Code is applicable to the claims brought by the Plaintiffs against all the Defendants.

The next determination is application of the statutory limitation and the period of extinctive prescription of 5 years under

Article 2271 to the Plaintiffs' claim. It has been shown earlier that the Plaintiffs' claims rest upon the fault of the first, second and third Defendant and that the cause of action is grounded in delict. In *Simon Emmanuel & A-G v Joubert* CA 49 of 1996 - Judgment delivered on 28 November 1998 - the Court of Appeal (per Ayoola JA) stated:

> The three elements which therefore make a claim arise in respect of a delictual act are fault, injury or damage and the causal link. The claim arises at the earliest when these three co-exist and it is from that time that it is open to the aggrieved person to bring an action to enforce the claim that has thus arisen. Put otherwise, the 'claim arises' when facts exist which give rise to the liability of the Defendant ... The coming into existence of liability to make good a loss is not normally dependent on but precedes the assessment of the quantum of loss. Liability must exist before question of proof of quantum of loss would arise...
>
> A claim in respect of an act or omission arises when facts on which liability can be founded exists. The coming into being of such claim cannot be delayed to await the ascertainment of quantum of loss. Where loss is the essence of liability as in claims under Article 1382 all that is required for a claim to rise is that loss has been caused by fault of the other party...
>
> In the light of the above, each of the Plaintiffs' claim must be distinctively considered.
>
> The Plaintiff's claims rest upon "the fault of the first, second and third Defendant..." Accordingly, the cause of action is grounded in delict. In delict the claim for remedy is directed towards an

act or omission or an error of conduct of the Defendant which forms the basis of the claim.

From the plaint, the act, omission or error of conduct alleged by the Plaintiff is namely that:

i) the Defendants have refused to recognise the Plaintiffs' rights (as alleged) namely:

(a) to keep their own personal belongings in their existing private premises next to the suite named 'Curieuse' and to have sole access and use of the said premises for this purpose;

(b) upon giving reasonable notice in writing to use the bedroom suite named Curieuse for their own use free of charge;

(c) a discount of 15% on the normal prices of food, drink, boutique or other goods consumed or acquired at the hotel;

(d) to use without charge a motor vehicle and boat from the hotel provided the hotel has one reasonably available at the time.

ii) the second Defendant, during the time that it owed and managed the hotel removed the personal belongings of the Plaintiffs from the premises and for which both the first and second Defendants are claimed to be liable for the loss of their personal belongings.

iii) the third Defendant has unlawfully occupied and used premises (of which the Plaintiffs were allegedly entitled) from 1.2.92. and for which all Defendants are jointly liable.

Each Plaintiff claim moral damages against all three Defendants jointly pertaining to loss of enjoyment of their rights as alleged in the sum of R60,000 per Plaintiff. Both Plaintiffs claim damages against all three Defendants jointly for the unlawful occupation of the private premises at a rental value of R2,500 per month from first December 1992. The first Plaintiff claims against the first and second Defendant damages in the sum of R142,700 for the removal and appropriation of personal belongings and R9,348.35 as financial loss pertaining to "refund of accommodation."

With regard to the use without charge of a motor vehicle and boat from the hotel, the first Plaintiff gave evidence that when the second Defendant - COSPROH - "took over they said it was not acceptable because they no longer provided the vehicle or the boat because the management had their own vehicle. I agreed and I never ask them to pay for anything..." Accordingly, the first Plaintiff would have relinquished their claim which in any event would have arisen at the time the second Defendant "took over". Relying on the date of registration of transfer of the parcels in the name of the second Defendant (first May 1982) as being the date when the second Defendant took over, any claim thereupon against the first Defendant has been time barred after a period of six months therefrom. Any claim thereupon pertaining to the refusal to recognize the Plaintiffs' rights as against all three Defendants is prescribed, the plaint having been lodged more than 5 years after the claim arose.

With regard to "the right to keep their own personal belongings in their existing private premises next to the suite named “Curieuse” and to have sole access and use of the said premises for this purpose", the testimony of the first

Plaintiff confirms that the Plaintiffs have been denied the said right since the incident of 10 March 1991. On that date upon their arrival to Seychelles, the Plaintiffs found that the 'private premises' had been broken into and most of the things therein had disappeared. The Plaintiffs were not able to enjoy the use of the private premises since then and it was eventually converted into a hotel room. Accordingly, the Plaintiffs' claim under “faute” pertaining to the said 'private premises' would arise as from 10 March 1991 and any suit against the first Defendant is time barred after the expiry of six months therefrom. Any claim jointly against all three Defendants for the refusal to recognize the Plaintiffs' rights is prescribed as the plaint is lodged more than five years after the claim arose. The Plaintiffs' claim that the second Defendant during the time that it "owned and managed" the hotel removed the personal belongings of the Plaintiffs from the premises and for which both the first and second Defendants are claimed to be liable for the loss. The said alleged act of removal and appropriation came to the first Plaintiff's knowledge on 10 March 1991, date when the first Plaintiff arrived at the hotel and found the items missing. Accordingly, the Plaintiffs' claim in that respect arose on 10 March 1991 and is time barred after the expiry of six months therefrom against the first Defendant. The Plaintiffs claim in that respect against the first and second Defendant are prescribed after the expiry of 5 years therefrom.

Additionally, the evidence on record falls short of establishing the averment that the second Defendant "managed" the hotel during the relevant period. Mr Dagostini testified that the hotel was managed by Seychelles Hotels Limited from first April 1989 until August 1991. The testimony of the first Plaintiff confirms that it was "Mr Dagostini himself who stood before me and said he broke the door because I was finished …” Accordingly, the breaking into the private premises and disappearance of personal items would have occurred during Mr Dagostini's management under the Seychelles Hotels Limited, a different entity.

With regard to the claim that the third Defendant has unlawfully occupied the premises to which the Plaintiffs were entitled and for which all Defendants are claimed to be liable. The plaint dates the resulting loss to start as from first February 1992. Any claim thereupon against the first Plaintiff is statute barred after six months from the date averred and any claim against the first, second and third Defendants, are prescribed after a period of five years from date against all three Defendants. Accordingly, the Plaintiffs' claim is statute barred against the first Defendant and prescribed against all three Defendants.

In addition, as disclosed by the evidence on record, the third Defendant had occupied the premises under a duly executed lease (exhibit Pl) for a period of 10 years. Where, as in such instance, the use and occupation is carried forth by the third Defendant under a legitimate interest, the third Defendant's conduct would only be actionable if its dominant purpose is to cause harm - vide: *Hoareau v Government of Seychelles*, supra. No such evidence has been adduced before this Court against the third Defendant.

The remaining claims by the Plaintiffs relate to the refusal by the Defendants to recognize the Plaintiffs' rights to be allowed the bedroom suite named “Curieuse” for their own use free of charge and to enjoy a discount of 15% on goods consumed or purchased at the hotel. The first Plaintiff's version is that after the incident of 10th March 1991, he continued to visit Seychelles. In his own words:

> Q: After that did you come back to Seychelles?
>
> A: Yes, I did. For necessary company meetings and I brought in everything with me each time. For a long time the premises were not being used by the hotel and it stayed just as it was but it was not good to me. Everything was gone. There was a chest and a drawer which

remained but the contents had gone.

Q: You said they continued to honour which part of the agreement?

A: The Government continued to give me accommodation without payment and 15% discount on food and beverage until 2 years ago...

The first Plaintiff explained that two years back he was informed that the hotel would be put up for sale. He was an interested party and, in addition, had informed the second Defendant that should the hotel be sold to a third party, the latter should be informed about his rights. As per the first Plaintiff "they immediately refused to honour everything." On the other hand, the version of the second Defendant is that there had been no grant of accommodation or 15% discount on consumption to the first Plaintiff under the terms of the agreement, exhibit P2. Any such grant was merely 'complimentary' as per the testimony of Mr Bibile.

A few letters of correspondence were adduced in evidence on behalf of the Plaintiff, exhibit P5. Objection was raised to the first two letters dated 29 January 1987 (exhibit P5(a)) and 10 November 1987 (exhibit P5(b). Given that these letters were addressed to parties other than the Defendants, the Plaintiff will not strictly be able to rely on the content of these letters as against the Defendants. There was no objection to the remaining correspondence.

In April 1997, a request is addressed to Northolme Hotel on behalf of the first Plaintiff to seek a reservation of the “Curieuse Suite” for 29 and 30 April 1997 on free of charge accommodation basis and 15% discount on food and beverages (Exhibit P5(c)). By letter of 31 March 1997, a letter is addressed to COSPROH (Exhibit P5(d)) claiming the right to use “Curieuse” free of charge and discount of 15% on all

food and beverage. Reference is made in the letter to the agreement between Northolme Ltd. and the first Defendant. It is admitted in evidence that the first Plaintiff was subsequently allowed to stay in the Curieuse Suite on free of charge basis and granted a 15% discount on food and beverages.

In 1998, a request was made once again on behalf of the Plaintiff to be granted accommodation on free of charge basis and 15% discount on food and beverage by letter dated 24th March 1998 (Exhibit P5(g)). The second Defendant by letter (Exhibit P5(h) instruct Northolme Hotel to bill them for the accommodation and to grant the requested 15% discount. It is true that at that time there were negotiations going on between the first Plaintiff and the second Defendant pertaining to the eventual sale of the hotel (Exhibit P5(j)). However the evidence disclose that an 'option to purchase' given to the first Plaintiff did not materialise and second Defendant made clear its intention in the letter of 7 May 1998 (Exhibit P5(r)) whereby, it was expressed that "In any event it has been decided that neither COSPROH nor Northolme Limited should bear any of the expenses related to clause 5 of the agreement from now on …". There is also evidence (as per Exhibit P5(j) and P5(k) that Northolme Hotels Limited was 'wholly owned' by COSPROH, the second Defendant, referred to as the holding company. In addition, it is admitted by Mr Bibile that COSPROH had control over Northolme Limited.

The above decision of 7 May 1998 is a denial of the privilege of the Plaintiffs during their visit to Seychelles to enjoy free accommodation at “Curieuse” and 15% discount on food and beverages. The act by the second Defendant, in its capacity as assignee of the first Defendant, binds the first Defendant through the undertaking given in the agreement Exhibit P2. However, the conduct of the second Defendant is independent of and does not bind the third Defendant. In that respect the claim against the first and second Defendant is said to arise on 7 May 1998. The instant plaint was filed on 8 April 1999. Being a tortious claim filed against the first

Defendant, any such claim is time barred after the expiry of 6 months from the date the claim arose against the first Defendant. Accordingly, the claim for denial of rights pertaining to the free accommodation in “Curieuse” and 15 % discount on food and beverage is statute barred against the first Defendant. The period of 5 years prescription as against the second Defendant has not run out and the Plaintiff's claim in that respect against the second Defendant is to be further considered.

The Plaintiff's claim is that the second Defendant as an assignee of the first Defendant, through its conduct, denied them of their rights to enjoy the “Curieuse Suite” free of charge and 15% discount on food and beverage during their visit to Seychelles. Although the issue of “contract or privity of contract” has been raised, no objection has been formally made to the fact that the plaint was not maintenable in delict. Generally,

> contracts entered into by parties do not have any absolute effect and do not have obligatory force orga ormes although they may in certain cases confer rights on a third parties (vide *Amos & Walton*, 2 ed, 173).

The evidence on record disclose that the second Defendant was appraised of the existence of the contract, Exhibit P2, during the visit of the Plaintiff's to the hotel in 1997 although, the second Defendant was not privy to the said contract. The second Defendant paid for the accommodation expenses of the Plaintiff in 1997 and enabled the Plaintiffs to enjoy a 15% discount on their food and beverages at a time when on behalf of the Plaintiffs reliance on the agreement had been sought, Exhibit P5(d)). Subsequently, the stand and conduct of the second Defendant is that it will not abide by the terms of the agreement between Northolme Limited and the first Defendant as confirmed in Exhibit P5(r).

Taking into account that a contract may create rights in favour of third parties, before a Plaintiff can recover damages in tort it must be shown that he suffered damages and that the damage was caused by the act or omission for which the Defendant was responsible. In *Amos & Walton* supra at 208 it is observed:

> The damage must consist of a prejudice to a legitimate interest protected by the law.

The contract between Northolme limited not having been rescinded, the third party was primarily entitled to enjoy the benefits therefrom. Accordingly, the conduct of the second Defendant, as assignee of the first Defendant, in preventing the enjoyment of such rights constitute a "faute" for which they are liable. This claim is not prescribed by the 5 years prescription period and succeeds against the second Defendant.

With regard to the above claim, the Plaintiffs have claimed moral damages for loss of the enjoyment of their rights and financial loss. The actual loss is the amount paid in accommodation costs and moral damages is to reflect the inconvenience and trouble suffered. In that respect I award, R9,348.35 to the first Plaintiff (as per the claim under amended plaint).

From the interpretation given to the term "Mr John Henry Atkinson and his wife", I find the claim for moral damages to be joint and I grant to both Plaintiffs R10,000 as moral damages against the second Defendant. In the end result, I enter judgment against the second Defendant in the sum of R9,348.35 in favour of the first Plaintiff and R10,000 in favour of both Plaintiffs with costs.

The claims against the first Defendant are statutorily barred and prescribed except for the last considered claim which is merely statutorily barred. Accordingly, the plaint against the

first Defendant is dismissed with costs.

The claims against the third Defendant are prescribed and in respect of the last considered claim, there has been no “faute” on behalf of the third Defendant. The plaint against the third Defendant is dismissed with costs.

Record: Civil Side No 125 of 1999

Azemia v Saffrance & Ors

Personal injury – quantum of damages

The Plaintiff, a 13 year old, was injured in a motor vehicle accident. The Plaintiff suffered permanent incapacity in one leg and had continuing medical problems. The Defendants were either the drivers or owners of the motor vehicles involved in the accident. The Plaintiff sued for damages of a total of R1,650,000. The Defendants admitted liability but disputed the amount of damages.

HELD:

A review of the precedents gives an indication as to quantum, but the precedents have to be calibrated to suit the facts and needs of each case.

Judgment for the Plaintiff. Total damages awarded R423,000 for medical costs and damages for injuries, loss of earnings and amenities, and moral damages.

Legislation cited
Civil Code of Seychelles, art 1383

Cases referred to
Norman Agricole v Wills Philoe & Anor CS 64/1996
Daphne Louis Azemia v Nishesh Prikh CS 433/1998
Harry Confiance v Allied Builders CS 226/1997
Cathleen Harry & Anor v Nella Hoareau CS 393/1997
Monica Kilindo v Morel CS 2/2000
Jocelyn Nicette v Ralf Valmont CS 395/1997

John RENAUD for the Plaintiffs
Kieran SHAH for the Defendants

Judgment delivered on 28 March 2002 by:

KARUNAKARAN J: Master Nukus Azemia is a smart boy of tender age. He is now 13 and doing his first year of Secondary School. Throughout his life, it was his maternal grandmother, who brought up him, loved him and maintained him. Since his birth, neither his Mother nor his father has ever cared for him. Nukus is naturally more attached to his grandmother than anyone else in his world and likewise is his grandmother towards him. At the age of 8, he was very fanciful and playful too. In those days, he used to have an ambitious dream about his future. He was always fancying of becoming a pilot or a film-actor when he grew up. Unfortunately, an accident he met in his life shattered his dream. He now feels that his dream career as pilot or an actor would never come true, as he is no longer physically fit to become one.

In fact, at present he is incapacitated permanently due to an injury to his left leg. He sustained that injury in a road traffic accident occurred on 11 August 1996, in which two motor vehicles namely, registration number S 1152 driven by the third Defendant and another motor vehicle registration number S 3505 owned by the second Defendant and driven by first Defendant collided on the public road. Following the collision, the minor Nukus, hereinafter called the Plaintiff, who was a passenger at the material time in one of the said vehicles, suffered severe bodily injuries. This eventually caused him to suffer permanent incapacity to his left leg. According to the Plaintiff, the collision occurred due to the negligence of the Defendants. Hence, the Plaintiff claims damages from the three Defendants levelling joint and several liability against them. At this juncture, I note his grandmother, the second Plaintiff herein, has also claimed damages from the Defendants. However, the counsel for the Plaintiff during the proceedings of 9 November 2001 withdrew her claim against the Defendants in this matter. Be that as it may, the particulars of loss and damage claimed by the Plaintiff -as per plaint- are as follows:

Loss	
Attendance to care and assistance	R 13,000-00
Transport to attend hospital an treatment	R 2,000-00
Medical Report	R 1,000-00
Damages	
Injuries	R500,000-00
Pain and suffering	R250,000-00
Loss of earnings	R200,000-00
Loss of amenities	R600,000-00
Inconvenience, anxiety and distress	R100,000-00
Grand Total	**R1,650,000-00**

Wherefore, the Plaintiff prays this Court for a judgment in his favour and against the Defendants in the sum of R1, 650,000-00 with interest at the bank rate as from 11 August 1996, and with costs.

The Defendants on the other hand have admitted liability. However, they dispute only the quantum of damages claimed by the Plaintiff in this matter. According to the Defendants, the Plaintiffs claim is grossly exaggerated and exorbitant. In the circumstances, the only issue before this Court for determination is the assessment of the quantum of damages payable by the Defendants.

I shall now turn to the nature and extent of the injuries the Plaintiff sustained in the accident. According to the testimony and medical report-exhibit P1- dated 21 April 1997 of Dr. Alexander, the surgical consultant the Plaintiff was admitted in Victorian Hospital on 11 August 1996 with the history of road traffic accident. On examination he observed the following injuries on the Plaintiff:

a. Compound comminuted fracture shaft of the middle femur.

b. Compound comminuted fracture of the left tibia and middle of the fibula.

c. Laceration of the right leg on posterior aspect; and

d. Injury on left calf muscle.

On the same day of admission, the Plaintiff underwent an emergent operation. He also had debridement - surgical removal of dead tissue - from the calf wound and was put on traction pin. Again on 14, 22 and 24 August 1996 wound debridements of the left calf were carried out. Dr. Alexander then examined the Plaintiff on 28 August 1996 and found no calf muscle on the left leg. Upon taking x-ray he noticed that the left femur and tibia were not fixed satisfactorily. On the same day he performed another surgery for the fixation of the left femur and tibia and inserted an Ilisarov's apparatus. Since then daily dressing of the wound were carried out. On 30 August 1996 a skin graft on the granulated wound of the left leg was done. The Ilisarov's apparatus was removed on 14 October 1996. A check X-ray showed a moderate united left tibia and moderate united femur with some angulations. The left leg was immobilized by a plaster of paris, which was removed on 31 October 1996. Again a repeated-close-reduction of left femur was performed by an Ilisarov's apparatus. The apparatus was then removed on 25 November 1996 and physiotherapy started. A pike plaster of paris was applied on the fracture of the left femur. The Plaintiff was finally discharged from hospital on 29 November 1996. The fracture was again immobilized by plaster of paris, when the Plaintiff attended the casualty as an outpatient. This was subsequently removed on the 21 February 1997. A check x-ray showed a united fracture of the left femur with angulations in posterior medial side. But still there was no presence of calf muscle on the left leg. He had a limp and walked with a stick. He had to continue physiotherapy and follow-ups by orthopedic surgeon. He is still limping. He has a chronic

ulcer on the calf region of his left leg. He is still suffering from Scoliosis Lumber Spine - an abnormal lateral curvature of the spine - due to trauma.

Further, Dr. Alexander testified that the Plaintiff had to undergo about 10 operations or surgical interventions required at different stages and stayed in hospital for- a long time- about 4 months. Now there is no muscle, no nerves and no artery in the calf region of the left leg. As the Plaintiff is very young the chronic ulcer on his left leg would become complicated in future. There is no tissue to cover the bone in that area as there is no calf muscle to grow around. Tibia is open. There is no protection. Chronic exposure of the bone would inevitably lead to various infections. There is no other medical solution. Plaintiff may get any infection at any time and suffer from pain. He may even need surgical interventions in future. The Plaintiff cannot be the same person what he is now. He needs symptomatic treatments all the time in the rest of his life. His wound needs to be cleaned and dressed up every day throughout his life. The deformity of the spine is due to limping, which in turn caused by the chronic ulcer. The Plaintiff has to take painkillers daily for the pain due to ulcer. He cannot carry heavy objects. He cannot walk normally. He cannot play. He cannot swim. He cannot stay, sit or stand in the same position for some time like normal persons do. He has a permanent disability of 35%. The left leg is shorter than the right one. According to the surgeon the Plaintiff needs plastic surgery of the left leg in future.

Further, the grandmother testified that the injury on the Plaintiff has drastically changed his life style and his personality too. It has also affected his performance in school. As he is not able to lead his normal life like other children of his age he feels sad and at times gets tired very easily. Sometimes he gets frustrated and takes it on his grandmother. As he cannot play after school hours and during weekends he is almost tied up at one place. He does

only his school - works, drawings and paintings. Thus, the grandmother concluded that the injury following the accident has devastated the Plaintiff's childhood life.

I diligently perused the medical evidence as to the injuries and the prognosis given by the medical expert. I had the opportunity to observe the injury on the left leg and the present physical, intellectual and emotional condition of the Plaintiff. I gave meticulous thought to the written submissions filed by the counsel. I went through the precedents cited by the counsel with a view to assist this Court to make a critical evaluation of the damages.

I considered the relevant aspects particularly of the following precedents cited by the counsel:

1. *Daphne Louis Azemia v Nishesh Parikh* C. S No: 433 of 1998 in which the Plaintiff had traverse fracture of midshaft, tibia, fibula and comminuted fracture of cuboids with no residual disability. The Court awarded R30,000 moral damages and loss of amenities of life.

2. *Cathleen Harry and another v Nella Hoareau* C. S No: 393 of 1997 in which the Plaintiff had injury to right knee, fracture of right tibia plateau, a compound fracture of left tibia and fibula with possibility of early arthritis with very slow healing. The Court awarded R35,000 for pain, suffering, distress, discomfort and R15,000 for loss of amenities and loss of equipment.

3. *Jocelyn Nicette v Ralf Valmont* C. S No: 395 of 1997 in which for permanent limp in right leg the Court awarded R15,000.

4. *Harry Confiance v Allied Builders* C. S No:226 of 1997 - a cut injury to patella tendon penetrating in to the joint of right knee; cut injury to the muscular quadriceps and muscular vastus medialis in the right leg, that was the same main muscle of the leg Residual disability of the right leg by 10%. Injury to joint that may cause osteoarthritis. Muscle wasting on right thigh. Diameter of right thigh became less than left thigh. Awarded R15,000 for pain, suffering, distress and discomfort; and R25,000 for permanent disability, infirmity and loss of amenities of life.

5. *Monica Kilindo v Morel* C. S. Appeal No: 2 of 2000 - Comminuted fracture of the left knee, three surgical operations including knee replacement. Moral damage for injuries, pain, suffering, loss of amenities of life, inconvenience, anxiety and distress. Permanent disability of 40%. Award of R140,000 by this Court was increased by the Court of Appeal to R180,000.

6. *Norman Agricole v. Wills Philoe and another* C. S No: 64 of 1996- Right fore foot of a boy aged 12 crushed and amputated. Susceptible to infections due to skin graffing. Awarded R125, 000 for injury and moral damages. For loss of education and future prospects R50, 000 in that he would not be able to engage in sports and walk properly.

In assessing the quantum of damages, firstly I warn myself that this Court should not be influenced by the sympathetic condition of the minor Plaintiff and the deprivation of his

childhood activities and enjoyment. Further, I note the damages in tort must be assessed so that the Plaintiff suffers no loss and at the same time makes no profit. In a case of tort the damages are obviously compensatory not punitive. On the question of loss of future earnings one should note that the Plaintiff is not totally incapacitated. He has not lost the hope of future earnings totally. There is no total loss of future earning. The Plaintiff may still be self-employed in future engaging himself in suitable earning activities as he rightly indicated to his grandmother in that, he would be able to run a video rental shop for his livelihood at least sitting at one place when he grows up.

Although the precedents (supra) cited by the learned counsel for the Defendant give some indication to the Court as to quantum, I find that the nature and extent of the injuries, loss and damage suffered by the minor Plaintiff in the present case are notably distinguishable from that of those precedents. Therefore, it is very unsafe to apply the yardstick of those precedents to the present case without altering the quantum. In fact, they have to be recalibrated so as to suit the changing needs of facts and circumstances that are peculiar to the present case on hand and applied accordingly to measure the quantum of damages fairly and as accurately as possible. At the same time I note the quantum claimed by the Plaintiff under each head is highly exaggerated, exorbitant and unreasonable in the circumstances. Moreover, the Plaintiff has not shown the basis or criteria to the Court as to how he arrived at the figure of R200,000 in respect of his claim for loss of earning. After taking all the relevant circumstances into account I award the following sums in favour of the Plaintiff towards loss and damage he suffered following the injury.

Loss

Attendance to care and assistance	R10,000-00
Transport to attend hospital and treatment	R 2,000-00
Medical Report	R 1,000-00

Damages	
Injuries	R150,000-00
Pain and suffering	R 60,000-00
Loss of earnings	R100,000-00
Loss of amenities	R 50,000-00
Inconvenience, anxiety and distress	R 50,000-00
Grand Total	**R423,000-00**

In the circumstances I enter judgment for the Plaintiff and against the Defendants jointly and severely in the sum of R423,000 with costs. Interest at the legal rate shall be payable on the said sum as from the date of judgment.

Since the Plaintiff is a minor I direct that the amount awarded hereof in his favour should remain invested into an interest bearing deposit account on the said minor's name with any commercial bank in Seychelles until he attains majority. Any dealing with the said deposit amount should meet the approval of the Court during his minority.

Record: Civil Side No 118 of 2000

Bibi v Ndjeutchou Xakeu

Lease of building – tenant's obligations – meaning of 'improvement', 'alteration', 'addition' and 'expiration of the lease' – withholding of rent

The Defendant leased premises from the Plaintiff to run a guesthouse. The lease agreement stated that the Defendant would "keep and maintain the premises in a good state of repair at all times". The lease further stated the any building work carried out by the Defendant would become the property of the Plaintiff and the Defendant would not be able to claim compensation. The Defendant carried out repairs on the property and withheld rent payments on the ground that the work was required to bring the premises up to standard. The Plaintiff claimed the Defendant agreed to take the premises as they were and sued for unpaid rent of R45,000. The Defendant counterclaimed for costs of repair work of R75,000.

HELD:

(i) A landlord has no general obligation to carry out repairs or make the property fit for a particular purpose. A tenant takes the premises as they are unless provisions on repairs have been set out in the lease. A tenant is responsible for repairs except those which are necessary for the landlord to carry out;

(ii) Whether work carried out on the premises is an 'improvement' or 'alteration' depends on whether from the point of the tenant they confer a positive benefit to the tenant as occupier. An alteration affects the valuation of the property. The value of an improvement will only be to the tenant;

(iii) A lease agreement cannot be interpreted in a manner repugnant to the general agreement by the parties if they have provided for an earlier determination in a fixed tenancy. The clause in question stated at the 'expiration of the lease'. There were no express words limiting the clause to the expiry term. The phrase 'or sooner determination' could be implied. The Defendant has no right to compensation for any work carried out;

(iv) A tenant may withhold rent to set-off against the cost of repairs if:

(a) the tenant pays for repair work that the landlord had agreed to carry out and pay for;

(b) the tenant pays for repairs at the request of the landlord where the work is a performance of the landlord's obligations.

(v) The Plaintiff had agreed for some early repair work to be set-off against one rent payment. The Defendant was not entitled to withhold that entire instalment or any future payments.

Judgment for the Plaintiff. Counterclaim dismissed.

Legislation cited
Civil Code of Seychelles, Arts 552, 1720

Foreign cases noted
British Anzani (Felix Stowe) v International Marine Management [1979] 2 All ER 1063

Lucrott v Wakely & Wheeler [1911] 1 KB 905
Morcom v Campbell-Johnson [1956] 1 QB 115
Proudfoot v Hart [1890] 25 QB 42

France BONTE for the Plaintiff
Frank ALLY for the Defendant

Judgment delivered on 21 January 2002 by:

PERERA J: The Plaintiff (landlord) sues the Defendant (the tenant) for the recovery of R45,000 being arrears of rent. The matter originated before the Rent Board where the Plaintiff obtained an order of eviction of the Defendant on the ground of non-payment of nine months' rent at the rate of R5000 per month. The instant action was filed on 17 January 2000, after the Defendant vacated the premises.

The Defendant avers that payment of rent was withheld by her since February 1999 as a set off against the cost of repairs effected to put the premises in a tenantable condition due to damage and wear and tear caused by the previous tenant. She claims a sum of R75,000 as such cost, and setting off R45,000 withheld from rent, counterclaims a sum of R35,000. In answer to the counterclaim, the Plaintiff avers that:

> the Defendant agreed to take the premises as it was, and that she was responsible for repairs and renovations to the same including the interior paint and decoration as stipulated in paragraph 5 of the lease agreement dated 23 October 1998.

The Plaintiff further avers that the fact that the Defendant paid rent for the first four months discloses the intention of the parties at the time of signing the agreement.

According to the evidence in the case, the premises in suit, were used as "business premises" as "Vanilla Guest House".

Prior to the agreement with the Defendant, the premises were leased to a company called "Dream Tours" for one year. Ericson Larson, the Managing Director of that company testified that although the company was able to run the business for one year, there were several defects in the premises such as a leaking roof over the dining area, and water supply system, which he repaired from time to time. He stated that on several occasions the Ministry of Tourism threatened to withdraw the licence unless major remedial work was undertaken at the Guest House.

The Defendant also produced a letter dated 26 October 1998 (exhibit D1) wherein the Plaintiff had informed the Director, Seychelles Licensing Authority that Mr Larson had vacated the premises on 18 October 1998 and that she had started renovation work on the premises, and that an application for a licence would be made once the work was completed. However, at the time that letter was sent, the Plaintiff had already entered into a lease agreement on 23 October 1998 (exhibit P1) with the present Defendant.

The Defendant testified that upon entering the premises on 1November 1998, repairs were effected to the ceiling of the lounge area, fixed "fly netting" to the kitchen windows, constructed a housing for gas cylinders, repaired the toilets and painted the interior and exterior of the premises. She also stated that the roof was repaired, and that pillars were constructed in the verandah, and also that fascia boards were fixed. She claimed that the Plaintiff gave oral permission to effect those repairs before entering the premises, but those repairs were done subsequently and after, paying the Plaintiff four months rent in advance. According to her, the agreement was to set off the cost of such repairs from the rent. She further stated that she leased the premises for a fixed period of 10 years to run a Guest House, and that it was the Plaintiff who undertook to apply for the licence in her capacity of landlord. The Defendant also testified that she spent R33,300 for the repair work and produced through one Jovani Bethew

an invoice for that amount less 10% as provisional tax amounting to a net sum of R29,970, (exhibit D2), she also stated that she spent on the general cleaning of the premises and the garden, but produced no proof of the costs.

This dispute has necessarily to be determined within the terms of the lease agreement (exhibit P1). In the agreement, the Plaintiff (lessor) described as "the owner of a property on which is constructed a 4 bedroom Guest House situated at La Passe, La Digue….. and trades under the business name "Vanilla Guest House" the Defendant admittedly leased the premises to run the business of a Guest House. The letter dated 26th October 1998 *(D1)* corroborates the Defendant's assertion that the premises were, at the time she came into occupation, not sufficiently suitable to commence business as a Guest House. Who then was responsible for the repairs and renovations that had arisen from defects prior to the date of the agreement? In respect of leases of houses, Article 1720 of the Civil Code provides that:

> the owner shall be bound to deliver the thing in good repair in all respects. During the continuance of the hire he shall carry out all the repairs which may become necessary except which are the responsibility of the tenant.

The common law position of the United Kingdom however was stated by the *Uthwatt Jenkins Committee on Leasehold, Final Report (*1950) at paragraph 228, thus:

> The landlord may by covenant undertake to do the repairs, or some of them, and it is not uncommon in short leases for the landlord to agree to be liable for external repairs. It is important to observe that except in so far as he expressly covenants to do so, he is generally speaking under no obligation to repair nor in general does he warrant that the premises are fit

> for occupation for any particular purpose. If therefore the lease is silent as to repairs, the tenant must take the premises as he finds them…….

These common law liabilities and obligations are however modified by agreement. Hence it becomes necessary to consider the provisions of the lease agreement of the parties in the present case. The relevant clauses are the following:

> Clause 3 The lessee will keep and maintain the Premises in a good state of repair at all times.
>
> Clause 5 The lessee will be responsible for repairs and renovations to the premises, including the interior paint and decoration
>
> Clause 7 The lessee will not undertake any alterations or additions to the premises without the consent of the lessor in writing.
>
> Clause 13 At the expiration of the lease, the lease, the lessor will become owner of all additions, alterations, renovations or improvements made by the lessee to the leased premises and the lessee will have no right to claim any compensation therefor.

It is here, necessary, to consider the legal connotation of the terms "repairs" "renovations", "improvements" and "alteration". The term "addition" is obviously what it means in ordinary language. Lord Denning in the case of *Morcom v Campbell-Johnson* (1956) 1 QB 115 defined "repairs and improvements" thus:

> If the work which is done is the provision of something new for the benefit of the occupier, that is, properly speaking, an improvement, but if it is only the replacement of something already there, which has become dilapidated or worn out, then, Albeit that it is a replacement by its modern equivalent, it comes within the category or repairs and not improvements.

In distinguishing between "repairs" and "renewal" (or renovation) Buckley LJ stated in the case of *Lurcott v Wakely and Wheeler* (1911) 1 KB 905 that:

> Repair is restoration by renewal or replacement of subsidiary parts of the whole “Renewal" as distinguished for "repair" is reconstruction of the entirety, meaning by the entirety not necessarily the whole, but substantially the whole.

TM Albridge on *Letting Business Premises* states that leases of business premises usually contain a tenant's covenant not to make alterations to the premises, which is an absolute prohibition, or not to make alterations without the landlord's consent. The reason for this, is that additions or alterations enhances the ratable value of the premises. However, "improvements" must be distinguished from “alterations”: Improvements have to be considered from the Tenant's point of view and not from the Landlord's. They need not necessarily increase the value of the premises, but they must alter the premises in such a way as to confer positive benefit on the Tenant as occupier.

On the basis of these legal definitions, and by virtue of Clause 13 of the agreement, the lessor would be entitled to all additions, alterations, renovations or improvements to the premises by right of accession contained in Article 552 (1) of the Civil Code which provides that "Ownership of the soil

carries with it the ownership of what is above and what is below it".

The dispute before the Court involves two issues. First, does Clause 13 operate only upon the expiration of the full lease period of 10 years? Secondly, can the lessee set off rent against cost of repairs, renovations, improvements, additions and alterations where the lease has been sooner determined. In this respect, Clause 3 is of paramount importance. The agreement thereunder was to "keep and maintain the premises in good state of repair at all times". *Woodfall on Landlord and Tenant* (Vol 1) paragraph 1-1431 states:

> A lessee who has covenanted to repair and keep in repair the demised premises during the term, must have them in repair at all times during the term,and if they are at any time out of repair, he commits a breach of covenant … A covenant to keep premises in repair and leave them in repair at the end of the term, means, that the lessee will put them into repair if they are not in repair when the tenancy begins; for otherwise they cannot be kept or left in repair pursuant to the covenant. (See also *Proudfoot v Hart* (1890) 25 QBD 42).

Hence Clause 3 would include all repairs done at the commencement of the lease, as well as these done during the term of the lease, if any. By Clause 5, the Defendant, as lessee was responsible for all repairs and renovations, including the interior paint and decoration. According to the invoice produced (exhibit D2), repairs had been effected to the roof, ceiling, door frames, locks, window frames and louvres. There had also been painting of the interior and exterior of the premises, and the "replacing of three timber posts". The Defendant in her testimony stated that there were no pillars in the verandah and hence three pillars were erected. That was therefore an addition and an alteration, and

not a repair or a renovation, for which the Defendant had not obtained written consent of the lessor, as stipulated in Clause 9 of the agreement. However in the absence of a specific agreement by the lessor to paint the exterior of the premises, painting by the Defendant was, in the circumstances, an “improvement".

The main thrust of the contention of Counsel for the Defendant was that in the absence of the words "or sooner determination" in Clause 13, the lessor would be entitled to all additions, alterations, renovations or improvements made by the lessee only upon the expiration of the lease at the end of 10 years. Where a tenancy was in writing for a fixed period, it shall, as of right come to an end at the expiry of such term. However by agreement, provision can be made for "sooner determination" In the present agreement, paragraphs 14, 15 and 17 provide three instances when the agreement could be terminated prematurely by the lessor. In these circumstances, the absence of the words "or on sooner determination" in paragraph 13, cannot be interpreted in a manner repugnant to the general agreement by the parties providing for a sooner determination. Moreover, the words used in paragraph 13 are "at the expiration of the lease", and not "expiration of the term or period of the lease". The words "or sooner determination" are therefore implied in paragraph 13.

The lessor obtained an order of eviction from the Rent Board on the ground that the lessee had breached Clause 14 of the agreement, which was a ground for eviction as specified in Section 10(2) (a) of the Control of Rent and Tenancy Agreements Act (Cap 47). There has therefore been a sooner determination of the lease due to a default by the lessee, and hence by virtue of Clause 13, the lessee has no right to compensation.

The second issue to be considered is whether the lessee was entitled to retain rent as a set-off against repairs. In the case of *British Anzani (Felix Stowe) v International Marine*

Management [1979] 2 All ER 1063, Forbes J recognised two sets of circumstances in which at common law there can be a set-off against rent, one where the Tenant expends money on repairs to the premises which the Landlord has agreed to carry out, but has failed to do so, and the other, where the Tenant has paid money at the request of the Landlord in respect of some obligation of the Landlord connected with the premises demised. In the present case, the Defendant testified that the Plaintiff agreed orally for repairs to be done initially and for the deduction of a sum from the rent payable. The Plaintiff denied that and stated that the lessee had agreed by Clause 5 of the agreement to be responsible for repairs and renovations, unconditionally, and that although the lessee had also agreed by Clause 7 not be undertake any alterations or additions to the premises without the consent of the lessor in writing, she had made alterations to the verandah by erecting three pillars. Further, although the lessee testified that the lessor agreed to a certain sum was to be deducted from the monthly rent, admittedly she defaulted paying the whole rent since March 1999.

In these circumstances, the Defendant had no right to withhold rent against repairs. Accordingly the Plaintiffs action succeeds, and the counterclaim of the Defendant is dismissed.

Judgment is therefore entered in favour of the Plaintiff in a sum of R45,000, together with interest and costs.

Record: Civil Side No 9 of 2000

Delcy v Camille

Oral evidence – admissibility – family relationships – moral impossibility

The Plaintiff is the Defendant's mother. The Defendant was given authority to make withdrawals from the Plaintiff's bank account based on her instructions. The Plaintiff alleged the Defendant made withdrawals without her consent and sued for the overdrawn amounts. During the Plaintiff's evidence in chief, she stated that she allowed her daughter to remove R10,000 from her bank account. The defence objected on the basis of article 1341 of the Civil Code and sought a ruling declaring inadmissible oral evidence on sums over R5,000. The Plaintiff averred that she was exempted from providing a written agreement because of moral impossibility.

HELD:

The Defendant made a judicial admission that she was authorised by the Plaintiff to operate her account. On that basis oral evidence may be admitted.

Obiter:

(i) The basis for applying the exception on moral impossibility under article 1348 of the Civil Code depends primarily on the relationship between the parties: the intimacy of the relationship between the parties and the proximity of lien de parenté between the parties.

(ii) Trust may be the real reason for an oral rather than written agreement. An oral agreement based on trust may constitute a moral impossibility.

Ruling Oral evidence admitted.

Legislation cited
Civil Code of Seychelles, arts 1341, 1348

Cases referred to
Andre Esparon v Serge Esparon & Anor (1991) SLR 52
Rene Francoise v Raymond Herminie (1991) SLR 100

Frank CHANG SAM for the Plaintiff
Philippe BOULLE for the Defendant

Ruling delivered on 27 September 2002:

PERERA CJ: This ruling concerns the admissibility of oral evidence on a matter, the value of which exceeds R5000, as envisaged in Article 1341 of the Civil Code. The Plaintiff is the mother of the Defendant. There are three claims averred in the plaint. First, the Plaintiff avers that she was the holder of a Bank Account with Banque Nationale De Paris in Reunion, and at the material time had FF 300,000 to the credit of that account. She avers that by a letter of authority to the bank, she "authorised the Defendant to operate the account on her behalf". She also avers that there was an oral agreement between them that the Defendant would use the letter of authority, in particular for the purpose of withdrawing money from the account, upon specific instructions given by her. She acknowledges that FF 15,000 was withdrawn on instructions pursuant to that oral agreement, but alleges that the Defendant had withdrawn the balance FF 285,000 without any authorisation from her. The Defendant admits paragraph 3 of the plaint regarding the authorisation but avers that she operated the account on behalf of the Plaintiff for the reason that the account was in the name of the Plaintiff, she was the owner of the funds and operated the account for their own benefit.

Secondly, the Plaintiff avers that pursuant to another oral agreement that the Defendant will accommodate and maintain her during her lifetime, she deposited FF 200,000 in the name

of the Defendant in an account with the same bank in Reunion. She avers that the Defendant has breached that oral agreement by not providing her with accommodation and maintenance, and hence she seeks a refund of the whole sum of FF 200,000.

Thirdly, she avers that she left a sum of R20,000 in the custody of the Defendant for the purposes of meeting her burial expenses, and that the Defendant has failed to return that amount though demanded.

The present ruling arises from replies given by the Plaintiff in the course of her examination in chief concerning the circumstances under which the Defendant was authorised to make withdrawals in respect of the first claim. The relevant question and answer, as recorded, are as follows:

> Q. Subsequent to your putting the money into the account, what happened afterwards?
>
> A. When the money was placed in the bank, it was not to be removed, but in case something happens to me.

Mr Boulle, Learned Counsel for the Defendant objected to this reply as violating the provisions of Article 1341 as it explains the conditions of the withdrawal. Paragraph 4 of the plaint avers that withdrawals were to be upon specific instructions of the Plaintiff.

Objection was also raised on the same grounds in respect of the following reply given by the Plaintiff:

> Q. Do you know how much money – how many times you asked your daughter to remove?
>
> A. I asked my daughter to remove money on two occasions.

Q. Do you know what amounts?

A. For the first time I asked her to remove 10,000 but she removed 15,000.

Mr Boulle submitted that this was evidence of breach of instructions, and that since the amount was over R5000, oral evidence was not admissible pursuant to Article 1341.

Mr Chang Sam, Learned Counsel for the Plaintiff thereupon sought to establish on a voir dire, the moral impossibility of the Plaintiff to obtain written documents, which is an exception contained in Article 1348 to the Rule in Article 1341. At the voir dire, the Plaintiff testified that at the time of the oral agreement, she was living with the Defendant, who was her eldest child and that she trusted her as she had promised to her father before his death that she would look after her. The arrangement regarding the authority to be given to the Defendant was made in the presence of Mr Bernadin Renaud, who was her Attorney and a friend of the family. She further stated that the Defendant came to Mr Renaud's Office voluntarily. Mr Renaud, in his testimony stated that the Plaintiffs father was his former teacher and had later worked with him. He came to know the family very well. Mr Delcy asked him, before his death, to assist the family. Accordingly, Mrs Delcy always consulted him and obtained his advice and assistance on any matter. He further testified that the Plaintiff, the Defendant and her husband came to his office and discussed the arrangement concerning a certain sum of money in an account in Reunion. He acted as a friend of the family. He further stated that the question of a written document did not arise as he was aware of the closeness of the relationship between the Defendant and his parents. On being questioned by Mr Chang Sam as to why, as a lawyer, he did not advise them to reduce the agreement to writing, Mr Renaud said that, because of the trust the family members shared, he did not consider it necessary to advice any writing. Cross-examined by Mr Boulle he stated that if he had advised

them to draw up a document they would have agreed. Mr Renaud however said that he was a witness to the conversation regarding the arrangement to withdraw money from the bank.

The Law

Article 1348 contains one of the exceptions to the Rule of evidence in Article 1341. Article 1348 recognises two types of impossibilities, (1) where the creditor has not been able to secure written proof of the judicial Act, (2) where the creditor has lost the written document through unforeseen and inevitable accident or through an Act of god. The instant ruling concerns the first type where the creditor has not been able to secure a written document due to moral impossibility, that is, due to the closeness of the relationship between the parties. The “fait juridique” or the juridical Act is the Act which manifests the will. Hence in the present case, the juridical Act is what the Plaintiff intended when she authorised the Defendant to operate her account. Was it to be done only upon specific instructions given by her or was it a carte-blanche? Since the amount involved was over R.5000, that “fait juridique” must be proved by a document. The exception to that requirement established by jurisprudence, lies primarily in the relationship between the parties. But that relationship, per se is not the deciding factor. The Court has a wide discretion to decide what constitutes moral impossibility on the facts of each case. In the case of *Rene Francoise v Raymond Herminie* (C.S.115 of 1991), it was held that the basis of applying Article 1348 by judges would be the intimate relationship of the parties concerned and also that the proximity of the "lien de parenté" which binds them that was considered as a vital factor. It was also held that the further the "lien de parenté" between the parties, the lesser the chance for one to invoke the provisions of Article 1348.

Mr Boulle however sought to extend the scope the inquiry by the Court in considering moral impossibility, by submitting that

the subject matter was as important as the relationship. In that respect, he relied on the dicta in the *Francoise* case (supra) which was an action for specific performance of an oral agreement to sell immovable property. The Court held that there was nothing special in the relationship between two brothers in law to establish moral impossibility, and proceeded to state obiter, that -

> Besides, the sale or purchase of immovable property does not fall into the category of obligations where the insistence by one party for a written document could be interpreted as a "méfiance" or mistrust by the other. On the contrary, the insistence of writing is proof that the party or parties is/ are indeed serious in his or their enterprise.

Mr Boulle however conceded that he was not equating a bank authorisation such as this with the formalities required in respect of a sale or promise to sell immovable property. He submitted that the Court should not readily conclude that in the present matter the reduction of the agreement to writing would have been considered as a mistrust of the daughter. The evidence of Mr Renaud that had he advised them to reduce the agreement to writing they would have complied, is evidence of the trust the family members had on him. It cannot be considered as a derogation of the trust the family members had for each other. Mr Renaud qualified his statement by stating that knowing the family relationship well, he would not have so advised.

It is averred that the Plaintiff authorised the bank to permit the Defendant to operate her account on her behalf. In these circumstances, the bank would be unconcerned about any agreement between the Plaintiff and the Defendant as to the circumstances under which specific withdrawals would be made. Hence unlike in situations where there is a legal requirement that parties must express their intentions or

agreements in writing, the only factor to be considered when deciding on moral impossibility would be the relationship between the parties and the closeness of that relationship.

In the case of *Andre Esparon v Serge Esparon & Or* (C.S. 157/90 decided on 27 September 1991). The Plaintiff was a 72 years old man. The first Defendant was his nephew *(brother's son)* and the second Defendant was the first Defendant's concubine. The Plaintiff lived alone in his house which was close to the house occupied by the two Defendants. During, illness the second Defendant assisted the Plaintiff. Once when the Plaintiff was in hospital, the second Defendant cleaned the Plaintiffs house with his consent. Later she told the Plaintiff that she took R27,000 which was in an unlocked box for safekeeping. Upon leaving hospital, the Plaintiff resided with the Defendants for sometime, but the second Defendant assured the Plaintiff that the money was safe with her. Later, consequent to some quarrel, the Defendants chased the Plaintiff out of the house. On a claim by the Plaintiff to recover the money, the Court ruled that there were "blood ties" between the uncle and nephew. As regards the second Defendant, the Court ruled that she had been looking after the Plaintiff when he was ill, and hence due to the trust, it was not reasonable to expect him to have obtained any writing in the circumstances still on circumstances, the Court ruled that the Plaintiff was ill in hospital, and that alone was sufficient reason why the Plaintiff could not have obtained a writing even if he so wished. The Court concluded that "it was obvious that trust played a prominent part in the occurrence."

In the present case, too, the Court is satisfied on the basis of the evidence at the voir dire that trust was the essence of the oral agreement.

In these circumstances the legal point raised by Mr Chang-Sam that in paragraph 3 of the defence, the Defendant has made a judicial admission that she was authorised by the

Plaintiff to operate her account, and that consequently oral evidence could be adduced in circumstances other than as provided in Article 1348, need not be considered for present purposes.

I therefore rule that oral evidence is admissible by the Plaintiff as regards the "specific instructions" given to the Defendant, as averred in paragraph 4 of the plaint.

Record: Civil Side No 55 of 2001

Ernesta v Commissioner of Police

State liability – vicarious liability – act of police officer

The Plaintiff composed and produced a music CD and cassettes. Police officers confiscated the CDs and cassettes from several shops and ordered the shop owners not to sell or distribute them. Police also seized cassettes from several homes and publicly stated that the recorded music was banned. The Plaintiff sued the Commissioner of Police in his vicarious capacity for unlawful seizure. The defence averred that the Police Commissioner could not be vicariously liable and that the music was seized pursuant to valid search warrants.

HELD:

(i) There is a distinction between actions for tort which are adjudicated by the Supreme Court in the exercise of its original civil jurisdiction and constitutional matters that arise for the constitutional division of the Court;

(ii) The liability and compensation for the loss of personal freedoms is different from the liability arising from a delictual act or omission and the award of delictual damages;

(iii) The Police are established by the Constitution which also sets out their functions. The State has empowered the Police to maintain law and order. Actions of police officers in the course of their employment are made on behalf of State and are an exercise of State powers; and

(iv) Any civil action based on any act or omission of a police officer must be instituted against the Government of Seychelles and not against the Commissioner of Police as vicariously responsible.

Judgment for the Defendant. Case dismissed.

Legislation cited
Constitution of Seychelles, arts 18, 22, 46, 130, 159, 160, 161
Police Force Act, ss 5, 8, 46

Cases referred to
Eric Derjacques v Commissioner of Police (1994) SLR 30
Georges O'Reddy v Commissioner of Police (1996) SLR 179

Foreign cases noted
Commonwealth of Virginia e*x parte* 11 US 339
Maharaj v Attorney-General of Trinidad [1978] 2 All ER 670
Ratnasara Thero v Udugampola (1983) 1 SLR 461
Velmurugu v Attorney-General (1981) 1 FRD 180

Antony DERJACQUES Attorney-at-Law for the Plaintiff
Anthony FERNANDO Attorney-General
With Laura VALABHJI Senior State Counsel for the Defendant

Judgment delivered on 7 October 2002 by:

PERERA CJ: This is a delictual action in which the Plaintiff, a Music Composer and Singer, sues the Commissioner of Police in a vicarious capacity for acts allegedly done by Police Officers in seizing certain audio cassettes and CDs. He claims a total sum of R556,300 together with interest and costs.

The Plaintiff avers that he composed, published and distributed nine songs, by CDs and audio cassettes entitled "Fristasyon Nwel ek Lannen" to the Public, and that on 6

December 2001 numerous Police Officers led by one Mousbe of the Anti-Drugs Unit seized 10 CDs and 76 cassettes in two shops at Market Street, known as "OJs". He further avers that certain Police Officers went to several shops in Victoria and verbally ordered the shop owners not to sell and distribute the said cassettes. He also avers that Police Officers have seized the said cassettes in numerous houses and have publicly stated that they were "banned".

The Plaintiff has sued the Commissioner of Police in his vicarious capacity. He avers that the Commissioner of Police, pursuant to the provisions of the Constitution, administers and operates the Police Force, and hence he is liable for the acts and omissions of the Police Officers in the force.

The Defendant, in his statement of defence avers that "the Commissioner of Police" cannot be made vicariously liable for alleged acts of the Police Officers, and also cannot be made liable to the Plaintiff as he is not the master or employer of such officers. On the merits, the Defendant admits that Police Officers seized the cassettes as averred in paragraphs 3 and 4 of the plaint, but avers that it was done pursuant to valid search warrants issued under Section 96 of the Criminal Procedure Code. The Defendant avers that the cassettes were seized on reasonable suspicion that they contained seditious and defamatory material.

Can the Commissioner of Police be sued in a vicarious capacity?

Paragraphs 6 and 7 of the plaint are as follows:

> 6. The said Police Officers were acting during the course of their duties with the Defendant for which Defendant is vicariously liable in law.
>
> 7. Plaintiff avers that the Defendant's said acts are unlawful and render the Defendant liable

to Plaintiff in law.

Clearly, the Defendant is sought to be made liable solely for alleged acts of Police Officers who, it is averred were acting *"in the course of their duties with the Defendant".* Mr Derjacques, Learned Counsel for the Plaintiff conceded that the Commissioner of Police is being sued on the basis of the ruling in the case of *Eric Derjacques v Commissioner of Police* (CS 214 of 1993). In that case, the Court considered two issues, (1) whether a Police Officer carrying out his duties is exercising original or delegated authority, or both; (2) whether the 1993 Constitution changed the law or status with regard to Police Officers and their authority. The Court held, (1) that Article 160 (1) of the Constitution established the Commissioner as the overall head of the Police and provides that he shall be responsible for determining the use and control of the operations of the Police in accordance with the law; (2) That the combined effect of the relevant provisions of the Constitution and the Police Force Act was that the Police Officers carry out their work on behalf of the Commissioner; (3) The Commissioner of Police can be sued jointly with the Police Officer, who was the alleged tortfeasor.

Basically, a distinction must be drawn between delictual actions which are adjudicated by the Supreme Court in the exercise of its original Civil Jurisdiction, and Constitutional matters that arise either under Article 46(1) or Article 130(1) of the Constitution, which are determined by the Constitutional division of the Court. Mr Derjacques, submitted that the cause of action in the present case concerns the Fundamental Right to Freedom of expression as guaranteed by Article 22(1) of the Constitution. He submitted that the action instituted against the Commissioner of Police was properly constituted as by virtue or Article 18(10) of the Constitution, anyone unlawfully arrested or detained had a right to receive compensation:

from the person who unlawfully arrested that person

> or from any other person or authority, including the state, on whose behalf or in the course of whose employment the unlawful arrest or detention was made or from both of them.

It was therefore submitted that although, in the instant case, the cassettes were seized by Police Officers, and not by the Commissioner in person, he fell into the latter category.

Article 18(10) of the Constitution deals with arrests and detentions which affect the Fundamental Right to Liberty. That Sub Article applies when a contravention of that right is canvassed before the Constitutional Court. The instant matter is a delictual action based on an alleged unlawful seizure of property. Liability for the contravention of a Fundamental Right and the payment of compensation therefor, is different from liability arising from a delictual act or omission, and the awarding of delictual damages.

In the *Eric Derjacques* case, Bwana J, considered Section 48(1) of the Police Act, 1964 of the United Kingdom which specifically provides that the Chief Officer of Police in any area shall be liable in respect of torts committed by Constables under his direction and control in the performance of their functions in like manner as a master is liable in respect of torts committed by his servants in the course of their employment, and shall be treated as a joint tortfeasor. He also cited Section 48(2) of that Act, which provides that any damages or costs awarded against the Chief Officer of Police shall be paid out of the "Police Fund" Bwana J thought that the “spirit” of Section 48 of the U.K. Act has been incorporated in Article 18(10) of the Constitution of Seychelles. He therefore equated the Commissioner of Police to the Chief Officer of Police in an area in U.K, in respect of delictual liability in a vicarious capacity. That was a serious misdirection. Section 48 of the Police Act of the UK deals with the liability of Police Officers solely in tort. In Britain, there are 52 Police Forces, mainly organised on a local basis. Each

Force is headed by Chief Constables who are answerable to the Police Authorities for the competence, efficiency and conduct of their force. The Police Force of Seychelles is differently constituted.

Further, Bwana J made the following contradictory finding:

> The Constitution now allows individuals to sue even the State for damages without passing through a long complicated procedure as was formerly the situation. The State here includes the Government and institutions under it. Thus the Commissioner is not excluded.

Here, the Learned Judge considered the Commissioner of Police as being synonymous with "the State". Justifying the institution of the action solely against the Commissioner, he proceeded to state that “in cases like the present one, the Commissioner can be made to meet the costs or damage awarded only if he is made a party to such proceedings. Without that, Lance Corporal Patrick (who was not made a party to that action), if he loses his case, may find himself being required to pay damages for actions done in the course of his employment”. Further considering the Commissioner as being synonymous with "the State", he stated:

> It is my considered judgment, that the 1993 Constitution has changed the law in Seychelles regarding liability of the State and its organs for acts committed by its servants. It can (the State) be sued jointly. Therefore, in this case, the Commissioner of Police of Seychelles may be Jointly sued with Lance Corporal Patrick.

The ratio of that ruling therefore was that the direct tortfeasor could be sued jointly with the State that employs him, the State being represented by the Commissioner of Police. Hence although the Learned Judge relied on the Police Act

1964 of the U.K. which considered the Chief Officer of Police liable in a like manner of a master for the acts of his servants, yet came to a different conclusion. His finding that any damages or costs awarded to the Plaintiff could be recovered from the Police Fund only if the Commissioner of Police is made a party, adds confusion to the otherwise contradictory ruling, as the Police Fund in Seychelles, unlike its counterpart in the U.K., is a 'Police Reward Fund' established by Section 46(1) of the Police Force Act (Cap 172). Payments out of that fund are made for “rewards and gratuities to subordinate officers for good conduct or good service, and for such other purposes as the Commissioner of Police may deem beneficial to the force”. In no way can this fund be utilised to pay compensation for delictual acts as provided in Section 48(2) of the Police Act of the UK.

Bwana J, in the subsequent case of *Georges O'Reddy v Commissioner of Police* (CS 147 of 1994) decided on 19th September 1996) reiterated his view “that (the Commissioner of Police) is liable for the Act of his subordinate staff when carried out in the course of their employment."

What then is the position of the Commissioner of Police in a delictual action in which the cause of action is an alleged unlawful act committed by Police Officers? The Commissioner of Police is not the head of a Private Security Service, but is the repository of the coercive powers of the State. The Police is established under Article 159(1) of the Constitution. The Commissioner of Police is appointed by the Executive President and approved by the National Assembly to command the Police Force.

Section 5(1) of the Police Force Act provides that the force shall consist of the Commissioner of Police, and other subordinate Officers up to and including a Constable. Section 6 provides that –

> The force shall be employed in Seychelles for

> the maintenance of law and order, the preservation of peace, the prevention and detention of crime, and the apprehension of offenders, and for the performance of such duties Police Officers may carry arms.

Article 161 of the Constitution also sets out the functions of the Police Force. Section 8 vests the Commissioner of Police with general powers to command, superintend, direct and control the force, subject to orders and directions of the President. Hence the Executive and the Legislature have invested the Commissioner with state power to maintain law and order in the country through the Subordinate Officers in the Police Force. In the case of *Ex-parte Commonwealth of Virginia* (100 US 339 at 346), the Supreme Court of USA stated thus:

> A State acts by its Legislative, its Executive or its judicial authorities. It can act in no other way. The Constitutional provisions therefore must mean that no agency of the State, or of the Officers or Agents by whom its powers are executed, shall deny to any person within its jurisdiction or equal protection of the laws. Whoever by virtue of public function under a State Government deprives life or liberty without due process of the law or denies or takes away the equal protection of the laws, violates the Constitutional inhibition; and as he acts in the name and for the State's Power, his act is that of the State.

Hence the Commissioner of Police is an Executive Officer of the State. It was held in the case of *Velmurugu v A-G* (FRD (1) Page 180) (Sri Lanka) that:

> "A claim for redress under Article 126 (Article 46(1) of our Constitution) for what has been

> done by the Executive Officers of the State, is a claim against the State for which has been done in the exercise of the executive powers of the State. This is not vicarious liability; it is the liability of the State itself; it is not a liability in tort at all; it is a liability in Public Law of the State.

Lord Diplock in delivering the majority judgment in *Maharaj v A.G.of Trinidad* [1978]) 2 All ER 670 at 677 stated-

> It is against State action that fundamental rights are guaranteed. Wrongful individual acts unsupported by State authority are not reached by fundamental rights. Fundamental rights are claimed against the State and its instrumentality and not against private parties.

Therefore, a delictual action based in Private Civil Law cannot be instituted against the Commissioner of Police in his vicarious capacity as an employer of his Subordinate Officers. All Police Officers are in the employment of the State and are not employees of the Commissioner, who himself is a State employee. In the Sri Lankan case of *Ratnasara Thero v. Udugampola* (1983) 1. SR1 L. 461, a Superintendent of Police obtained a warrant and seized 20,000 pamphlets which the petitioner had intended to publish. They were suspected to contain seditious material. The Court held that

> It was in the exercise of the Police powers vested in him that (the Police Officer) in the discharge of what he conceived to be his duty, (seized the pamphlets) and arrested the petitioner. He acted thus in the name of, and for the State. His action bears the stamp of State action even though he failed to observe the forms and rules of law. He has used the State power to commit the contravention which the Constitution prohibits. The Commission of the

> wrong has been rendered possible by the State power of which he was a repository and hence his action is that of the State.

On the basis of these authorities, and on a consideration of the provisions of the Constitution, and also of the Police Force Act of Seychelles, any Civil action based on any act or omission of a Police Officer must be instituted against the Government of Seychelles and not the Commissioner of Police. The Plaintiff in the present case therefore has no cause of action against the Commissioner of Police in a vicarious capacity.

Although this finding is sufficient to dispose of the case I shall proceed to consider the merits of the case as presently constituted.

The Merits

The Plaintiff is admittedly, a singer and composer of songs. In December 2001, he released a cassette entitled "Fristrasyon Nwel ek Lannen" mainly through "O.J Enterprise", "C and A Trading" and "Rays Music Room". The lyrics were composed by him. He stated that the "Fristrayon" he was singing about related to the shortages of goods in the Market. He stated that he chose Christmas time as that was the time people were more concerned with buying goods. He further stated that for the last 10 years or so, there has been a tendency to publish funny songs to amuse the people. One such song involved an imaginary character called "Felix". But what is attributed to that character was not always true. He stated that in his songs he is partly critical and partly humorous. The arrangement with the sales outlets was that the shop gets R25 for every CD sold and R10 for a cassette. The cassettes and CDs continued to be his property until sold.

The Defendant avers that the said cassettes were seized upon search warrants issued under Section 96 of the Criminal

Procedure Code. This Section provides that:

> where it is proved on oath to a Judicial Officer that in fact or according to reasonable suspicion anything upon, by or in respect of which an offence has been committed… is in any building … The Judicial Officer may by warrant authorise a Police Officer… to search the building… and if anything searched or be found, to seize it and carry it before a Court to be dealt with according to law.

The Defendant produced in evidence seven search warrants issued by a judge of the Supreme Court in Chambers. They are marked as exhibits D5, D6, D9, D10, D12, D14 and D15. These warrants were issued upon Complaints SWORN by a Police Officer that certain cassettes in the possession of shops in Market Street known as O.J Enterprise and C and A Trading, Rays Music Room at Albert Street, J and R Trading, in the premises of Sadec Jumaye, and the Musical Studio of David and Wilven Payet, contained seditious material, and material defamatory of the President. The cause of Action pleaded against the Defendant is unlawful seizure of property. Damages are claimed mainly for an alleged economic loss caused by the failure to sell these cassettes, the cost of these cassettes, and for moral damages.

The defence, admits seizure, but avers that it was done by following due process of the law upon reasonable suspicion that the cassettes and CD's contained seditious and defamatory material. Chief Superintendent of Police, Mr Antoine Belmont who commands the Criminal Investigation Unit testified that he obtained the search warrants upon swearing on oath, the contents of a complaint before a judge. He produced 76 cassettes and 2 CDs seized from "OJ Enterprise" and "C and A Trading" 7 such cassettes were also seized from "Rays Music Room" 1 cassette was seized from the premises of Sadec Jumaye. Although the Music Studio and the residence of David and Wilven Payet were searched,

no cassettes or CDs were found. Mr Belmont testified that he received a cassette, marked exhibit D1 from a Police informer who complained that it contained seditious and defamatory material. He listened to it and was satisfied that the complaint was correct. Later he received complaints from members of the public as well. It was then that he decided to obtain the search warrants and to seize the cassettes and CDs for further investigation. After seizure, he noticed that although the cover and labels of all cassettes and CDs were the same, in one of the songs called "Ros Felix" in cassette exhibit D2, the contents were slightly different from the same song in the cassette marked exhibit D1 which he originally received. He stated that after listening to the songs he was satisfied that the lyrics contained seditious intentions to bring the President into hatred or contempt and to excite dissatisfaction against the Government and also to excite the People of Seychelles to procure an alteration otherwise than by lawful means. That, he stated, was an offence under Section 95 of the Penal Code.

Elaborating on his belief SP Belmont cited the following lyrics in cassette D1, when translated from Creole to English were:

1. Father Christmas, Father Christmas, Oh, make it rain, because desalination is for the little blacks like me.

2. Father Christmas, Father Christmas, ask Felix what he has done with our dollars, even if there was no conference.

3. Father Christmas, Father Christmas, ask Felix how much he paid for land to set up the Sheep Farm.

4. Felix has gone to Australia to spend his holiday, even if there was no conference, he took our 40,000.

5. A few genius are making a sheep campaign, he has bought large plots of land to set up Sheep Farms.

6. Father Christmas bring me a crowbar, a crowbar very long for me to roll the big boulder.

7. Father Christmas, Father Christmas tell us how many millions South Africa paid Felix to release the mercenaries. Ah Felix, where are all those several millions, South Africa paid Seychelles when you released the mercenaries.

8. Fifteen years ago you acted only like a playboy, this year you are among the elderly “Twarzyemaz”, you better change your ways brother, go on retirement and give us peace.

9. All businessmen have packed up and left, the crisis is now getting more complicated, all your friends are becoming senile, take care we do not fall in the pit.” “Felix, lift up your eyes, Felix, look on the mountain, Felix if you are a man of truth, tell for whom are all those big palace, Felix there is no milk, Felix there is no cheese, Felix there is no cream, tell us how these children will face. Last year you told us things would change, this year you would work miracles, next year we wonder what you will tell us, oh Felix, we have had enough”. “Felix you try to dodge, this is playing hide and seek, Felix make things clear before life becomes more critical, Felix try to export instead of importing, if they do not make an effort, soon the problem will become more serious.” “Father Christmas, Father Christmas, give me a dam as gift, a large dam for several millions, same value as the Pajeros, Father Christmas, Father Christmas, oh, make it rain, because desalination is for the

little blacks like me, Seychellois said build dams, they do not have money, there in the Assembly they vote for desalination, they are a majority, they have authority, I am pleading with you, Father Christmas, give a dam as gift. Father Christmas, bring me a crowbar, a crowbar very long for me to roll the big boulder, the so called mercenaries landed in Seychelles to invade our small Island, then they were captured, Seychellois said kill them, after he received his several millions he told us criminals, release them, Father Christmas, Father Christmas, tell us how many millions South Africa paid Felix to release the mercenaries, ah Felix, where are all those several millions South Africa paid to release the criminals.

10. Song entitled "Christmas Comparison"
Father Christmas, we must know children. Christmas is here, Christmas is here, see the problem our country is in, the situation is deteriorating, bring medicine to heal us, in the olden days here in Seychelles we got whatever we wanted, we lived well in harmony, there was pride all over, but nowadays everything has changed, no longer nowhere to run, all over we are in problems, not even know where to run, Father Christmas bring gifts, gifts of deliverance, last year there was no paper, but this year there is no water, Father Christmas, bring us gifts, gifts of deliverance, last year there were no matches, but this year there are no cigarettes, in the olden days there were so much in Seychelles, abroad we went whenever we wanted, Forex in the reserve was not lacking, baskets were full of everything, but nowadays when we are suffering, just ask oneself where to go, even hospitals have no medicine, Doctors have only panadol, Father Christmas, bring gifts, gifts of deliverance, last year there were no Doctors, this

year there are no qualified nurses. I am praying for change in Seychelles, I am praying for our economy, oh my dear, give me your hand, pray Seychellois, may God bless our country, Father Christmas, bring us gifts, gifts of deliverance, last year there was no oxygen, this year the ambulance has a price.

11. Unite my sister, brother, mother and father also, all sincere friends, make this a better world, pray the lord, you who are in hell, for our creator to come and save this land, all the bad deeds of the Dictator, renounce this world.

The Plaintiff did not contest the accuracy of those translations. In his evidence he identified his voice in the songs from the cassettes played in open Court. He also admitted that the person he referred to as “Felix”' was the President of Seychelles. He identified "Felix" in the lyrics quoted as 4 and 8 in particular as referring to the President. As regards the issue of sedition, the Plaintiff in explaining the difference in lyrics contained in D^1 and D^2 stated:

A. What I have done is, I have taken the album, the song, that I think is seditious and I did not put all the words in it

Q. Ah, that you think, is seditious?

A. No, I am talking about the other one. I am talking about the other one O.K?

The Plaintiff maintained that only the cassette exhibit D1 contained seditious and defamatory material, and that on the advice of his lawyer that was not distributed for sale. He also stated that only the altered version contained in cassette exhibit D^2 was being sold through the various shops. But SP Belmont stated that he got it from a member of the public.

However when both cassettes D^1 and D^2 were played in Open Court, the Plaintiff was unable to distinguish between the two for sometime. Ultimately he identified exhibit D^2 as the one he distributed for sale. As regards the reference to "rolling the big boulder in the lyric at 6 above, he stated:

> A. O.K this is pure politics, where I, just to say that, during the past election, the Opposition Party has gained more People, and in the coming time we will gain more.
>
> Q. So, the big rock is the Government, that you want to roll, the President.
>
> A. That is not the President.
>
> Q. No?
>
> A. No it is the Government, the Government of the day.

SP Belmont stated that the cassette exhibit D^1 which he received from the Police Informer contained only three songs, but cassette exhibit D^2 has 8 songs. However when he applied for the search warrant and went to seize the cassettes and CD's he had no doubt that what he had received, (exhibit D^1), and those in the shops and premises from which cassette D^2 were seized were the same.

In the cassette, exhibit D^2, seized from the shops the following passages were marked in evidence. The translations into English, which were not challenged by the defence, were as follows:

> 1. All businessmen have packed up and left. There is no milk, there is no cream, there is no cheese, try to export instead of importing.

2. Felix lift up your eyes Felix look on the mountain. Felix if you are a man of proof, tell for whom are all those big Palaces. Felix there is no milk. Felix there is no cream, tell us how those children will be fed.

3. You better change your ways brother, go on retirement and give us peace. Last year you told us things will change, this year you would work miracles, next year we wonder what you will tell us, Oh Felix we have had enough.

4. Felix you are trying to dodge, this is playing hide and seek. Felix make things clear before life becomes more critical Felix try to export instead of importing, if any do not make any effort, soon the problem will become more serious.

5. Christmas is here, see the problem our country is in.

6. The situation is deteriorating, in olden days here in Seychelles we get whatever we wanted, we lived in harmony, there was pride all over.

7. But nowadays everything has changed, no longer nowhere to turn, all over we are in problems, don't even know where to run. Father Christmas, bring gifts, gifts of deliverance, last year there was no paper, but this year there is no water. Father Christmas bring us gifts, gift of deliverance, last year there were no matches, but this year there are no cigarettes. In olden days there were so much in Seychelles, In olden days there were so

> much in Seychelles, abroad we went whenever we wanted, forex in the reserve was not lacking & baskets were full of everything, but nowadays we are suffering, just ask oneself where to go, even hospitals have no Medicine. Doctors have only panadol.

These lyrics were identical with those on cassette exhibit D1, which the Plaintiff admitted contained seditious and defamatory material. The Plaintiff who listened to the cassette (D^2) being played in Open Court, admitted all those lyrics. He stated that the reference to "Felix" differed in different contexts it was used. Sometimes it was the President, sometimes it was Mr Mancham. Questioned as to whom he referred in the lyric numbered 2 above, he stated that it was "Felix himself, who is "the new year man". He stated that the lyrics at 3 above, referred to the Government. However after being reminded that he had stated that 'Felix" was a person, the Plaintiff agreed but still maintained that he was not referring to the President. He further stated the lyrics at 4 above referred to members of the National Assembly. However he finally admitted that the reference to Felix in respect of a trip to attend a conference in Australia was to the President.

Mr Derjacques, Learned Counsel for the Plaintiff contended that there was no reasonable cause for the Police Officers to seize the cassettes and CDs as all that the Plaintiff was singing about was factually correct. He submitted that in that respect there can be no sedition or defamation of the President as being averred by the Defendant.

In the present delictual action, what arises for consideration is not whether the songs in cassettes D1 and D2, and the CD's, contained seditious or defamatory material, but whether S.P. Belmont had reasonable cause to obtain search warrants and seize them for investigation.

The effect of the warrants

As Lord Wilberforce stated in the case of *R v IRC ex parte Rossminster Ltd* (1980) AC 952 at 1000 "there is no mystery about the word "warrant" it simply means a document issued by a person in authority … authorising the doing of an Act which would otherwise be illegal."

In the case of *A-G of Jamaica v Williams* (1998) AC 351, suspecting that the Applicants were involved in the fraudulent importation of motor vehicles, a Police Officer applied for, and was issued with search warrants under Section 203 of seize documents. The Supreme Court of Jamaica found that the search and seizure was lawful and dismissed the action. On appeal, the Court of Appeal overruled that decision on the ground that the warrants failed to mention the statutory power under which they were issued and purported to give additional powers outside the ambit of Section 203. On appeal to the Privy Council, if was held that the Judge's statement in each warrant that he was satisfied of the existence of reasonable cause of suspicion must, prima facie, be accepted and is not rebutted by the alleged defects in the warrants, and that the legality of a search and the taking of documents properly authorised by statute and warrant could not be challenged. The Privy Council considered the dicta of Patterson J in the Supreme Court that "the oath of the Officer of his reasonable cause to suspect is what is required, and not the particulars upon which the suspicion is grounded", and also of Smith J that:

> even if all the Justice had before him was a statement on oath by the office that he had good reasons to believe that uncustomed goods were being kept or concealed on the premises aforesaid that would be sufficient to found jurisdiction for the issuing of the warrants by the justice.

The Board also approved the statement of Wright JA of the Court of Appeal that "there is no requirement for the Justice to

make an assessment of the Officer's reasonable cause to suspect and to satisfy himself before issuing the warrant."

In Seychelles, the format of the search warrant is prescribed as form VIII of the fifth Schedule to the Criminal Procedure Code. The wording therein is that "whereas it has been made to appear to me." Hence there is strictly no requirement in law that the Judge or Magistrate who issues the search warrant should be satisfied that the Officer seeking the warrant has a reasonable cause. He can rely on his affidavit sworn on oath.

In the present case, S.P. Belmont had received cassette exhibit D^1 which in his opinion clearly had seditious and defamatory material. The cover, the label, and get up of that cassette and those on sale at the three shops were identical. (Exbibit D^2). Section 54 (1) of the Penal Code provides that sedition is an intention to effect inter alia the following purposes:

(a) To bring the President into hatred or contempt.

(b) To excite disaffection against the Government, the Constitution or the People's Assembly.

(c) To excite the People of Seychelles to attempt to procure the alteration, otherwise than by lawful means, of any matter in Seychelles established by law.

(d) ……

(e) To raise discontent or dissatisfaction amongst the People of Seychelles.

Section 185 provides that criminal defamation is *"*matter likely to injure the reputation of any person by exposing him to

hatred, contempt or ridicule, or likely to damage any person in his profession or trade by an injury to his reputation.…"

On the basis of the material and information he had in his possession, SP Belmont had sworn an affidavit before a judge on reasonable suspicion that the cassettes and CD's on sale or in the possession of members of the Public contained matters defamatory of the President and also matters amounting to sedition. Even if cassette D^2 was not published and sold through the shops, it was, on the basis of the evidence, in the hands of members of the public. Cassette D^2 also contains sufficient material to justify S.P. Belmont's suspicion, and his applying for and obtaining search warrants for the purpose of investigation. It is however left to a Criminal Court to consider whether in law, the offence of sedition under Section 54(1) of the Penal Code or of Criminal defamation under Section 185 had been established, if and when the Plaintiff is charged with those offences.

The Court holds that the Acts of the Police Officers did not constitute "faute" as averred in the plaint.

Accordingly, the Plaintiffs action is dismissed with costs.

Record: Civil Side No 348 of 2001

Amina Khatib, ex parte

Ex parte proceedings – appropriate cases

The Applicant's sister and her son had been living in Kenya when she died. The Applicant took the boy into her care. The Applicant applied ex parte to be appointed as guardian of the boy. The father of the boy who lived in Seychelles was notified of the proceedings. The father claimed in limine litis that the proceedings should proceed by way of plaint.

HELD:

(i) An ex parte application is an exercise of the inherent equitable powers of Court in Chambers. A determination may be made on the evidence of only one party if it does not violate the fundamental right to a fair and public hearing of the other party;

(ii) An ex parte Applicant does not seek a remedy to any grievance but an exercise of the equitable powers of the Court; and

(iii) A proceeding may cease to be ex parte if the rights and interests of the other parties may be affected.

Ruling application may proceed to hearing.

Legislation cited
Civil Code of Seychelles, arts 402, 1007, 1025, 1026
Seychelles Code of Civil Procedure Act, s 23

Cases referred to
Margitta Bonte Civil Side 111/1997 (Unreported)
Ex parte Helene Hoareau Civil Side 11/1990 (Unreported)
Gilberte Morel v Jeanine Morel Civil Side 172/1990

(Unreported)
Maire-Alise Quilindo v Jude Monnaie Civil Side 149/1992 (Unreported)

Foreign cases noted
In Re D (A minor) [1992] 1 All ER 892
Ex parte de Labauve d'Arifat (1944) MR 12
Ex parte MTG Citta (1998) MR 347 [?]
Ex parte Rohomon (1992) MR 122

Melchior VIDOT for the Applicant
Philippe BOULLE for Michel Hoareau (Party noticed by Court).

Ruling on plea In limine litis delivered on 3 October 2002 by:

PERERA J: This is an application for appointment of guardian pursuant to Article 402 of the civil Code.

The Applicant is the maternal aunt of Nelson Jules Hoareau, a minor, born in Seychelles on 10 December 1992. The natural mother of the child, one Georgette Andrade died in Kenya on 18 September 2000. The father, who has acknowledged the child, is resident in Seychelles.

It is averred that when the mother passed away, the minor child, who was also in Kenya remained in the care and custody of one Michelle Van Togeren, a half-sister of the said deceased, who was also residing in Kenya. It is further averred that in November 2000, the child was handed over to the Applicant who is presently resident and domiciled in Dubai, and that the child is still in her care and custody. The Applicant avers that the father of the child has never shown any interest in the child nor maintained him. It is also averred that he is an alcoholic and often displays aggressiveness and hence was not person who could make a sound judgment in the interest of the child. The Applicant also avers that he, by

an affidavit dated 28 September 2000 granted guardianship of the child to the said Michelle Van Togeren.

Michel Hoareau, the father of the minor child on whom notice of this application was issued at the instance of Court, has raised two points in limine litis. They are –

(1) The applications discloses no cause of action

(2) The application is incompetent as it should have commenced by plaint and not by ex-parte application.

Ex-Parte Applications – Procedural Regularity

I shall first consider the second ground which is based on procedure. In the case of *Ex parte Margitta Bonte* (CS 111/97) the Applicant sought a declaration that she was the owner of a property by virtue of a judgment of the Seychelles Court of Appeal. The Court granting the declaration ex parte held that she was the rightful owner of the property "to the exclusion of the world". However two persons who were claiming rights to the property were not made parties to the application. The Court of Appeal (SCA 36 of 98 – judgment delivered 15 April 1999) held inter alia thus –

> The procedure adopted by the Respondent to invoke the jurisdiction of the Supreme Court to grant a declaratory relief is not only unknown to the law, but also contrary to the clear provisions of Section 23 of the (Code of Civil Procedure). Besides it is clear that such proceedings which may affect the rights and interests of others should not have been conducted ex-parte. It is not enough to say that others have no title, rights or interests or that they may have no reasonable defence to the action .... It is for the Court and not for the Plaintiff or Applicant to determine

whether or not the other parties have any reasonable defence.

Section 23 of the Code of Civil Procedure provides that every “suit” shall be instituted by filing a plaint. Section 2 defines, a suit or action as a civil proceeding commenced by a plaint. A "cause" includes an action, suit or other original proceedings between a Plaintiff and a Defendant "matter" includes every proceeding in Court not in a cause. Therefore in the Code of Civil Procedure, any reference to "suit", "action" or "cause" would involve proceedings inter partes, as they are proceedings for the prevention, or redress, of a wrong. Hence in such proceedings there being a lis between the parties, the suit, action or cause should have a Plaintiff and Defendant But when can a person invoke the jurisdiction of the Court ex parte? Obviously, it is when there is a “matter” which does not involve a dispute between two parties which requires adjudication by Court. It has been the practice of this Court to entertain ex-parte applications, and to register them under the category of "Chamber side" as distinct from “civil side”. Such applications have been mainly for purposes of appointing an executor under Article 1026 of the Civil Code, confirming the appointment of an executor in a will under Article 1025, the appointment of a guardian in different situations set out in Chapter II of the Civil Code, or the opening of a holograph will under Article 1007. In all these matters the Applicants do not seek a remedy to any grievance, but merely an exercise of the inherent or equitable powers of Court which can be done in Chambers on a consideration of the averments or evidence of one party without violating the fundamental right to a fair and public hearing as guaranteed in Article 19(1) of the Constitution. But where even in such matters, the rights and interests of others are affected or likely to be affected in a way that the Court would be called upon to adjudicate any disputed issue, then it would become a “suit” or “action” which should commence by a plaint as provided in the Code of Civil Procedure. This was done in a similar application under Article 402, before this Court in *Gilberte Morel v Jeanine*

Morel (CS 172/90). In that case the maternal grandmother of the minor child sought guardianship over the natural mother, who was her own daughter. It was averred that the Respondent, the natural mother abandoned the child in her care since he was 4½ months old. The natural mother was a semi cripple who could not properly look after the child. However she resisted the application and claimed that she could look after the child with the help of her husband. The Court considered the interest of the child and granted guardianship to the Applicant grandmother. In that case, the Applicant in anticipation of the contest chose, and correctly so, to file an application inter partes. On the other hand, there may be circumstances when an ex-parte application may be entertained despite the rights and interests of others being affected. In the case of *Ex parte Rohomon* (1992) MR 122 consequent to a decree of divorce being granted, the Court granted custody of a minor child to the mother. She took the child overseas and did not return. The father applied *ex-parte* for the variation of the custody order. The Court followed with approval the decision in the case of *In Re D (A minor)* [1992] 1 All ER 892, which dealt with an ex parte application in similar circumstances. In that case Balcombe LJ stated:

> The other matter is that this application is made ex-parte. It would have been, I suppose, theoretically possible for the father to have applied for leave to serve the application on the mother out of jurisdiction, and then, I suppose, one anticipates the mother would not have turned up on the hearing. … It seems to me that the mother's position can be quite properly protected by this Court making the order and giving the mother leave to apply to discharge it upon 48 hours written notice to the father.

In the *Rohomon case* (supra), the Court posed the question as to whether the filing, of an ex-parte application when notice can be served on the mother out of Jurisdiction "debars the

Applicant from obtaining the order prayed for because of what appears to be a procedural defect in the proceedings?" and then answered it by relying on the above authority and holding that an ex-parte application was not a bar. The Court however, on the facts of that case revoked the custody order without reserving the right of the mother to apply for its discharge, as was done in the English case.

Ex parte applications are particularly appropriate when invoking the equitable jurisdiction of this Court under Section 6 of the Courts Act (Cap 52). That section provides that:

> The Supreme Court shall continue to be a Court of equity and is hereby vested with powers, authority, and jurisdiction to administer justice and to do all Acts for the due execution of such equitable jurisdiction in all cases where no sufficient legal remedy is provided by law.

If therefore an ex parte application is made on any matter for which the law has provided a specific procedure, equitable jurisdiction cannot be sought by way of such an application. In Mauritius, Section 16 of the Courts Act (which corresponds to Section 6 of our Act) has been strictly applied in such cases. In the case of *Ex parte de Labauve d'Arifat* (1944) MR12 the agents of a testator, as well as of the universal legatee, filed an application under the Curatelle Act for payment of special legacies in the will on the ground that if they remain unpaid the universal legatee would be liable to pay interest and eventually the testamentary will would be reduced pro tanto. The Court held that equitable powers could not be exercised where an order would in effect supplement the powers of the Applicant and the universal legatee. So also in the case of *Ex parte MTG Citta* (1998) MR 347 [?], an ex parte application was made to appoint a provisional administrator to a person, who due to illness, could not speak and was incapable of administering his own affairs. The Court held that equitable powers vested in the Court under Section 16 of the Courts Act

could not be used as there was another remedy for interdiction. That procedure required that the person whose interdiction is sought, be made a Respondent and that the Attorney-General be noticed.

Section 2 of the Seychelles Code of Civil Procedure defines “Court” as meaning “the Chief Justice or the Puisne Judge sitting in Court or Chambers”. Hence the practice of the Court to entertain ex-parte applications on the "Chamber side" appears to have originated to deal with purely uncontested or uncontestable matters which do not fall within any specific procedure laid down in the Code of Civil Procedure, and where the granting of relief does not affect the rights and interests of others.

However in practice, the Court has ex mero motu issued notice on persons likely to be affected by ex-parte applications or whose presence is required for a proper determination of the matter. Hence in the case of *Marie-Alise Quilindo v Jude Monnaie* (CS 149 of 1992) the Plaintiff sued the Defendant for legal guardianship of their natural child who was a minor, and for maintenance. Although the matter had commenced as a Civil Suit or Action, the Registrar, following practice of Court, issued notice on the Attorney General and Director of Social Services. Objection was raised by the Counsel for Plaintiff as regards the locus standi of the two persons noticed. As Presiding Judge I ruled that since the Court had power to refer such matters to the Ministère Public under Section 150 of the Code of Civil Procedure, the practice to notify the Attorney-General and his presence at the hearing were proper, and also as the Court in such matters is required to have regard to the welfare of a child, and could call for a Social Inquiry Report, the presence of the Director was also proper. In the present matter too, a judge in Chambers has directed that notice be issued on the father of the minor child who has now filed an answer as a "Respondent", and also on the Attorney General. Hence there is no danger that the Court would make any order without hearing the matter inter partes. Although

ground 2 of the plea has merit, procedurally, the filing of an ex parte application alone is not fatal, as by practice of Court, the necessary parties needed for a proper determination of the matter canvassed therein are now before Court. Hence no useful purpose will be served by insistence on form, other than to delay on the vital issue of guardianship of a child presently living in a foreign country.

Does this application disclose a cause of action?

In the present matter, Article 402 of the Civil Code, under which the application has been made, provides that "when no guardian is appointed to a minor by his parents or the survivor of them, the guardian shall be appointed by the Court". Article 392 provides that "a person entitled to appoint a guardian of minor children may do so, first by a last will, or second, by a declaration made before a Judge or before a notary". In paragraph 2 of the application it is averred, inter alia that the father of the minor child has acknowledged the child and is resident and domiciled in Seychelles. In paragraph 5 of the application it is averred that he, by an affidavit dated 28 September 2000, granted guardianship of the child to Michelle Van Togeren, the half-sister of the child's natural mother.

Article 390 is as follows:

> After the dissolution of marriage caused by the death of either of the spouses, the guardianship of minor children who have not been emancipated shall belong as of right to the surviving spouse.

Article 394 provides that:

> Illegitimate children shall have a guardian in the same manner as legitimate children…

Hence where the mother dies, the father of a legitimate or illegitimate child shall have guardianship, as of right. If the

affidavit dated 28 September 2000 has been executed in compliance with Article 392, the appointment may be valid, as Article 397, provides that "a guardian appointed by the parents or the survivor of them may be a relative or a stranger". Article 401 provides that "if the guardian who is appointed does not wish to act, the Court shall have authority either to compel him to act or to appoint another.

A judicial appointment under Article 402 arises when the parents had not appointed a guardian. As both parents have guardianship as of right whether the child is legitimate or illegitimate, such an appointment is made when both parents are dead. In the present case, whatever may be the character or conduct of the father he retains guardianship as of right. However, the Court has wide powers to act in the interest of the child. In the *Morel* case (supra) the grandmother was granted guardianship over the right of the natural mother of the child.

However in the case of *Ex parte Helene Hoareau* (Chamber Side no. 11 of 1990) the Applicant was the paternal grandmother of a minor child. It was averred that the natural mother left the child who was 1 year old in the custody of the Applicant and left for the United Kingdom. Six years later, the Applicant sought guardianship of the child as the mother had not returned.

Upon notice being served on the NCC, the mother was traced in UK. She had married and settled down there. She disclosed that the child was left with her own mother and not with the Applicant. The child was with the Applicant for schooling convenience. The child's mother and her sister were joined as intervenors to the application. The mother averred that she could give the child a better life and a good education in the United Kingdom. The Court held that by virtue of Article 394(2) the natural mother was the guardian as of right, and as there was nothing to show that she was unable to look after the child properly, the application was dismissed.

In an affidavit dated 16 August 2001, the Applicant in the present case has averred inter alia that she requires the guardianship to be granted so that she may make a decision in connection with his residence with her in Dubai. Hence, it could not be said that the Applicant per se has no cause of action, as the issue of guardianship remains to be decided by Court with the interest of the child being given paramount consideration. In such enquiry, the issue as to whether the father is a fit and proper person to have guardianship would arise for consideration.

Hence the application shall proceed to hearing on merits.

Ruling made accordingly.

Record: Civil Side No 158 of 2001

Magnan v Lucas & Or

Personal injury – quantum of damages

The Plaintiff was a passenger in an omnibus being driven by the first Defendant and belonging to the second Defendant. As she disembarked she was dragged along the road. She was left with a large scar and a permanent lump. The Plaintiff sued for damages for pain and suffering. The Defendants accepted liability but disputed the amount of damages claimed.

Judgment for the Plaintiff. Damages awarded R45,000.

Cases referred to
Terence Dingwall v Royce Dick CS 207/1995
Ruiz v Borremans SCA 22/1994

Bernard GEORGES for the Plaintiff
Kieran SHAH of the Defendants

Judgment delivered on 18 February 2002 by:

PERERA ACJ: This is a delictual action for damages arising from personal injuries suffered by the Plaintiff. It is averred that on 16 February 1997, the Plaintiff who was a passenger in the omnibus bearing on S.2313 belonging to the second Defendant Corporation (SPTC) and driven by the first Defendant dragged her along the road after she had disembarked.

The Defendants have accepted liability for the accident and hence this Court is called upon to determine only the quantum of damages. It is averred that the Plaintiff was travelling from Mont Fleuri to Cascade that day, and that she asked the driver to stop the bus before the bus stop. As she got down, her clothes got caught to the automatic door of the bus and she got dragged along the road. The Plaintiff testified that

consequently she suffered injuries on both buttocks and legs. She was initially hospitalised for ten days and later for one month on re-admission. She claimed that she was operated on thrice.

Regarding her present condition, she stated that she still had pain in her leg, and is being treated by her company doctor as well as Dr Marie of the Les Mamelles Clinic.

Dr Ken Barrand, the Consultant Surgeon, in a report dated 14 August 1997 stated that the Plaintiff had a cyst in the left buttock which had persisted after a haematoma. However draining fluid on 25 May 1997, the mass had been reduced, but still the soft tissues are slightly fuller on the left buttock than on the right. She however had a 6 cm long residual scar. She could walk well and has normal function of the left leg. She however complained that she had pain in the left buttock when standing.

Dr Ludmina Marie who examined the Plaintiff subsequently on 17 July 2000 testified that she came with a pain on the left leg. She found that the left buttock area was swollen and tender, indicating infection. She was treated with antibiotics. Questioned by Counsel for the Plaintiff, she said that the swelling could be due to a trauma or an abscess caused by an infection.

Upon subsequent examination of the Plaintiff at the instance of Court, Dr Marie stated that there is still a deformity of left thigh. She also stated that the pain and the swelling of the left thigh could be attributed to the trauma she suffered in 1997. The Plaintiff produced photographs P1-P3 showing the deformity in 1997 and P5-P8 taken subsequently on second August 2001. Dr Marie, comparing the two sets of photographs could not state the percentage of the improvement of the swelling, but stated that it was less than before.

On the basis of the medical evidence, it is clear that the Plaintiff has still a residual scar of 6 cm on the right buttock and a permanent mass, or a lump on her left buttock. Those are therefore cosmetic injuries. As regards physical pain, medical evidence supports that she has some pain in the left buttock when standing. No medical reports were furnished regarding the injuries the Plaintiff suffered at the time of the accident on 16 February 1997 and her hospitalisation for 10 days. However according to the testimony of the Plaintiff, thereafter she was admitted once more to the hospital for 1 $^1/_2$ months during which time she underwent three operations. It is therefore reasonable to hold that she underwent pain and suffering for about two months.

Damages

The Plaintiff claims a sum of R25,000 for pain and suffering. It is reasonable to accept that the Plaintiff suffered immense pain as a result of the direct injuries to her buttocks. The haematoma and the scarring are still persisting though markedly reduced. Consequently I consider a sum of R15,000 to be adequate compensation under that head. I would consider the loss of enjoyment, and amenities of life, and disfigurement cumulatively. It is obvious that the haematoma on her left buttock is prominent, and hence she would experience embarrassment when wearing a swimsuit or a pair of shorts. This is a handicap she would suffer for a long time, as there is no prognosis that the haematoma will completely disappear.

In the case of *Ruiz v Borremans* (SCA 22/94) the Court of Appeal considered a global sum of R40,000 for pain and suffering and a 5% permanent incapacity for a residual injury consisting of a permanent swelling of the left foot which necessitated the wearing of a special shoe made to measure.

In the case of *Terence Dingwall v Royce Dick* (CS 207/95) I awarded a sum of R15,000 for pain and suffering and

R30,000 for permanent deformity caused to the nose, in an
On a consideration of those two previous awards, I award a sum of R30,000 in respect of the second and third heads of damages, cumulatively.

Judgment is accordingly entered in favour of the Plaintiff in a total sum of R45,000 together with interest and costs.

Record: Civil Side No 406 of 1998

Verlaque v Vargiolu

Easements – water rights – prescription – interpretation – retroactivity of legislation

Water from a nearby stream was supplied to the Plaintiff's property by a pipe that ran across the Defendant's land. The Defendant cut the pipe. The Plaintiff claimed that his predecessors in title had a right to draw water from the stream and a right to access that water by a pipe over the Defendant's land. The Plaintiff sued for property damage to the pipe, loss of earnings, and moral damages. The Defendant admitted disconnecting the supply and averred that the pipe was laid over his land unlawfully.

HELD:

(i) Damages for tort arise if there has been detriment caused to a legitimate interest or right protected by law. A right to draw water is a discontinuous easement.

(ii) Legislation does not operate retrospectively unless expressly stated.

(iii) Rights which vested before new legislation came into force are not affected by unless otherwise expressly stated.

(iv) The Defendant is not entitled to rely on present law which requires a licence to draw from a private water source as the Plaintiff's right crystallised before that requirement was made law.

(v) For the purpose of prescription, possession of an easement means the continuous exercise of that right. The Plaintiff through

his predecessors in title possessed the easement for 20 years before the water supply was disconnected. Therefore the water easement has been acquired by prescription.

Judgment for the Plaintiff. Damages awarded for repairs R23,000 and moral damages R8,000.

Legislation cited
Civil Code of Seychelles, arts 688, 690, 1317, 1319, 2228
Land Survey Act Regulations, Sch C
Public Utilities Corporation (Miscellaneous) Regulations, reg 8

Cases referred to
Beynon v Attorney-General (1969) SLR 183
Leit v Repulic of Seychelles (1981) SLR 191

Jacques HODOUL for the Plaintiff
Phillippe BOULLE for the Defendant

Judgment delivered on 23 September 2002 by:

PERERA ACJ: This is a delictual action based on alleged unlawful acts of the Defendant whereby the Plaintiff's water supply was disconnected by cutting the supply pipes and damaging them. The Plaintiff avers that consequent to a survey and partition done in 1977, there was agreement among the co-owners of Parcels PR. 306, PR. 309 and PR311 that they would have a common right to draw water from a "Prise d'Eau" on Parcels PR. 311 belonging to the Verlaque family.

It is not in dispute that the Plaintiff is presently co-owner and sole occupier of Parcel PR. 306, and then he operates the "Bonbon Plume" Restaurant, and that he also resides on the land. The Defendant is admittedly the present owner of Parcel PR. 309. Parcel PR 308 is co-owned by heirs Mederick

Verlaque. Hence between Parcel PR. 306 co-owned and occupied by the Plaintiff, and Parcel 309 owned by the Defendant, the Plaintiff is also the sole owner of Parcel PR. 307.

The Plaintiff testified that the water supply which emanated from the Prise d'Eau on Parcel PR 311 was originally being used by one of the heirs Mederick Verlaque who was farming on Parcel PR. 308. After the agreement, Parcel PR 306 was served with water from Parcel PR 311 along a galvanized pipe. The Plaintiff claimed that he personally started to use that supply in 1988, but that since 1979, there always existed the supply to Parcel PR 308 over Parcel PR. 309 from the same source, albeit through a smaller three-quarter inch pipe. But in 1988, he changed the entire line from the source into a half inch polythene pipe, but neither the location of the pipe nor the system were changed.

The Plaintiff further testified that the Defendant, who admittedly left for Australia in 1988, returned in 1997. Prior to that, the Defendant's father had an independent supply from a different part of the stream on PR. 311 to Parcel 309. Later his father died and the house and the water supply system became dilapidated. The Defendant, on his return wanted to repair it and also start a business venture as a Restaurateur. At his request, the Plaintiff supplied water "from his own pipe". However, later, the Defendant restored the independent supply from the stream in Parcel PR. 311, and cut the supply to the Plaintiff’s house and restaurant on Parcel PR. 306. The Defendant in his defence has admitted disconnecting the supply pipe going over his land and avers that that was done as that pipe had been laid over his land unlawfully. The Defendant is presently operating a business on his land under the name "Cafeteria, Restaurant and Boutique".

The Plaintiff further testified that consequent to the disconnection of the water supply by the Defendant, his restaurant business was affected for 15 days, and lost about

R22,000. Then he got a connection from the P.U.C. That installation cost about R6000.The Plaintiff also claims damages for the pipe that is now disused and for moral damages. Cross examined by learned counsel for the Defendant the Plaintiff stated that he had no licence to draw water from the stream, although his predecessors may have had one. He however maintained that the quality of water was good for human consumption. He stated that although he now has the P.U.C. supply, he wanted the supply from the stream as it was cheaper to maintain,, and also as he has other agricultural activities on the land. As regards the disconnection, the Plaintiff said that the Defendant cut the pipe at a point where the line crossed his property (PR.309) so that the water stopped flowing to both properties. The Defendant had by then installed his own independent supply from the same stream, after receiving water from the existing supply of the Plaintiff.

Alex Morel, a carpenter who was working for the Plaintiff corroborated the evidence of the Plaintiff and testified that in 1999, the Plaintiffs land was served by a water supply from the stream on Parcel PR 311 through the Defendant's land. The Defendant's father had a separate supply from the same source, but from a different point, flowing to a storage tank. But after the death of the Defendant's father, that pipe line rusted and perished. When the Defendant returned from Australia, that line could not be used, and hence he used a connection from the Plaintiffs supply. Later, after repairing the previous system, the Defendant cut off the supply to the Plaintiff’s land near the boundary of the two properties. On being cross-examined, this witness stated that there was a small stream on the Plaintiffs land, which dried up completely during the period of drought. Normally that water was sufficient for the flowers and plants. But after the supply from Parcel PR. 311 was disconnected by the Defendant, the Plaintiff used that source for about two weeks until he got the PUC connection. That source was adequate for limited purposes as September was the rainy season. He further

stated that he was engaged in the changing of pipes in 1988 from a three quarter inch metal pipe to a half inch polythene pipe, as testified by the Plaintiff. He further stated that the previous metal pipe line was left in the same position. The disconnection to fix the polythene pipe was done at a point on the Plaintiff's land. The new polythene pipe line was laid from the source to the Plaintiff's land over the Defendant's land, a distance of about 800 metres.

The Defendant in his testimony stated that his father, when building the house on Parcel PR. 309 in 1976, installed a polythene pipe line from Parcel PR. 311 to draw water from the stream. Galvanized pipes were used only from the water tank on the land to the house. When he came from Australia in 1997, the polythene pipe had been removed by someone. Then he got a temporary connection from the Plaintiff as he arrived, but his wife told the Plaintiff that he should remove the pipes on his land as people were trespassing on his property to cut bushes and repair blockages in the line. Thereafter he disconnected the system from a point behind his house. Then Alex Morel and two other men came and reconnected. Then he disconnected once again. They came and reconnected for the second time. On the third occasion he cut the polythene pipe of the Plaintiff with a knife. Then the Police got him to reconnect, but after the Police Officers went, he cut it again. No one has re-connected it so far.

Delictual damage consists of prejudice caused to a legitimate interest or right protected by law. The Defendant contends that the laying of pipes over his land was unlawful and hence he was entitled to prevent the usage of his land to exercise any right to the easement.

As regards the agreement dated 16 February 1977 (exhibit P2) the Defendant identified the signatures of his father and mother who are now dead and stated that the agreement was limited to the agreement on boundaries. He denied that they had agreed to all parties drawing water-from the stream in

Parcel PR. 311. He stated that prior to 1976, the Plaintiff's predecessors in title used a stream on Parcel PR. 306 and at that time he (the Defendant) was also living on that property with her two aunts. He however conceded that that stream ran dry during the dry season. The Defendant contests the Plaintiff's right to draw water from the stream on Parcel PR. 311, and the accessory right to exercise that right over his land. As regards drawing of water, the Defendant has submitted that in terms of Section 8(1) of the Public Utilities Corporation (Miscellaneous) Regulations, the Plaintiff has no right to draw water from a private source without a licence, and hence the entire claim being unlawful, the right claimed is against Public Policy. That regulation prohibits the abstraction of water from "any source of supply", without the permission of the Corporation. "Source of supply" is defined as "any rivers and streams" or "underground state". Those Regulations came into force on 24 March 1986, when the Plaintiff was already exercising a vested right to abstract water. The changing of pipes from galvanised to polythene did not affect the right. It is a principle of interpretation that past rights which became vested before the new law or Regulations came into operation are not affected retrospectively, unless stated expressly. Hence this Regulation does not apply to the Plaintiff's vested right.

Still on the right to draw water, the Plaintiff has submitted that the drawing of water is a "continuous and apparent' servitude, which under Article 690 of the Civil Code can be acquired by a document of title or by possession for twenty years. Mr Boulle however submitted that such a right was neither continuous nor apparent, as it needs the intervention of man, in which case it is discontinuous within the meaning of Article 688, and also that it could not be seen with the eye. This Court, in the case of *Leite v Republic of Seychelles* (1981) SLR 191 held inter alia that the right to draw water from a Prise D'eau was "an apparent continuous" easement within the meaning of Article 690. That finding was not disturbed by the Court of Appeal (SCAR 1978-1982) 212. The plaint in the present case

is based on the proviso contained in the agreement, and alternatively on prescription.

In the case of *Beynon v A-G* (1969) SLR 183*,* it was held that culverts built by the Defendant over the Plaintiffs land to discharge water constituted an easement which was "continuous and apparent" and since they had peaceful and uninterrupted possession of them for more than 20 years, acquisitive prescription applied. Here what was "continuous" was the "culvert" which is Akin to a "drain" as envisaged in Article 688, and "apparent" within the meaning of Article 689.

As regards prescription in the present case the Plaintiff has averred in paragraph 4 of the plaint that his predecessors in title drew water from the source on Parcel PR. 311 since 1979. Admittedly, the supply was cut off by the Defendant in July 1999.

Here the laying of pipes and drawing of water are both "continuous and apparent" easements. In terms of Article 2228(3) - for purposes of prescription, "possession" in the case of easements or other land charges, consists of the effective exercise of such rights. Hence, in the absence of any challenge by the Defendant, the Plaintiff had, through his predecessors in title possessed the easement for 20 years from 1979 to 1999 at the time of interruption. When the agreement to beacons and boundaries was signed on 16th February 1977 (exhibit P2), the land surveyed as Parcels PR. 306 to PR. 311 were co-owned by heirs Verlaque. The Defendant is the Plaintiff's father's sister's son, and therefore a cousin.

Parcel PR. 311 has a larger stream than the one on Plaintiff's land, from which the Defendant presently draws water and the Plaintiff was also drawing water till his supply was admittedly cut off by the Defendant in July 1999. The Plaintiff testified that the Public Utilities Corporation water supply was available in the area only 1995. The agreement dated 16 February

1977 has been drawn up in the format prescribed in Schedule C of the Land Survey Act Regulations (Cap 109). At the foot of the attestation, there appears a note signed by the Land Surveyor stating inter alia that "the acceptance of the partition of the property is subject to the proviso that a right to draw water from the rivers be granted to each and every one of the heirs..... ". The parties to the agreement have however not signed the declaration at paragraph (c), which in fact should have been paragraph (e). The Defendant submits that his parents did not agree with, or sign the proviso and hence he is not bound by it.

Mr Hodoul, learned counsel for the Plaintiff submitted that the agreement to beacons and boundaries (exhibit P2) which is drafted by a Land Surveyor, who is a "Public Official", in accordance with prescribed forms, is an "authentic document" as defined in Article 1317 of the Civil Code. Hence under Article 1319:

> it shall be accepted as proof of the agreement which it contains between the contractual parties and their heirs or assigns, and under Article 1320 such proof of agreement shall be found even if expressed in terms of statements, provided that statement is directly related to the transaction. Statements foreign to the transaction, shall only be accepted as writing providing initial proof.

The main *"transaction*" in that agreement was the agreement of the co-owners regarding the beacons and boundaries. The statement regarding the common right to draw water from the streams on Parcel PR 311 has been recorded as a proviso to the acceptance of the main transaction. Hence such statement, though made by the Land Surveyor, shall, pursuant to Article 1320 be accepted as proof of agreement between the parties, and consequently on their heirs and assigns under Article 1319. This document was not challenged, nor was any evidence adduced in rebuttal. In any

event, the Defendant and his predecessors in title, admittedly, have since the date of the agreement in 1977 drawn water from the same source on Parcel PR. 311. This should have been pursuant to the statement in the proviso to the agreement. According to evidence the Plaintiff and his predecessors in title have also done the same until interrupted in 1977. These facts corroborate the statement in the proviso contained in exhibit P2, and the Defendant as an heir of the original parties to the "authentic document", would not be competent to rebut the proviso recorded by the Land Surveyor under his signature. I therefore hold that the proviso should be read as part and parcel of the agreement on beacons and boundaries, and that the Plaintiff has established his right to draw water from Parcel PR 311 over the land of the Defendant both under the agreement and by acquisitive prescription.

Mr Boulle, Learned Counsel for the Defendant also submitted that the right to draw water on a Parcel of land does not carry with it the accessory right under Article 696, which provides that “when a person creates an easement, he shall be deemed to provide everything necessary for its use. Thus, the easement of drawing water from the fountain of another necessarily carries with it the right of way". It was submitted that on the *Authority of Dalloz Codes Annotes* Art. 697 notes 31, 32 and 33, and note 2926 of *Planiol’s Treatise on Civil Law* Vol, Part 2, that those accessory rights can only be exercised over the land owned by the person who created the easement. Mr Hodoul Learned Counsel for the Plaintiff however submitted that those authorities would apply to a third party and not to the Defendant who is an heir of the original contracting parties. In the *Leite case* (supra) the Court of Appeal held inter alia that an easement is a right granted in favour of a dominant tenement and not its owner, against a servient tenement and not its owner, and that it was a right appurtenant to the dominant tenement and the benefit of such right accrues to the transferee or grantee of the dominant tenement. It was also held that the owner of the

servient tenement cannot be required to do a positive Act. In that case, the Plaintiff who had a right to draw water from a river, over state land, sought to require the government to repair a damage that had been caused to the supply line due to a storm. The Court of Appeal upheld the decision of the Supreme Court that the government had no such duty to perform.

In the present case the Plaintiff prays for an order on the Defendant to restore his water supply from Parcel PR. 311. Although there would be no obligation on him to do so under Article 696, yet as the damage has been admittedly caused by him, he is obliged in a delictual action to repair the damage he has caused and restore the supply. In addition he will also be liable in damages.

Damages

The Plaintiff claims R22,250 as loss of net revenue from the Restaurant for 15 days when he was deprived of water from the stream on Parcel PR. 311. He testified that his normal turnover per day was about R8000 - R9000, and abnormally it was about 3200 - R3400. He stated that he was claiming R22,250 for 15 days on a much lower assessment. He explained that due to lack of water, the guests were given snacks and drinks. Alex Morel, who was engaged in connecting and reconnecting pipes damaged by the Defendant testified that as it was the rainy season, there was some water in the small stream on the Plaintiff's land, and that was used till the PUC connection was done. There is no evidence of the number of guests who patronized the Restaurant during the 15 days and the actual turnover by reference to documents. However, on the basis of other evidence in the case it is reasonable to accept that some prejudice was caused by the interruption of the normal water supply to the Plaintiff's house and Restaurant. Accordingly, I award a sum of R10,000 under this head.

The Plaintiff also claims R6400 as the cost of providing an

alternative supply from the PUC. The fact of the PUC. connection is not being contested. In the absence of documentary evidence, I award a sum of R5000 which I consider to be reasonable under this head.

The Plaintiff claims R27,000 in respect of the damage caused to the pipe. He testified that since 1999, the polythene pipe line lay abandoned and that the pipes have cracked. He claimed that the entire length of 800 metres will now have to be replaced from the source on Parcel PR. 311, and the pipes alone would cost about R22,000. He also stated that the water tank has also cracked and would cost about R16,000 to repair. The labour cost would be another R5000. In the absence of any evidence of the actual damage, the Court is unable to accept that such extensive damage would have been caused to polythene pipes during a period of 3 years. Hence as an alternative to monetary compensation, the Defendant is ordered in terms of prayer (ii) to supply the necessary materials and labour and restore the supply which he had cut off. If he fails to do so within a month hereof, the Plaintiff or his servants or agents are hereby authorised to enter the land of the Defendant solely for the purpose of repairing and reconnecting the supply, and to recover from the Defendant the cost of materials and labour which should be supported by receipts of payments. These works are limited to the stretch of pipes on the Defendants land from the point where it was cut off to the point of exit into the Plaintiff's land.

The Plaintiff also claims a sum of R18,000 as moral damages for inconvenience, concern, disruption of business activity and domestic life. The Court accepts the evidence given by the Plaintiff in this regard. The Defendant in his evidence stated that he had through his wife asked the Plaintiff to remove the pipes on his land. That evidence was not corroborated but he took the law into his own hands after benefiting from the benevolence of the Plaintiff who ungrudgingly supplied him with water until he installed his own supply. He stated that he did so as the Plaintiff's workers were trespassing on his

property to cut bushes and to repair blockages in the pipe. If that be so, as a law abiding citizen he ought to have sought his remedy through the Courts. Instead, he cut off the water supply on 23, 24 and 26 July 1999 on each occasion after it was reconnected, once on the orders of the Police. These Acts should have certainly caused anxiety, inconvenience and pain of mind to the Plaintiff as they affected his domestic and business supplies. Taking these factors into consideration, I award a sum of R8,000 as moral damages.

Judgment is accordingly entered in favour of the Plaintiff as follows:

1. The Defendant shall pay the Plaintiff a total sum of R23,000, and in addition, repair the damage he has caused to the Plaintiff's water supply at his own cost, failing which, after one month from today, the Plaintiff or his servants or agents will be entitled to enter the land of the Defendant for that purpose, effect the repair and reconnection and claim the cost of materials and labour supported by receipts.

2. The Defendant is restrained from interfering in any manner with the Plaintiff's water supply passing through his land Parcel PR. 309 after the necessary repairs and reconnection have been done.

The Plaintiff will be also be entitled to costs of action.

Record: Civil Side No 52 of 2000

Gresle v Sophola & Or

Trespass to land

The Plaintiff operates a pig farm next to the second Defendant's hotel. While the Plaintiff was in town on business, the first Defendant and another person entered the Plaintiff's property to investigate an unpleasant odour. Upon learning of the alleged trespass, the Plaintiff left town prematurely and consequently lost a business contract. The Plaintiff sued for loss of earnings, damages for trespass, and moral damages. The Defendants averred that they had informed the Plaintiff of their visit and he had agreed but a time was not fixed.

HELD:

(i) Delictual liability for trespass is based on damages caused by the act or omission of the person who entered the property. Not every entry upon property will give rise to a claim in tort.

(ii) There is no delictual claim for trespass if there is mere entry for a lawful purpose or entry with implied or express consent.

(iii) The Defendant had a legitimate reason to enter the property and informed the Plaintiff of his visit to which the Plaintiff agreed. The Defendant did not cause any property damage or enter the property with the intention to cause harm or damage.

Judgment for the Defendant. Case dismissed.

Legislation cited
Seychelles Civil Code, Art 1382

Frank ELIZABETH for the Plaintiff
Kieran SHAH for the Defendant

Judgment delivered on 1 July 2002 by:

PERERA J: This is a delictual action based on trespass to land and for consequential loss. The Plaintiff is a farmer, and the first Defendant is a security guard employed by the second Defendant. It is averred that on 13 April 1999, the second Defendant instructed the first Defendant to enter the Plaintiff's property to investigate a smell allegedly emanating from a pig-sty thereon, It is further averred that at that time, he was in Victoria to meet a butcher who had agreed to purchased 100 pigs for a total sum of R150, but that he had to rush back upon being informed of a trespass on his land. The Plaintiff avers that consequently he lost the contract, and hence claims R150 from the first and second Defendants jointly and severally. He also claims R50 for trespass on land and a further sum of R50 as moral damages.

The Plaintiff testified that he reported the alleged act of trespass to the Port Glaud Police Station and that one Sergeant Andrew came to investigate. He further stated that one Nicole Hoareau, one of his workers, telephoned him that the first Defendant and another person had entered his property to investigate a smell from the pigsty, and that was when he abandoned his visit to the butcher to sign a contract. He denied that the first Defendant had previously informed him of his visit that day.

Police Sergeant France Andrew testified that on receiving a complaint of trespass, he went to the Plaintiff's land, but did not see any person. Then he went to the hotel, and the Defendant admitted that he entered the Plaintiff's land to investigate the smell. On being cross examined, he stated that he saw about 50 pigs in the sty but that he did not count them.

Edwin Jean-Baptiste, the butcher with whom the Plaintiff claimed that he had a contract to supply pigs testified that although the Plaintiff agreed to sell 100 pigs, he did not supply them, so he went to another supplier. He further stated that he had not purchased pigs from the Plaintiff before 13 April 1999 nor after that. In his cross examination, he stated that the agreement was to supply 10-15 pigs per week, and that the arrangement was that the Plaintiff would telephone him when he had pigs to sell, and then he would go to the Plaintiff's pig-sty to weigh the pigs before purchasing.

He further stated that he did not get any telephone call asking him to come, as he may not have had pigs to sell at that time. He also stated that even if the Plaintiff offered pigs for sale subsequently, he would have purchased them.

Nicole Hoareau, the Plaintiff's assistant testified that on 13 April 1999 two persons wearing the uniforms of the Berjaya Hotel Security Guards, came to the Plaintiff's property and asked him to show the septic tank. Although they did not ask permission to enter, he showed them the septic tank. They asked him to tell the Plaintiff that the odor from the pig-sty was coming to the hotel, and left.

The first Defendant, Jean Sophola testified that he telephoned the Plaintiff about the smell coming from the pigsty to the hotel, and told him that he would come the following day to investigate. Then the Plaintiff told him that he had already received a complaint from the hotel and that he would come. The next day, 13 April 1999, he went there accompanied by the Front Officer Manager. They met a young boy whose surname was Hoareau, and on being informed that the Plaintiff had already been informed of their visit, they were taken to the septic tank. They found that the septic tank was uncovered and that there were gunny bags full of pig manure. On being cross-examined, he maintained that he telephoned the Plaintiff the previous day about the visit of the next day. But no particular time was fixed for the visit.

Mr Elizabeth Learned Counsel for the Plaintiff submitted that the telephone is listed in the 1999 directory under the name of the Plaintiff's wife and hence Sophola was not speaking the truth about calling the Plaintiff by reference to the directory. I have perused the 1999 telephone directory and found that the only Gresle in Port Glaud is listed as "A Gresle 378217". Sophola in his cross examination stated that he did not know the Plaintiff before the telephone call, but knew that it was one Gresle who was rearing pigs in that area. Hence, as only one Gresle was listed under Port Glaud, it could not be stated that he was being untruthful, as he may not have known whether the initial of the first name of the Plaintiff was first or "S". Hence I believe the evidence of the first Defendant that he entered the property of the Plaintiff after having given prior notice of his visit, although the exact name of the visit was not agreed.

Liability

As regards "trespass to land", not every entry upon the property of another, gives right to a delictual claim. Delictual liability is based on damages caused by the Act or omission of a person. Hence, mere entry for a lawful purpose is nor actionable. So also, is entry with notice or with express or implied authority. Trespass is an invasion of privacy or of proprietary rights over property. However, if the dominant purpose of the entry is to cause harm or damage to the property, even if it appears to have been done in the exercise of a legitimate interest, would constitute a fault within the meaning of Article 1382 (3) of the Civil Code.

In the present case, the Plaintiff avers in paragraph 2 of the plaint that on the 13 April 1999, the second Defendant instructed the first Defendant to enter the Plaintiff's property to investigate the smell of pigs". The first Defendant stated that he entered the property accompanied by the Front Officer Manager of the hotel. Nicole Hoareau confirmed that two persons came that day in connection with the smell emanating from the pig sty. His evidence, and that of Sergeant France

Andrew discloses that there was a foul odor in the pig sty and the septic tank to which the waste water from the septic tank flowed. If that smell did not reach the hotel, the first Defendant need not have entered the property. Hence he had a legitimate interest and permission to enter the property of the Plaintiff. He did so after informing the Plaintiff of his visit. Also as there is no averment that the first Defendant caused any damage to the property, or entered the land with the dominant intention of causing harm or damage, the tort of trespass to land has not been established.

Although this finding is sufficient to dispose of the case, I shall proceed to consider the averment in the plaint and the Plaintiff lost a contract to sell pigs as the first Defendant entered the land without prior notice. The butcher Edwin Jean-Baptiste stated that the agreement was that the Plaintiff would telephone him when pigs were available for sale and that he would go to his pig-sty for weighing and purchasing. He did not get any such call from him. He had not purchased pigs from the Plaintiff before or after 13 April 1999. There is therefore no evidence to support the averment as regards to a frustration of a contract. In any event, such a claim would have failed for remoteness.

In these circumstances, the Plaintiff cannot maintain the action.

Accordingly, it is dismissed with costs.

Record: Civil Side No 447 of 1999

Morin v Pool

Amendment of plaint

The Plaintiff and Defendant are neighbours. The Plaintiff had been using a vehicle access road across the Defendant's land for 6 years before access was blocked by the Defendant. The Plaintiff claimed a right of way and sued for loss of earnings and moral damages. The Defendant averred that when he acquired title to the property there was no right of way and that the Plaintiff cleared vegetation for the access road without his permission. During the proceedings the Plaintiff wished to amend his statement of claim.

HELD:

(i) Section 146 of the Code of Civil Procedure permits a party to amend his pleadings at any stage of the proceedings; and

(ii) In the case of a plaint, no amendment which seeks to convert a suit of one character into a suit of another and substantially different character should be allowed.

Ruling: The plaint be amended.

Legislation cited
Seychelles Code of Civil Procedure Act, s 146

Philippe BOULLE for the Plaintiff
Jacques HODOUL for the Defendant

Ruling delivered on 13 March 2002 by:

PERERA ACJ: This ruling concerns an application for amendment of the plaint. Paragraph 2 of the original plaint

reads as follows:

> 2. The Plaintiff has and had at all material times a right of way over the Defendant's land above mentioned."

That averment was answered by the Defendant in his statement of defence as follows:

> 2. Para. 2 of the plaint is strictly denied. The Defendant avers that he is the sole and absolute owner of Title C. 768; that the encumbrance Section in the Land Register reveals that his property is not burdened by a right of way as alleged and that he has not granted any easement for land comprised in C. 948 which, from time immemorial, has its own passage.

On 15 March 2001, before re-examining the Plaintiff, Mr Boulle, Learned Counsel made an oral application to amend paragraph 2 of the plaint to read as –

> 2. The Plaintiff has and had at all material times a right of way over the Defendant's land abovementioned to the public road. by virtue of the fact that his property is enclaved". (Amendment underlined).

Mr Hodoul, learned counsel for the Defendant stated that he had no objections, as in paragraph 2 of the defence he had already averred that "from time immemorial" the Defendant's land had its own passage and that no easement has been granted over his land to serve the land of the Plaintiff. He stated that that was an adequate reply to the amendment sought. Asked by the Court whether there would be any consequential amendment to the prayer of the plaint. Mr Boulle replied in the negative.

However on 4 June 2001, learned counsel for the Plaintiff filed a notice of motion seeking to amend the plaint as per the amended plaint attached therewith. That amended plaint contains the paragraph 2 as amended on 15 March 2001 and an additional prayer, which is as follows:

> (a) To declare that the Plaintiff has a right of way on the Defendant's land, Title no. C. 768 exercisable by the use of a vehicular access road on the Defendant's land which has been blocked by the Defendant.

On 1 October 2001, Mr Boulle moved that that prayer be added. He submitted that no additional remedy is being sought, and that what was involved in that amendment was only a "clarification".

Mr Hodoul, Learned Counsel for the Defendant, however objected to the amendment of paragraph 2, but had no objection to the amendment of the prayer of the plaint. He submitted that although he had not objected to the amendment of paragraph 2 on 15 March 2001, upon subsequent instructions, he would submit that by introducing the concept of an "enclaved property", the original cause of action based on faute has been added with another cause of action under Article 682 of the Civil Code.

In the present action therefore the Plaintiff has to establish that he was using the passage, as of right, and not out of mere tolerance and sufferance on the part of the Defendant. Article 682 of the Civil Code provides that where a person's land is enclosed on all sides, and has no access or inadequate access to the public road, he "shall be entitled to claim from his neighbours a sufficient right of way to ensure the full use of such property, subject to his paying adequate compensation for any damage that he may cause". An enclavement has therefore to be declared by Court, it cannot be presumed. Hence, the Plaintiff in the present proceedings

does not claim such a right of way, but avers that he used that passage by virtue of the fact that his land is enclaved. The Plaintiff also avers that at all times and six years after the Defendant had acquired ownership of land Parcel C 768, he had been using that right of way. The Defendant on the other hand avers that before he purchased Parcel C 748, the Plaintiff had never claimed, enjoyed or attempted to create any passage thereon, and that after he purchased, the Plaintiff, despite strong objections, unlawfully cleared vegetation to create a vehicular passage. The co-lateral issue to be decided is limited to that dispute.

Mr Boulle however contended that the cause of action is still based on faute. He referred the Court to paragraph 5 of the plaint wherein it is averred that the Defendant blocked the access road six years after he (the Defendant) had acquired land Parcel C 768. In paragraph 6 it is averred that the Plaintiff had been using that access road, inter alia for the purpose of transporting his produce to the market and to customers. It was therefore submitted that the facts on which the Plaintiff relies on and the remedy sought are both based on a right of way. Hence he submitted that the averment as regards the land being enclaved was added to establish "the original of the right of way".

Section 146 of the Code of Civil Procedure permits a party to amend his pleadings at any stage of the proceedings. But in the case of a plaint, it provides that no amendment which seeks to "convert a suit of one character into a suit of another and substantially different character should be allowed".

The cause of action pleaded in the plaint is unambiguous. The Plaintiff avers that he had been using a right of way over the Defendant's land and that the Defendant on 25th May 1999 blocked that access road causing him loss of earnings and moral damages.

Accordingly I rule that in these circumstances the amendment of paragraph 2 of the plaint does not have the effect of adding a separate cause of action. The amended plaint is accordingly accepted.

Record: Civil Side No 259 of 1999

La Digue Island Cruising (Pty) Ltd v
The Owners of the Fishing Vessel Demosfen

Admiralty jurisdiction – role of intervener

A skiff from the *Demosfen* collided with the Plaintiff's vessel. The Plaintiff sued the owners of the *Demosfen* for damages to their vessel from the collision. The Defendant owners did not appear and the vessel was impounded. The mortgagee of the *Demosfen* intervened and raised a preliminary objection that the Plaintiff had not followed the appropriate admiralty procedures and sought to have the claim struck out.

HELD:

(i) If there has been damage from a collision between two ships, either party must file a preliminary act within two months;

(ii) The filing of a preliminary act is a procedural requirement in Seychelles by virtue of the Admiralty Jurisdiction Rules which extends parts of the Administration of Justice Act 1956 (UK) to Seychelles;

(iii) The obligation to a file a preliminary act applies to the owners of the vessels in the collision who are the parties in the action in rem. A third party is not a party to the collision dispute and therefore is not entitled to object on the basis of a lack of a preliminary act; and

(iv) The role of the intervener is limited to the protection of their interest. The intervener is not entitled to raise matters beyond the limited interest. The particulars to be

supplied in a preliminary act are irrelevant to an intervener to safeguard their interest.

Ruling objection overruled. Application to strike out claim refused.

Legislation cited
Admiralty Jurisdiction Rules, Order 75 rr 2, 4, 18, 19

Foreign cases noted
'Craig Hall' [1910] P 207
'El Ose' (1925) Lloyds Rep 216
'Frankland' (1872) LR 3 A&E 511
'Vortgern' (1859) SWA 518
Lord Strathcona [1926] AC 108

Kieran SHAH for the Plaintiff
John RENAUD for the Intervenor

Ruling delivered on 2 August 2002 by:

PERERA J: The Plaintiff, La Digue Island Cruising (PM) Ltd, filed this action in rem on 13th November 1996 against the owners of the Fishing Vessel "Demosfen" claiming a sum of US dollars 54,346 in respect of damages caused to their vessel "Assumption" on 6th July 1996 at Port Victoria.

The said owners of "Demosfen" defaulted appearance. However Moscow Narodny Bank Ltd, intervened as the mortgagee of that vessel. The vessel, which was arrested by this Court on 8 November 1996 was released upon the intervener furnishing a bank guarantee dated 8th November 1996 from Barclays Bank, Seychelles for a maximum sum of US dollars 75,000.

On 28 August 1998, the intervener, sought "further and better particulars" of the claim. These particulars were furnished by the Plaintiff on 15th January 2001. The Plaintiff disclosed that

the collision alleged occurred around 9.50p.m on 6 July 1996 at the Inter Island Quay, Port Victoria when a skiff of the "Demosfen" operated by two crew members collided into the "Assumption" which was moored alongside the quay. For purposes of an Admiralty claim, a skiff is considered as an accessory of the registered mother ship or vessel.

The present ruling arises from a preliminary objection raised in the defence of the intervener, that the Plaintiff has not filed a "preliminary act" as required by RSC Order 75 Rule 18 within two months of service of the writ, and that hence the action should be struck out.

The initial issue is whether Order 75 Rule 18 which provides for the filing of a Preliminary Act has been extended to apply to Seychelles by the Admiralty Jurisdiction Rules (S.I. 60 of 1976) (Cap 52). These Rules provide that Sections 1, 3, 4, 6, 7 and 8 of the Administration of Justice Act 1956 of the United Kingdom Parliament, shall have force and effect in Seychelles subject to the modification in column II of the Schedule thereto. Section 2 and 5, and Parts II to V and the Schedules of the UK Act have been omitted.

Section 4(6) which applies to Seychelles is as follows-

> The claims to which this Section applies are claims for damage. loss of life or personal injury arising out of a collision between ships or out of the carrying out of or omission to carry out a manoeuvre in the case of one or more of two or more ships or out of non-compliance, on the part of one or more of two ships, with the collision regulations.

"Collision Regulations" are defined in Section 8 as meaning Regulations under Section Four Hundred and Eighteen of the Merchant Shipping Act, 1894 or such rules as are mentioned

in Subsection (1) of Section 421 of that Act or any rules made under Subsection 2 of the said Section *421.*

This identical provision is contained in Order 75 Rule 2 under the heading "certain actions to be assigned to admiralty". That rule provides that claims arising under Rule (1) (same as Rule 4(b) of the Seychelles Rules) shall be assigned to the Queen's Bench Division and taken by the Admiralty Court. The Queen's Bench Division, is a division of the High Court of Justice. In the Rules adopted, reference to High Court of Justice has been substituted by the words "Supreme Court of Seychelles". The reference to "Collision Regulations" in Order 75 Rule 2(2) has been defined, inter alia as Regulations under Section 418 of the Merchant Shipping Act 1894. Accordingly, pursuant to Rule 4(6) of the Admiralty Jurisdiction Rules of Seychelles, the filing of a Preliminary Act is a procedural requirement.

Dr Lushington stated in *The "Vortgern"* (1859) SWA 518 that:

> Preliminary Acts were instituted for two reasons, to get a statement from the parties of the circumstances recenti facto, and to prevent the Defendant from shaping his facts to meet the case put forward by the Plaintiff.

The object of preliminary acts is to obtain from the parties, statement of the facts at the time when they are fresh in their recollection (per Sir Robert Phillimore in *The "Frankland"* (1872) LR 3 A & E 511). Order 75 Rule 18(2) sets out 16 items which should be disclosed in the first part of preliminary act. A preliminary Act is in two parts. The first part consists of a series of questions concerning the circumstances in which the collision occurred and the manoeuvres of, and observations made, by the ship owned by the party on whose behalf it is filed. These questions cover a wide range of details from the measurements, tonnage, horse power of the ship, the direction and force of the wind, the state of weather,

the state of the lights on the ship, sounds and signals and the course taken by the ship before and after collision and a specification of the parts of the ship which first came into contact, and the approximate angle between the two ships at the time of the collision. The second part consists of any other facts and matters relied upon, together with the allegations of negligence made by the party on whose behalf it is filed and the remedy or relief which the party seeks.

A claim for damages resulting from a collision arises when two ships in motion collide. Hence was held in the case of the *"Craig Hall"* (1910) Probate Division - 207 preliminary acts are not required in an action arising out of a collision between a ship and a fixed or floating structure such as a landing stage. A skiff is a small light boat propelled by oars, sail or motor. Although it is not averred as to how the skiff in the present case was propelled, the Plaintiff has disclosed that it was *"operated by two crew* members" of *"Demosfen"* at the time of the collision. In any event Section 8 of the Admiralty Jurisdiction Rules *(Cap 52)* defines the word *"ship"* as including any description of vessel used in navigation. Hence a skiff whether propelled by an oar, sail or motor would fall within that definition.

However a collision with a vessel moored to a quay is considered as a collision between ships for purposes of Section 4(6) of the Admiralty Jurisdiction Rules, as by definition a ship includes any description of vessel used in navigation, and as such vessel was in navigable waters.

What then would be a consequence of failure to lodge a preliminary act? RSC or 75 Rule 19(1) provides that -

> Where in such an action as is referred in Rule 18(1), the Plaintiff fails to lodge a preliminary act within the prescribed period, any Defendant who has lodged such an Act may apply to the Court by summons for an order to dismiss the action,

> and the Court may by order dismiss the action or make such other order on such terms as it thinks just.

In *"El Ose"* (1925) Lloyds reports 216 it was held that:

> The Rule (as to filing of a preliminary act) applies in full force in cases where the owner of one vessel sues the owner of the offending vessel. Discretion is exercised in claims by third parties or cargo owners.

The filing of Preliminary Acts applies to the two owners of the vessels in collision and who are the Plaintiffs and Defendants in the action in rem. In the present case, the collision claim is by the owners of the damaged vessel against the owners of the offending vessel. Moscow Narodny Bank Ltd is not a party to that dispute, but only a party who has an interest in the property arrested, and subsequently released on a bank guarantee. As was held in the *"Lord Strathcona"* the right of an intervener is limited to the protection of his interest in the *"Res"* and the Court will not permit him to raise extraneous issues. In that case, the mortgagees sued the mortgager on a charter party. The chatterers intervened and, inter alia, challenged the validity of the mortgage.

The Court held that they were only entitled to be heard on the question whether the Plaintiffs ought to be restrained from exercising their rights in such a way as to interfere with the intervener's contractual rights under the charter party.

Hence defects in pleadings or failure to lodge pleading such as preliminary Acts are not matters which an intervene can rise to seek to strike out an action in rem against an owner of a vessel over which it has only a pecuniary interest as a mortgage, and as the pleadings of an intervener are different to what a Defendant is required to plead. The particulars to be supplied in a preliminary act are irrelevant to an intervener

to safeguard his limited interest. Hence such an application could have been made by the owners of the vessel, in their capacity as Defendants. But they have defaulted appearance. Hence the preliminary objections based on paragraphs 8 and 9 of the defence are dismissed.

Costs in the cause.

Record: Civil Side No 353 of 1996

Andre v Andre

Evidence – breach of oral promise – public policy

The Plaintiff is the mother of the Defendant. The Plaintiff orally agreed to sell the Defendant some land. The Defendant paid the Plaintiff the purchase price and carried out some initial work on the land. The Defendant then brought his family to live on the property. The Plaintiff alleged that the sale was subject to certain conditions including that the Defendant's wife not live there and sought a declaration that the sale had been frustrated due to a breach of condition. The Defendant averred that there was no restriction on who could live on the property and sought a declaration that the sale was valid.

HELD:

(i) A sale is complete and the ownership passes from the seller to the buyer as soon as the price is agreed upon whether or not the thing has been paid for or delivered. If the parties have agreed on the thing and the price then the promise to sell is equivalent to a sale.

(ii) The sale of the land was complete. The parties had agreed upon the thing and the purchase price and the land had been delivered. The requirement for registration only applies to third parties.

(iii) The concept of public order is used to protect the State, its institutions, and its interests. The condition that the daughter-in-law not reside at the property would have effectively split up the family. In light of the protection of families under article 32(1) of the Constitution that condition would be

against public policy. Such an agreement would also be unlawful under article 1133 of the Civil Code.

Judgment for the Defendant. Declaration of valid sale.

Legislation cited
Constitution of Seychelles, art 32
Civil Code of Seychelles, arts 1133, 1583, 1589
Land Registration Act, s 75

Cases referred to
Hoareau v Gilleaux (1978-1982) SCAR 158

Charles LUCAS for the Plaintiff
Frank ELIZABETH for the Defendant

Judgment delivered on 23 September 2002 by:

PERERA ACJ: This is an action for a declaration that an oral promise to sell an immovable property has been frustrated due to a breach of condition.

The Plaintiff is the mother of the Defendant. She was the sole owner of a land Parcel C. 2149 by right of purchase upon a deed dated second November 1992 (exhibit P1). It is not disputed that the Plaintiff verbally agreed with the Defendant to sell a part of that Parcel C. 2149 which was later subdivided into three Parcels, bearing nos C.4142, 4143, 4144. The Defendant was to receive Parcel C. 4142. It is also not in dispute that in consideration of the proposed sale, the Defendant paid the Plaintiff R25,000 as the full purchase price. The Plaintiff however avers that this promise to sell was subject to three other conditions, namely:

(1) The Defendant pays the cost of sub-division of Parcel C. 2129.

(2) The Defendant would not occupy the promises with his ex-concubine Modeste Thelemaque with whom he had severed relationship at that material time and who at all times verbally abused the Plaintiff.

(3) The Defendant builds his residential home on that property.

The Plaintiff admits that the Defendant paid R3000 as the survey fees for the sub-division. The Defendant has however produced a receipt from G & M Surveys for R3600 (exhibit D1). Defendant denies the condition set out at Clause (2) above, and seeks a declaration that there has been a valid sale of Parcel C 4142, in law.

The Plaintiff testified that the Defendant and his concubine were living at Anse Boileau at her parent's house. He was having problems with that family as well as the concubine. One day he came to her crying and asked her to sell a portion of land and gave her R25,000. Then she said "yes my son, I will take this R25,000, but I do not want this woman at my place." Thereupon, he spent on the subdivision of the land and put up a shed thereon. The Plaintiff further testified that despite her condition that the concubine should not be brought to the land, the Defendant came to live on the land with her. The Plaintiff in her evidence also stated that this daughter in law created problems and abused her. She also quarrel with the Defendant, and that was the reason why she did not want her on the land. The Defendant did not raise any objection under Article 1341 of the Civil Code to the adduction of oral evidence on the matter that exceeded R5000. He however testified that he came to reside on Parcel C.4142 with his concubine and two children in 1997. Denying that there was any condition that he should not bring her on the land, he stated that the only reason why the Plaintiff wants to return the money and get vacant possession of the land is for her to sell the whole property. He however admitted that his

concubine whom he married in 1998 has now been given a flat by the S.H.D.C at a monthly rental of R1000 and that the whole family would be going into occupation shortly. However, he maintained that as by operation of law, he has become the owner of Parcel C.4142, he wanted the land to build a suitable house later on.

In terms of Article 1583(1) of the Civil Code:

> A sale is complete between the parties and the ownership passes as of right from the seller to the buyer as soon as the price has been agreed upon, even if the thing has not yet been delivered or the price paid.

In the present case, the price had been agreed and paid and the thing had been delivered.

Article 1589 is as follows:

> A promise to sell is equivalent to a sale if the two parties have mutually agreed upon the thing and the price. However, the acceptance of a promise to sell or the exercise of an option to purchase property subject to registration shall only have effect as between the parties or in respect of third parties as from the date of registration.

It is now settled in the case of *Hoareau v Gilleaux* (1978-1982) SCAR 158 that the requirement of registration is only applicable to third parties, and that where there has been agreement on the thing and the price by the parties, the promise to sell is equivalent to a sale.

In law, therefore, there has been a valid sale of Parcel 4142 to the Defendant. Mr Lucas, Learned Counsel for the Plaintiff however contends that in the present case there was a condition attached to the promise and hence the promise to

sell would not be equivalent to a sale despite there being agreement on the thing and the price if that condition had been breached. Paragraph 3(iii) refers to Modeste Telemaque as the Defendant's "ex-concubine with whom he had severed relationship at the material time." But according to the Plaintiff's testimony, the father in law of the Defendant had injured him with a hoe, and the Probation Officer who investigated asked her to remove the Defendant from the house of Modeste Telemaque at Anse Boileau. Later she met the Defendant and he too wanted her to remove him from that place at that time. Then he came with R25,000 as the purchase price for the portion of land. Neither Francis Hiller, the Plaintiffs son, nor Florence Flore, her daughter testified that they heard the Plaintiff promising to sell the land subject to a condition. They only heard their mother subsequently refusing to effect the transfer as the Defendant had brought Modeste to the land after building a shed thereon. Such a condition would have had the effect of breaking up of a family, and hence would have been contrary to Public Policy, especially in view of the protection given to families by Article 32(1) of the Constitution. Accordingly even if there was an agreement, it would have been unlawful under Article 1133 of the Civil Code. The concept of Public Order is invoked to protect the State and its institutions, and on the other hand, the family. In any event if the condition was as stated in paragraph 3(iii) of the plaint, then there was no necessity to stipulate a condition that the promise to sell was subject to Modeste not being brought to live with him on that land, as it is averred in that paragraph that Modeste was the Defendant's ex-concubine with whom he had severed relationship at the time the promise to sell was allegedly made.

Although there may have been some disputes and unpleasantness between the Plaintiff and Modeste Thelemaque, the Court is not satisfied that at the time the "thing and the price" were agreed upon there was a condition as averred. Hence the promise to sell was equivalent to a sale.

In the circumstances, the Plaintiff cannot maintain the present action and accordingly the plaint is dismissed. The Court holds that there has been a valid sale of Parcel B. 4142 to the Defendant by virtue of Article 1583 of the Civil Code. Hence the Plaintiff is granted two months from the date hereof to transfer Parcel B 4142 to the Defendant by a notarial deed, failing which, the land Registrar is authorised to register, by virtue of Section 75 of the Land Registration Act, the Defendant as the proprietor of the said Parcel B. 4142.

There will be no order as to costs.

Record: Civil Side No 385 of 1998