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Poaching of turtles and birds – bail

The first to seventh accused were charged on six counts of offences involving killing of turtles and protected birds, possession of turtle meat and conspiracy to commit a misdemeanour. The eighth accused was charged with the offence of unlawful possession of turtle meat alone. All the accused were served with charges and obtained leave of the Court to plead the charges. The prosecution filed a motion to remand the eight accused pending the full determination of the case, as there was a real possibility of one of the accused being absent for the trial and the trial being unduly delayed. The defence submitted that the prosecution's claim was speculative and should not be a valid ground for remanding the accused. The prosecution also claimed that the evidence is of a perishable nature and that any delay in the trial would prejudice the case. The prosecution thirdly argued that all the accused should be remanded as the case was of a very serious nature with likelihood of a high financial penalty and that there was a fear that the accused might interfere with the complainant and other prosecution witnesses. The defence objected to the offence being categorised as "serious".

HELD:

(i) The people before the Court are "accused" not "suspects", therefore, Section 101(1) of the Criminal Procedure Code and article 18(7) of the Constitution do not apply as they are relevant to the rights of suspects. However article 19 of the Constitution provides for the right to a fair hearing and that a person should be considered innocent until proven otherwise. Whether the accused is remanded in custody or released on bail

pending trial falls within the discretion of the Court by virtue of Section 179 of the Criminal Procedure Code;

(ii) Delay caused by one or two of the accused, when there are several people being tried should not affect the rights of those present to be tried within a reasonable time. Therefore, the fact that an absence may be a possibility is not a valid ground for seeking a remand order until the end of the trial;

(iii) Section 133(1) of the Criminal Procedure Code provides for the taking of evidence in the absence of the accused;

(iv) The fact that the evidence is perishable is a ground in favour of an expedited hearing, rather than for a remanding of the accused. The Criminal Procedure Code provides for reasonable care and preservation of property seized and brought before the Courts;

(v) The Courts adopt a deferential approach towards legislation that serves legitimate social policy and environmental objectives. Therefore, although the offences may be regulatory in nature, their seriousness is not diminished. The case is of a serious nature; and

(vi) The fear that the accused will interfere with the prosecution if released on bail is a general fear in all cases. If regulated by strict bail conditions the possibility of the accused interfering with the prosecution could be diminished.

Judgment: Bail granted to all accused on conditions.
Legislation cited
Constitution of Seychelles, arts 2, 18, 19
Criminal Procedure Code, ss 98, 101, 133, 179
Misuse of Drugs Act, s 14
Penal Code, s 5
Wild Animals and Birds Protection Act

Cases referred to
Philip Imbumi v The Republic Const case 8/2001
The Republic v Jupiter (1977) SLR 5

Foreign cases noted
Constantinides v The Republic of Cyprus (1999) 2 CHRL 254

Ronny GOVINDEN for the Republic
Danny LUCAS for the First Accused
Alexia ANTAO for the Second, Third and Eighth Accused
Pesi PARDIWALLA for the Fourth Accused
Frank ALLY for the Fifth and Sixth Accused
ROMESH SUNDARAM for the Seventh Accused

Order delivered on 10 February 2003 by:

PERERA ACJ: Eight persons have been produced before Court, charged with offences contrary to the Regulations made under the Wild Animals and Birds Protection Act. While the First to Seventh Accused, are charged on 6 counts for offences involving killing of turtles and protected birds, possession of turtle meat, and conspiracy to commit a misdemeanour, the Eighth Accused alone is charged with the offence of unlawful possession of turtle meat. The particulars in the charge reveal that the First to Seventh Accused had in their possession 1141 kg of turtle meat, which constitutes the flesh of about 50 turtles, and 36.42 kg of bird meat, and the Eighth Accused had 58 kg of turtle meat. All the accused who

have been duly served with the charges have through their respective counsel obtained leave of this Court for time to plead to these charges.

Particulars of offence are as follows:

The Prosecution has filed a motion pursuant to Section 179 of the Criminal Procedure Code to remand the eight Accused "pending the full determination of the case". The grounds relied on are as follows.

1. There are 8 persons charged in this case. If enlarged on bail there is a real possibility that the trial would be unduly delayed as a result of non-appearance of at least one of them on any subsequent date that this case is adjourned to.

2. That any delay may prejudice the case, as the exhibits are of a perishable nature.

3. That the case is of a serious nature with a likely high financial penalty and thus there is a fear of the accused interfering with the Complainant and eye witnesses for the Republic and absconding if enlarged on bail.

It must initially be stated that the eight persons before the Court are not "suspects" but persons charged with offences, and hence are "accused". Accordingly, the circumstances set out in Section 101(1) of the Criminal Procedure Code (Amendment) Act no. 15 of 1995 do not apply to them as they apply only to suspects before being charged. Article 18(7) of the Constitution which was relied on by all the defence counsel in the case in their submissions specifically apply only to "suspects". Article 18 of the Constitution guarantees the right to liberty and security of the person, subject to limitations. This right protects a person from arbitrary arrest

and detention. Once a person is charged Article 19 provides that he has a right to a fair hearing. One such right, as contained in Sub Article (2) (a) is that he is considered innocent until proven otherwise, or has pleaded guilty. Although Mr Pardiwalla Learned Counsel for the Fourth Accused found uniqueness in this provision of the Constitution and submitted that the Constitution has declared that an Accused person "is innocent" until proven guilty, I fail to seen any distinction in other Constitutions where this Fundamental Right is stated as a presumption of innocence. The two terms are facultative in the sense of stating that the burden of establishing a charge against a person is always with the Prosecution. However, Article 19(10(b) contains a derogation to the declaration of innocence in Sub Article 2(a) which provides that it would not be inconsistent or a contravention of that right where a law "imposes upon any person charged with an offence the burden of proving particular facts or (declaring) that the proof of certain facts shall be *prima facie* proof of the offence or of any element thereof. The "reverse burden" provision contained in Section 14(d) of the Misuse of Drugs Act, was considered a permitted derogation by the Constitutional Court in the case of *Philip Imbumi v Republic* (Const Case 8 of 2001). Hence, with respect, there is no uniqueness in Article 19(2)(a).

Once a person has been charged with an offence, he becomes entitled to the right to a fair hearing which involves the rights specified in Subarticle (2) thereof. Procedurally, the remanding in custody pending trial or releasing him on bail falls within the discretion of Court by virtue of Section 179 of the Criminal Procedure Code. Hence the grounds urged by the Prosecution in the present case have to be considered on their merits before this discretion is exercised.

Considering ground 1, it was submitted by Counsel for the defence that the averment that there was a “real possibility” of at least one of the eight Accused being absent in Court on a

trial date and consequently the trail being unduly delayed, was speculative, and was therefore not a valid ground. It is the experience of Court that either the Accused or their Counsel fail to appear on trial dates for various justifiable reasons which are beyond their control. However where an accused person absconds and it is proved that there is no immediate prospect of arresting him. Section 133(1) of the Criminal Procedure Code provides for the taking of evidence in his absence. Article 19(2) (i) of the Constitution also provides that a person charged with an offence:

> shall, except with the person's own consent, not be tried in the person's absence unless the person's conduct renders the continuance of the proceedings in the person's presence impracticable and the Court has ordered the person to be removed and the trial proceeds in the person's absence.

Further the delay caused by the absence of one or two accused, when several accused are being tried, should not affect the right of those present to be tried within a reasonable time. Hence I agree with Learned Counsel for the defence that this is not a valid ground in seeking a remand order until the final disposal of the trial.

In the second ground, the prosecution avers that the exhibits in the case are of a perishable nature, and hence any delay would prejudice the case. With respect, I would consider this ground as an argument in favour of an expedited hearing, rather than an argument in favour of remanding the accused persons. Moreover, Section 98 of the Criminal Procedure Code provides that any property seized and brought before a Court may be detained until the conclusion of the case "reasonable care being taken for its preservation". If an appeal is made upon conviction, such property will be detained until the appeal has been disposed of. SubSection (3) provides

that if no appeal is made, the Court shall direct such thing to be restored to the person from whom it was taken, unless the Court sees fit and is authorised or required by law to dispose of it otherwise. In the present case, whether the accused are convicted or acquitted, the turtle meat and bird meat which will be exhibited would be liable to be destroyed ultimately as sale or distribution would be contrary to the nature and purpose of the Wild Animals and Birds Protection Act. In any event, the Prosecution has disclosed in the affidavit of S.I. Sonny Legate, that the meat is salted. Hence it would be the duty of the Police to take "reasonable care" for its preservation, as required by Section 98(1) of the Criminal Procedure Code. Ground 2 is again an argument in favour of the expeditious hearing of the case rather than a ground to remand the accused persons. Hence there is no merit in that ground.

Ground 3 has three elements, namely:

1. The case is of a serious nature with a likely high financial penalty.

2. Consequently there is a fear of the Accused interfering with the virtual complainant and other prosecution witnesses.

3. There is also the fear that if released on bail, they would abscond.

I have already dealt with the 3rd element and stated that Section 133(1) of the Criminal Procedure Code provides for such an eventuality.

As regards the 1st element, Learned Counsel for defence vehemently objected to the offence being categorised as "serious". They submitted that in terms of the definitions in Section 5 of the Penal Code, a misdemeanor is an offence which is punishable with imprisonment for less than three

years. The maximum custodial sentence that is permitted for the present offences is 2 years, and hence it is a misdemeanor. However the offence carried a minimum fine of R5000 and a maximum of R500,000. The charge discloses that the First to Seventh Accused are being charged for slaughtering about 50 turtles and about 40 protected birds. Learned Senior State Counsel, has in his affidavit stated that "the case is of a serious nature", and not that the "offence is serious". He was undoubtedly aware that a misdemeanor could not be categorised under serious offences such as murder, manslaughter or drug offences. It is the large quantity of the turtle meat and bird meat alleged to have been in the possession of the accused and the number of turtles and birds alleged to have been killed by them that makes the case to be of a serious nature. It must be stated that the Courts adopt a deferential approach towards legislation designed with legitimate social policy objectives and the environment. Although the offences are of a regulatory, as opposed to criminal, by nature, the seriousness is not diminished. The unlawful exploitation of natural resources is an offence against the present and future generations. Animals and Birds are protected to maintain the rhythm and harmony in the natural world. Hence every generation has a responsibility to the next to preserve that rhythm and harmony. It is for this reason that the Courts impose severe punishments on poachers. I would therefore agree with the prosecution that this case is of a serious nature.

Under the 2nd element, it is a general fear of the prosecution in all cases that if the accused are released on bail they would interfere with the virtual complainant and other prosecution witnesses. In the case of *Republic v Jupiter* (1977) SLR 5, two persons were charged with the offence of rape, which carried a maximum punishment of life imprisonment. The State opposed the granting of bail mainly on the ground that there was a likelihood of some of the witnesses being interfered with, on the ground of seriousness of the offence, and as

investigations had revealed that there had been a gang of persons involved in the offence and hence there was the likelihood that alibis could be manufactured if the accused were granted bail. The Court accepted that upon the facts disclosed, the State had a genuine apprehension that the witnesses would be interfered with, and refused bail.

In *Constantinides v The Republic of Cyprus* (1999) 2 CHRLD 254, the Supreme Court of Cyprus held that:

> The European Court of Human Right has established that a justifiable fear that the Accused will interfere with the course of justice, including destroying documents, warning or colluding with other possible suspects and bringing pressure to bear upon witnesses, is another permissible ground for his or her detention. A general statement that the accused will interfere with the course of justice is not sufficient; supporting evidence must be provided.

The evidence presented to the Court in that case consisted of a letter in which two prosecution witnesses expressed their intention to retract their previous statements. Accordingly, the Court held that on basis of the material adduced, the fears of the prosecution were reasonably justified, and hence refused bail.

Each application for bail must be considered in the context of its own circumstances depending on the facts disclosed to Court. In the present case, as submitted by Mr D. Lucas, Counsel for the First Accused and Mr Pardiwalla, Counsel for the Fourth Accused, the prosecution has not adduced any supporting evidence to substantiate the apprehension that the Accused would interfere with the virtual complainant or any other witnesses, nor that they would abscond.

I have carefully considered the submissions for the prosecution as well as for the defence. Although the case is of a serious nature, I cannot find any other ground that could not be regulated by strict bail conditions to assuage the apprehensions of the prosecution.

Accordingly, acting under Section 179 of the Criminal Procedure Code I grant bail to the First to Eighth Accused on the following conditions:

1. That they each enter into a recognisance in the form of a bond for R25,000 with two sureties.

2. That they surrender their passports or other travel documents to the Registrar of this Court forthwith.

3. The Director of Immigration to be informed that no passport or travel document should be issued to the eight accused, without a further order of this Court.

4. That the eight Accused report to the Police Station nearest to their place of residence every Monday and Friday at 9 a.m. They shall not leave Mahe to any outer or inner Island without the sanction of Court.

5. That they do not either directly or indirectly interfere with, the virtual Complainant or any other prosecution witness, nor engage in any activity that would affect the course of justice.

6. That they do not abscond, and that they will attend Court punctually on each and every day the case is adjourned either for mention or trial.

The breach of any one of these conditions by any of the Accused would make him liable to be remanded till the final determination of the case.

Record: Criminal Side No 11 of 2003

African Maritime Carriers Ltd v Owner of the Vessel "Lissom"

Admiralty jurisdiction – counterclaim – claims in rem – civil procedure

The Plaintiff chartered the "Lissom" from its former owners. They filed an action in rem against the Defendant for the value of property which was still on board the vessel when the charter was prematurely terminated and for other associated losses. The Plaintiff obtained a warrant of arrest for the vessel which was duly executed. The Defendant produced evidence they were the vessel's present owners and it was released. The Defendant averred that it had purchased the vessel and everything belonging to it whether on board or onshore. They further averred that if the Plaintiff's property was still on board the vessel at the end of the charter then that was a matter between the Plaintiff and the former owners. The Defendant counterclaimed for damages suffered as a result of the vessel's detention. The Plaintiff filed a motion to strike out the counterclaim on the grounds that it did not fall within admiralty jurisdiction and should be separately instituted by way of plaint.

HELD:

(i) The Admiralty Jurisdiction Rules 1976 set out in rule 1(1)(a)-(r) the claims that can be adjudicated under the Court's Admiralty jurisdiction "together with any other jurisdiction which either was in the High Court of Admiralty in England immediately before the commencement of the Supreme Court of Judicature Act 1873". Therefore the admiralty jurisdiction of the Court is wider than the specific claims set out in rule 1(1)(a)-(r). The Court may also exercise

jurisdiction vested in the High Court of England prior to 1 November 1875. Section 7 of the Courts Act empowers the Supreme Court to exercise the same admiralty jurisdiction as is now vested in the High Court of England;

(ii) The ordinary civil jurisdiction of the Supreme Court of Seychelles and its Admiralty jurisdiction are distinct. The Admiralty Jurisdiction Rules 1976 set out the questions and claims that fall within the jurisdiction and provide the mode of execution of such jurisdiction; and

(iii) A counterclaim may be made in personam in respect of any matter arising against the Plaintiff in the main action in rem. The Admiralty jurisdiction of the Supreme Court encompasses such an action. In the present case, the counterclaim is not based on a delictual fault but on an alleged cause of action arising from the arrest of the vessel for purposes of the claim in the action in rem. The success of the counterclaim is dependent on the outcome of the Plaintiff's action in rem.

Judgment for the Defendant. Motion to strike out counterclaim denied.

Legislation cited
Civil Code of Seychelles, art 1382
Courts Act, ss 7, 16
Admiralty Jurisdiction Rules 1976, r 1

Foreign legislation noted
Administration of Justice Act 1956 (UK), ss 1, 3, 4, 6, 7, 8
Rules of the Supreme Court, Ords 15, 18, 75

Foreign cases noted
The Cheapside [1904] PD 339
The Clutha (1876) 45 LJP 108
The Newbattle (1885) 10 PD 33

Karen DOMINGUE for the Plaintiff
Bernard GEORGES for the Defendant

Ruling delivered on 3 December 2003 by:

PERERA J: The Plaintiff, as charterer of the Defendant's vessel "Lissom" under a charter party dated 12 November 2001 filed an action in rem on 31 May 2002, claiming a sum of US dollars 193, 448 said to be the value of Plaintiffs bunkers remaining on board the vessel at the premature termination of the charter, and losses suffered by reason of the Defendant's alleged failure to settle the Plaintiffs claim. Upon a praecipe for a warrant of arrest filed by the Plaintiff, this Court issued a warrant of arrest on the said vessel, which was lying within the territorial waters of Seychelles. That warrant was duly executed 3 June 2002. However upon a bank guarantee from Barclays Bank (Seychelles) Ltd being furnished by the owners of MV "Homer", said to be the present owners of the same vessel earlier named "Lissom", which was under arrest, this Court made order on 7 June 2002 releasing the vessel from arrest.

The Defendant, in their statement of defence avers that it purchased the vessel "with everything belonging to her on board and on shore" and thus purchased the bunkers claimed by the Plaintiff. It is further averred that if the Plaintiff is owed the bunkers, it is the previous owner of the vessel to which the claim must be addressed. In a counterclaim attached to the

statement of defence, the Defendant claims a sum of US dollars 218,319 from the Plaintiff as loss and damages allegedly caused by reason of the vessel being arrested.

The present ruling arises from a motion filed by the Plaintiff to strike out the counterclaim on three grounds, namely that –

1. The counterclaim does not fall within the admiralty jurisdiction of this Court.

2. The counterclaim is a civil suit and hence should have been instituted by a plaint and dealt with under the provisions of the Code of Civil Procedure.

3. The counterclaim does not disclose a reasonable cause of faction.

It is not in dispute that the Admiralty jurisdiction is vested in this Court by Section 7 of the Courts Act (Cap 52). It provides that –

> (1) The Supreme Court shall have the Admiralty Jurisdiction of the High Court of England as stated in Section 1 of the Administration of Justice Act 1956 of the United Kingdom Parliament.
>
> (2) Subject to Subsection (3), the Act shall have force and effect in Seychelles.

Subsection (3) relates to the Rule making power of the Chief Justice to modify and adapt the U.K. Act to an extent as may appear to him to be necessary. The Rule making power to regulate practice and procedure is granted to the Chief Justice under Section 16(1) of the Courts Act (Cap 52).

The Chief Justice, in exercising his powers under Section 7(3) framed the Admiralty jurisdiction Rules, 1976, by S.I. 60 of 1976. Rule 2 thereof provided that only sections 1, 3, 4, 6, 7 and 8 of the Administration of Justice Act, 1956 (UK), subject to modifications in column I of the Schedule, shall have force and effect in Seychelles. Section 2 and 5 of that Act were expressly omitted. The questions or claims that could be adjudicated under the Admiralty jurisdiction of the Supreme Court of Seychelles are set out in Rule 1(1) (a) to (r) of the said Rules, "together with any other jurisdiction which either was vested in the High Court of Admiralty in England immediately before the date of commencement of the Supreme Court of Judicature Act, 1873" (that is 1 November 1875), or is conferred by or under an Act which came into operation on or after that date on the High Court of Justice in England as being a Court with Admiralty jurisdiction and any other jurisdiction connected with ships or aircraft vested in the High Court of Justice in England apart from this Section which is for the time being assigned by Rules of Court to the Probate, Divorce and Admiralty Division.

The Admiralty Jurisdiction is therefore wider than in respect of the specific claims set out in Rule 1(1) (a) to (r).

The additional jurisdiction vested in the Supreme Court exercising admiralty jurisdiction by Rule 1(1) of the Admiralty Jurisdiction Rules empowers the Court to exercise the jurisdiction vested in the High Court of England immediately before 1 November 1875. *Halsbury* (Vol 1(1) Para 415) states that a Defendant in an action *in rem* may set up a counterclaim in personam. The authorities cited are *The Clutha* (1876) 45 LJP 108 *and The Newbattle* (1885) 10 PO 33. In the latter case involving a collision between two vessels "Louise Marie" and "The Newbattle", the Defendant, owners of "New Battle" furnished security for damages, and filed a counter claim. They also sought security for damages from the Plaintiff (owners of "Louis Marie"). It was contended

by the Plaintiff that the Defendant's pleading was a counter claim and not a "cross cause" to which Section 34 of the Admiralty Act 1861 which provided for the furnishing of security, applied. The Court of Appeal held that in the circumstances of that case, the counterclaim was equivalent to a "cross action", and that it was both within the letter and spirit of Section 34 to require the Plaintiff in the main action in rem to furnish security for damages.

Although the Defendant in the present action has not claimed security for damages in the counterclaim based in personam yet the *Newbattle* (supra) is authority for the proposition that a counterclaim can be made in personam in respect of any matter arising against the Plaintiff in the main action in rem. *The Cheapside* (1904) PD 339 is also authority for allowing a counterclaim in a matter in personam to be made to a claim in rem.

Section 7 of the Courts Act empowers this Court to exercise the same Admiralty Jurisdiction as is now vested in the High Court of England. The proceedings in that Court are governed by Order 75 of the Rules of the Supreme Court. Or. 75/1/1 states that that order does not provide a complete code for admiralty proceedings, but has to be read in conjunction with the other Supreme Court Rules. The Sub Rule further states that for example, "pleadings in admiralty actions are governed by Or. 18 as modified by Rules 18 and 20 of Or. 75". Rule 18 relates to the filing of "Preliminary Acts" and Rule 20 to special pleadings in collision actions.

Order 15(r2) provides for the filing of counterclaims. Rule 2 - (1) is as follows:

> Subject to Rule 5(2), a Defendant in any action who alleges that he has a claim or is entitled to any relief or remedy against a Plaintiff in the action in respect of any matter

> (whenever and however arising) may, instead of bringing a separate action, make a counterclaim in respect of that matter; and where he does so, he must add the counterclaim to his defence.

In the United Kingdom, the Admiralty Court is part of the Queen's Bench Division. It has jurisdiction in all causes and matters assigned to it by the Supreme Court Act, 1981 to that Court, which involve the exercise of the High Court's Admiralty Jurisdiction. As stated in Or. 75 r. 1/6, an Admiralty action in personam is like an action in tort or contract in the Queen's Bench Division. But it differs from such an action, in that, it is subject to the Rules of Order 75 which modify those applicable to an ordinary Queen's Bench Division action. The ordinary Civil Jurisdiction of the Supreme Court of Seychelles and its Admiralty Jurisdiction are similarly distinct. By virtue of Section 7(3) of the Courts Act the Admiralty Jurisdiction Rules 1976 set out the questions and claims that fall within the jurisdiction and provides the mode of execution of such jurisdiction.

The contention of Learned Counsel for the Plaintiff is not that counterclaims in general, cannot be brought in actions in rem, but that the present counterclaim filed by the Defendant does not fall within any of the claims and questions set out in Rule 1, Sub Rules (a) to (r) of the said Admiralty Jurisdiction Rules 1976. I would then first consider the nature of the present counterclaim.

It is contended by Learned Counsel for the Plaintiff that the counterclaim filed by the Defendant is based on "faute" under Article 1382 of the Civil Code. She submitted that the loss and damage claimed consequent to the arrest of the vessel, is in effect based on an alleged abuse of process of Court. Learned Counsel for the Defendant, and the counterclaimant, however differs, and submits that it is an extension of the

defence to the statement of claim. The basis of the defence and the supporting affidavit is that, the vessel "MV Lissom" had been purchased by the present owners "Homer Shipping SA" from the previous owners "Penguin Maritime Ltd" under a Bill of sale dated 17 May 2002. The counterclaim is for loss and damage allegedly caused per se to the present owners as a result of the arrest. As submitted by Mr Georges, Learned Counsel for the Defendant, the counterclaim raises the question as to:

> whether the Applicant had the right to apply for the arrest of the vessel at all. If the Court feels that it did, and the Applicant succeeds in its claim, the counterclaim must necessarily fall. But if the Applicant fails, then the counterclaim will fall to be considered on the basis of whether the Applicant had a right in the circumstances to even make the application for the arrest.

An abuse of the process of Court arises in originating pleadings. Although a counterclaim is considered as a separate action, yet any matter "whenever or however arising" can be added to the defence for disposal in the same proceedings. Here, factors such as absence of good faith, or presence of malice, recklessness or negligence in making the arrest need not be pleaded. Hence the counterclaim is not based on a delictual "faute" but on an alleged cause of action arising from the arrest of the vessel for purposes of the claim in the action in rem. Such counterclaim stands or falls depending on the outcome of the Plaintiff's action in rem.

In contending that the counterclaim does not fall within the Admiralty Jurisdiction of the Supreme Court, Learned Counsel for the Plaintiff referred the Court to Sections 16(1) and 17 of the Courts Act (Cap 52), and submitted that there is a distinction between the practice and procedure of this Court in relation to the Admiralty Jurisdiction and the Civil Jurisdiction.

In this respect, Learned Counsel also referred to Section 22 of the Code of Civil Procedure (Wylie Edition) of 15 April 1920, and Section 22 of the 1991 Edition of the same Code. Section 22 of the former Edition distinguishes between matters that shall be brought before the Supreme Court and matters to be brought before the Colonial Court of Admiralty. It provides thus:

> All civil and commercial suits, actions, causes and matters shall be brought before the Supreme Court, save such as are required to be brought before the Colonial Court of Admiralty, or where other provision is made by law.

The 1991 Edition omits the reference to the Colonial Court of Admiralty, but still excludes cases "where other provision is made by law". Learned Counsel submits that his consequential amendment did not affect the distinct Admiralty Jurisdiction of the Supreme Court and the practice and procedure applying thereto. She therefore contends that as the Chief Justice has not made any Rules to regulate the practice and procedure of the Supreme Court in its Admiralty jurisdiction, save for the Admiralty Rules made by S.I. 60 of 1976, procedure, Rules and Practice of the High Court of Justice in England have to be applied pursuant to Section 17 of the Courts Act. That procedure is laid down in Order 75 of the R.S.C. Rules (U.K.), Learned Counsel however contends that the saving of cases "where other provision is made in law", maintains the distinction between the two jurisdictions and that hence, the counterclaim, which she contends is based in delict, does not fall within the provisions of the Admiralty Rules 1976, and hence ought to be brought under the provisions of the Code of Civil Procedure.

Section 6 of the Courts Ordinance Act (Cap 43 of the Wylie Edition) provided that:

> The Supreme Court is hereby declared in pursuance of the Colonial Admiralty Act 1890, to be a Court of Admiralty and shall, as heretofore, be a Colonial Court of Admiralty within the meaning of the Act, and its Admiralty Jurisdiction shall continue to be defined in the Admiralty Jurisdiction (Seychelles) order in Council 1961.

The Admiralty Jurisdiction (Seychelles) Order in Council was repealed by the Seychelles Independence Order 1976. Section 6 of the Courts Ordinance of Seychelles was amended by Ordinance No. 13 of 1976 on 22nd June 1976 and came into operation on 29th June 1976. The new provision now appears as Section 7 of that Act in the 1991 Edition of the Laws of Seychelles. As the Admiralty Jurisdiction (Seychelles) Order in Council 1961 was also repealed, the Supreme Court was vested with the Admiralty Jurisdiction of the High Court of England as stated in Section 1 of the Administration of Justice Act 1956. The Admiralty Rules, 1976 were made by the Chief Justice pursuant to Section 6 of the Courts Act on 17 July 1976. Since the new Section 7 came into operation on 29 June 1976, the Rules, though stated as having been made under Section 6 of the Courts Ordinance, were in effect made under the new Section 7(3) of the Courts Act.

The consequential amendment to Section 22 of the Code of Civil Procedure in the 1991 Edition arose from the repealing of the Admiralty Jurisdiction (Seychelles) Order in Council 1961 and the Supreme Court ceasing to be a Court of Admiralty under the provisions of the Colonial Admiralty Act, 1890. The new Jurisdiction in the Supreme Court in respect of Admiralty matters was provided in Section 7 of the Courts Act. There was no specific repeal of Section 22 of the Code of Civil Procedure (Wylie Edition) which distinguished the ordinary Civil Jurisdiction of the Supreme Court from the Jurisdiction in respect of the Colonial Court of Admiralty. The 1991 Edition

of the law of Seychelles carries Section 22 as amended by the Statute Law Revision Commissioner under the powers vested in him to omit, repeal or revoked obsolete provisions. The words "where other provision is made by law" appeared in the Wylie Edition of Section 22 and continues to appear in the 1991 Edition. It is therefore not a novel provision. With the omission of the words "save such as are required to be brought before the Colonial Court of Admiralty", the words "save in cases where other provision is made by law" would mean what it states, and does not include Admiralty jurisdiction. The jurisdiction of the Supreme Court is now provided in Article 125 of the Constitution. Sub Article (d) thereof provides for "such other original, appellate and other jurisdiction as may be conferred on it by or under an Act". The Supreme Court exercises its Admiralty jurisdiction by virtue of Section 7 of the Courts Act and the Admiralty Rules 1976. In the absence of Rules as to counterclaims therein, Cr. 15 r.2 of the RSC Rules (U.K.) would apply, pursuant to Section 17 of the Courts Act. There is therefore no necessity for a counterclaim in an action in rem, whether it falls within the questions and claims set out in Rule 1(1) (a) to (r) or otherwise, to be instituted as a separate Civil suit under the provisions of the Code of Civil Procedure, so long as such counterclaim is based on "any matter, (whenever and however arising) in an action brought by the Plaintiff, under the Admiralty Jurisdiction of the Supreme Court.

Hence the present counterclaim falls within the Admiralty Jurisdiction of this Court. It also discloses a reasonable cause of action.

In the circumstances, the motion is dismissed.

Record: Civil Side No 117 of 2002

Amina Khatib, ex parte

Guardianship – parental rights – foreign affidavit

The Respondent was living in Kenya with his wife and young son. The wife's daughter from a previous marriage was also living with them. The Respondent's wife died unexpectedly. The Respondent purported to appoint the wife's daughter as the boy's guardian. That process took place in Kenya. The siblings then went to live with their mother's sister (the Applicant in this case) in the United Arab Emirates. The Respondent returned to Seychelles. The Applicant applied for guardianship in respect of her nephew. At issue was whether there should first be a hearing to determine whether the Respondent was incompetent to be his son's guardian.

HELD:

(i) Following the death of one parent, the surviving parent is the guardian of the child as of right and would have to be removed as guardian before a new one was appointed by the Court;

(ii) Where a person appointed as guardian indicates that they do not wish to continue acting as guardian, the Court has authority to either compel that person to act or to appoint another person. However where that person is the parent of that child, the Court must remove guardianship as parental power cannot be voluntarily relinquished;

(iii) A foreign affidavit for an appointment of guardianship may be recognised under article 392 of the Civil Code if the Court is

satisfied that it was validly made in accordance with the relevant foreign legislation on affidavits. In the present case, the affidavit at question was relied upon as evidence of a lawful act. At the pertinent time when that the affidavit was sworn, the father, the step-daughter, and the child were all living in Kenya. That act was made validly in accordance with the Statutory Declaration Act of Kenya;

(iv) The Applicant has de facto custody and care of the child. Therefore the Applicant has the capacity as an 'interested party' under Article 445 of the Civil Code to proceed with an application for guardianship and to establish that the father was incompetent. The father would have a right to be heard in opposition; and

(v) When considering an appointment of a guardian, the duty of the Court is to consider the best interest of the child.

Ruling application for appointment as guardian to proceed.

Legislation cited
Civil Code of Seychelles, arts 392, 401, 445, 447
Seychelles Civil Procedure Code, s 17

Cases referred to
Ex parte Attorney-General (1977) SLR 260
Robert Poole v Government of Seychelles Const case 3/1996

Melchior VIDOT for the Applicant
Philippe BOULLE for the Respondent

Ruling delivered on 30 July 2003 by:
PERERA J: Subsequent to the ruling of 3 October 2002, Learned Counsel for the Respondent contended that before any other guardian is appointed, there should be a hearing to determine whether the father of the child is incompetent to be the guardian. It was submitted that it was only then that there would be "ouverture de la tutelle" paving the way for the appointment of any other suitable person, who could not necessarily be an Applicant.

It is conceded by Learned Counsel for the Applicant that the submission of Learned Counsel for the Respondent as regards procedure is correct. In the case of *Ex parte Attorney-General* (1977) SLR 260, the parents of a minor child were lawfully married. Subsequently their marriage was dissolved, and the decree of divorce was pronounced against the wife. Later, the husband died, and the Attorney General applied for the appointment of a guardian under Article 402 of the Civil Code, as he considered that Article 386 precluded the wife from being the guardian of the minor child.

Sauzier J held that guardianship commenced with the death of one of the parents, and that guardianship vests as of right on the surviving parent. Further holding that Article 386 applied only as regards the enjoyment of the child's property, it was held that before a guardian is appointed by the Court:

> the mother of the children who is guardian as of right since the death of the father by virtue of Article 390, would have to be removed from her guardianship under Article 440 before a new guardian may be appointed by the Court.

In the present case, the Respondent, as the surviving spouse purported to appoint one Michelle Van Tongeren, a daughter of his wife by a previous marriage, who was resident in Kenya, as the guardian of the child who was also living there

with his wife at the time of her death. That affidavit was sworn and declared on 28 September 2000, 10 days after the death of his wife, before a Commissioner for oaths in Nairobi, pursuant to the provisions of the Statutory Declaration Act of Kenya. On 9 November 2000, the said Michelle Van Tongeren, by an affidavit sworn and declared before a Commissioner for oaths in Nairobi, Kenya and duly authenticated by the Registrar of the High Court of Kenya, The Kenya Embassy in Abu Dhabi, and the United Arab Emirates Ministry and Foreign Affairs in Dubai, vested the legal guardianship of the child in Mrs Amina Khatib (the Applicant) resident in the United Arab Emirates, who is a sister of the late Georgette Andrade, and therefore an aunt of both Michel Van Tongeren, and of the minor child.

Article 401 of the Civil Code provides that:

> The guardian appointed by the father or mother shall not be bound to accept the guardianship.
> 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….

The granting of legal guardianship of the child to his aunt therefore constituted an Act indicating that she did not wish to act as guardian. However, pursuant to Article 401, it was only the Court that had authority to appoint another person. Hence the vesting of guardianship on the Applicant was invalid, and perhaps, it is for that reason that she is presently before this Court for appointment as guardian.

Article 401 does not provide that where a guardian appointed by the mother or father does not wish to act, the guardianship reverts back to either of them. Mr Boulle contended that the affidavit dated 28 September 2000, whereby guardianship was granted to Michelle Van Tongeren, was both invalid, and inadmissible under the laws of Seychelles. He cited the

Constitutional Court case of *Robert Poole v Government of Seychelles* (Const Case no 3 of 1996) where the Court held inter alia that –

> A commissioner of oaths or a notary in any country is authorised to attest or execute deeds and documents that have legal validity in their own country....
>
> a document notarially executed in a foreign country will not be admissible in judicial proceedings in Seychelles, save in circumstances contemplated in Sections 12 and 28 of the Evidence Act.

Mr Vidot, Learned Counsel for the Applicant submitted that the affidavit dated 28 September 2000 whereby Michel Hoareau granted custody and legal guardianship of the child to Michelle Van Tongeren, which is a declaration before a Commissioner of oaths in Nairobi, Kenya was a valid appointment under Article 392 of the Civil Code. Article 392 provides that "a person entitled to appoint a guardian of minor children may do so 1st by a last will or 2nd, by a declaration made before a Judge or before a Notary".

An affidavit is a formal declaration of facts upon oath or affirmation. Section 17 of the Civil Procedure Code provides that an affidavit may be sworn in Seychelles - "before a Judge, a Magistrate, a Justice of the Peace, a Notary or the Registrar."

The dicta cited from the case of *Robert Poole* (supra) must be distinguished as in that case an affidavit sworn before a Notary in Kenya was filed as an affidavit of facts under Rule 3(1) of the Constitutional Court Rules. The Court ruled that only documents authenticated by a Diplomatic Mission or by a Foreign Court or competent Jurisdiction could be admitted in

proceedings before a Court in Seychelles by virtue of Section 28 of the Evidence Act. In the present case, the Court is concerned with the validity of an appointment under Article 392 of the Civil Code. The pertinent affidavit is not being sought to be filed as part of the pleadings but merely as evidence of a lawful Act. Admittedly, Michel Hoareau, Michelle Van Tongeren, the child Nelson Hoareau, and the Notary were all present in Nairobi, Kenya when the affidavit was sworn. Hence that was a valid Act of appointment in terms of the statutory Declaration Act of Kenya in respect of a minor residing there at that time.

Although the appointment of the Applicant by Michelle Van Tongeren is valid, she had by her Act indicated that she did not wish to act as guardian on the appointment made by the Respondent. Hence in terms of Article 401, the Court has authority either to compel her to act or to appoint another person. But that would arise only where both parents are dead. In the present case, as the father is alive, he ought to be first removed from his guardianship as of right, before the Court appoints any other person, including the Applicant as parental power cannot be voluntarily alienated.

Hence procedurally, the Applicant, who admittedly has the de facto custody and care of the child in the United Arab Emirates, has the capacity as an "interested party" as envisaged in Article 445 of the Civil Code to proceed with the application and to establish that the Respondent is incompetent, for the reasons adduced in the Application. The Respondent would undoubtedly have the right under Article 447 to be heard in opposition, and even suggest any other person to be appointed as guardian. In the ultimate analysis, it would be the duty of the Court to decide on the guardianship upon consideration of the best interest of the child.

Record: Civil Side No 158 of 2001

Delcy v Camille

Evidence – banker's duty of secrecy – disclosure of banker's books

The Defendant summoned a bank manager to give evidence on its behalf about the Plaintiff's bank account. The bank manager appeared on summons and produced various photocopies regarding the Plaintiff's account from the bank's books. The Plaintiff objected to the production of the documents. The Court considered whether the bank was prohibited from disclosing any information on its account holders.

HELD:

(i) A banker's duty of secrecy is a legal duty that arises out of contract and is not an absolute obligation. The special provisions on evidence contained in the Evidence (Banker's Books) Act must be read subject to Section 38(1) of the Financial Institutions Act;

(ii) Evidence from banker's books, including photocopies of entries can be obtained under one of the exceptions in Section 38(1)(b)(i)-(iv) of the Financial Institutions Act. In both civil or criminal proceedings, the production of the banker's book under Section 6 or the inspection and taking copies of entries under Section 7 must be done pursuant to a Court order;

(iii) In determining whether to make an order of discovery for banking documents not within the ordinary rules of evidence, the Court

must be satisfied of the relevancy of the proposed evidence to the proceedings;

(iv) A summons compelling a bank officer to appear as a witness cannot be relied upon as authority to produce and disclose particulars of entries of the banker's books. That type of disclosure can only be made under compulsion of law; and

(v) Section 4(1) of the Evidence (Banker's Books) Act has a limited meaning. It is not enough to obtain a summons, serve it on bank manager, and then produce photocopies from the banker's books. A party cannot obtain through an indirect process documents that they would not be lawfully entitled to hold.

Ruling objection upheld.

Legislation cited
Code of Civil Procedure, ss 77, 81, 152
Evidence (Banker's Books) Act, ss 3, 4, 5, 6
Financial Institutions Act, ss 6, 7, 38

Foreign legislation noted
Banker's Books Evidence Act 1879 (UK), s 7

Foreign cases noted
King v Dave [1908] 2 KB 333
R v Bono (1913) 29 TLR 635
Tournier v National Provincial and Union Bank of England [1924] 1 KB 461
Williams v Summerfield [1972] 2 All ER 1334

Francis CHANGSAM for the Plaintiff

Philippe BOULLE for the Defendant

Ruling delivered on 30 April 2003 by:

PERERA J: By a praecipe for summons dated 14 February 2003, the Attorney for the Defendant moved for summons on the Manager, Barclays Bank (Seychelles) Ltd, "to give evidence on behalf of the Defendant and to produce statement of Accounts regarding Account number 4215173 in the name of Mrs Anicette Delcy for the years 1997 to date". Accordingly, Mr Andrew Bonne, a Manager of the said bank appeared on summons and produced photocopies of the relevant entries of the Plaintiffs account, extracted from the Bankers books. Mr Chang Sam, Learned Counsel for the Plaintiff objected to the production of these documents, mainly on three grounds.

First, that these documents had not been listed with the defence, as required under Section 77 of the Code of Civil Procedure.

Secondly, that in terms of Section 38(1) of the Financial Institutions Act (Cap 79) any Director, Manager, Officer, Employee or Agent of a Financial Institution was prohibited from disclosing any information to any person or Governmental authority as regards the identity, assets, liabilities, transactions or other information.

Thirdly, on the ground of relevancy. It was submitted that the settled pleadings in the case, concerns only an account of the Plaintiff with Banque Nationale de Paris Internationale, at Reunion, and that hence account particulars with the Barclays Bank in Seychelles were not relevant, especially as no evidence of any transaction was adduced in the case.

As regards the 1st ground, copies of the statements were furnished to Learned Counsel for the Plaintiff, and an

adjournment was granted to examine them. Hence the failure to list the documents with the defence, has been cured within the provisions of Section 81 of the Code of Civil Procedure.

As regards the 2nd ground, Mr Chang Sam contended that, as the bank acted through its directors and officers, the prohibition contained in Section 38(1) of the Financial Institutions Act (Cap 79) applied. He emphasised on the Banker's Duty of Secrecy, and submitted that any derogation must fall within the exceptions set out in Subsection (b), (i) to (iv) of Section 38(1). The exception relevant to the present case, as contained in Subsection (iii) is as follows:

> When lawfully required to make disclosure by any Court of competent jurisdiction in Seychelles.

In the case of *Tournier v National Provincial and Union Bank of England* (1924) 1 KB 461, Bankes LJ stated thus in regard to the Banker's Duty of Secrecy:

> At the present day, I think it may be asserted with confidence that the duty is a legal one arising out of contract, and that the duty is not absolute, but qualified. It is not possible to frame any exhaustive definition to classify the qualification, and to indicate its limits........ On principle I think that the qualifications can be classified under four heads: (a) <u>where disclosure is under compulsion of law</u>; (b) where there is a duty to the pub lie to disclose; (c) where the interests of the bank require disclosure; (d) where the disclosure is made by the express or implied consent of the customer.

In Seychelles, the first head of classification is covered by Subsection (iii) of Section 38(1) aforesaid which specified the

legal exception. The Evidence (Banker's Books) Act (Cap 75) contains provisions which are similar to the provisions of the Banker's Books Evidence Act 1879 of the United Kingdom. The UK Act was applicable prior to the enactment of the local Act in 1968.

Section 3 of the Evidence (Banker's Books) Act provides that "a copy of an entry in a Banker's Book shall in all legal proceedings be received as prima facie evidence of such entry, and of the matters, transactions and accounts therein recorded." Sections 4 and 5 stipulate the conditions under which such copy shall be admitted in evidence under Section 3. Provision has now been made to produce computerized documents, in which case, they must be proved in the manner set out in Section 5(3) (a) to (c).

Section 6 provides that:

> A Banker or Officer of a bank shall not, in any legal proceedings to which the bank is not a party, be compellable to produce any Banker's Book the contents of which can be proved under this Act, or to appear as a witness to prove the matters transactions and accounts therein recorded, unless by order of a judge made for special case.

Therefore, an order of a judge for special cause is needed for the production of the whole Banker's Book.

The issue that arises for consideration is whether the Banker's Duty of Secrecy, which is zealously guarded by Section 38(1) of the Financial Institutions Act and Section 6 of the Evidence (Banker's Book) Act, can be breached by compelling a Bank Officer to produce and disclose particulars of entries of the Banker's Books of an adverse party, upon serving a witness summons under Section 152 of the Code of Civil Procedure,

or whether it could only be done upon a proper motion being filed with notice to that adverse party, and an order being obtained from a judge, on cause being shown. It must be stated that the Evidence (Banker's Books) Act contains special provisions in the general law of evidence, due to the Banker and customer relationship that exists in respect of Banker's Books. Those provisions must however be read subject to Section 38(1) of the Financial Institutions Act.

Mr Boulle maintained that the Defendant has summoned the Manager of Bank to produce a copy of an entry in the Banker's Book, pursuant to the provisions of Section 4 of the Evidence (Banker's Books) Act, and submitted that such procedure did not require an order of a judge. He stated that the legislature has required such an order only in cases where it was necessary to produce the Banker's Books (not merely copies), and when a Bank Officer is required to appear as a witness to prove matters, transactions and accounts in such books, as envisaged in Section 6, and also for the purpose of inspecting and taking copies of any entries in the Banker's Books for the purposes of a legal proceeding, as provided in Section 7 and also, under Section 8 by means of a warrant, for the purpose of a Criminal Investigation. He also referred to the procedure of obtaining of an order of the Court, before summoning an adverse party on his personal answers, as another contra distinction to the procedure, which he stated was not required when a Bank Officer is summoned under Section 4.

Section 7 of the UK Act of 1879, which is identical to Section 7 of our Act, came up for interpretation in the case of *Williams v Summerfield* (1972) 2 All ER 1334. In that case, Widgery CJ cited the case of *R v Bono* (1913) 29 TLR 635, which, although a criminal case, established a "working rule" civil proceedings. It was held in that case that the Courts are against the use of Section 7 as a kind of "searching inquiry or fishing expedition beyond the Ordinary Rules of Discovery".

Hence documents that would not be discoverable under the ordinary Rules will not be disclosed by a "side wind" by the application of Section 7.

The words "shall, on its production" in Section 4 raise the question, "how is it produced in Court?" Obviously, it is by means of a summons served on the Manager or other official of the bank in terms of a "witness summons" under Section 152 of the Code of Civil Procedure. In English Practice, and Procedure, such summons is termed s*ubpeona duces tecum,* that is, summons to produce the documents. Such summons is issued to compel the Manager or other official to attend Court, but not to disclose the information contained in the books or the copies of the entries he had brought to Court. Such information can be disclosed only if the account holder consents, or if the judge on a consideration of relevancy, makes an order before summons is issued. In the *Tournier case (*supra), the manager of the bank, disclosed information to the employer of their customer, that his account had been overdrawn and that certain cheques passing through that account to a Bookmaker showed that he was a heavy gambler. Consequently, the employer did not renew the contract of employment. The customer then sued the bank for damages for slander and for breach of an implied term of secrecy. The Court dismissed the Plaintiffs case, but in appeal the Court of Appeal held that a Bank does owe a duty of secrecy to its customers. In the *King v Dave* [1908] 2 KB 333, the bank refused to obey a *subponena duces tecum* issued by the High Court of Justice on the ground that what they had in possession was a sealed envelope, which was deposited with them on condition that it should not be delivered to anyone without the consent of the two persons who deposited it. They contended that a sealed envelope was not a "document". In a rule nisi for contempt issued against the bank. Lord Alvertone CJ held that the Subpoena must be obeyed and the bank had to produce the sealed envelope. The Attorney-General submitted that the envelope

contained a document containing a secret formula, which should be analysed by a Chemist to maintain the Criminal charges against the two persons. The Court left that to be determined by the trial Court. Hence the requirement that the Banker's secrecy can only be breached by an order made by a Judge upon consideration of relevancy remains an established principle.

In the present case, Mr Boulle emphasised the words "without further proof" in Section 4(1) of the Evidence (Banker's Books) Act to support the view that no Court order was required, and all that was required was the serving of a summons on the Manager. With respect, that would amount to obtaining documents a party would not be lawfully entitled to hold, through an indirect process. In any event, Section 4(1) of the original Act was amended by Act no 8 of 1990, by deleting the word "shall not be received in evidence under this ordinance unless it be first proved that the book was at the time of the making of the entry one of the original books of the bank." The objects and reasons for such amendment, as stated in the bill are as follows:

> To allow the admission as evidence the contents of a document produced by a computer, without the need to call each of the persons who entered the information contained in the computer.

Hence, that is the limited meaning of the words "without further proof in the amended Section 4(1). The Evidence (Banker's Books) Act applies to both Civil and Criminal proceedings, as well as investigations. In criminal proceedings, when inspection of the Banker's Book or any other document in the custody of a bank is needed for the purpose of investigation, the Investigating Officer must obtain a warrant from a Judge under Section 8(1) of the Act. In either Civil or Criminal proceedings, the production of the

Banker's Book under Section 6 or the inspection and taking copies of entries under Section 7 has to be done by an order of a Judge, or upon an order of Court. Section 3, 4 and 5 merely specify the mode of admissibility of copies of entries in a Banker's Book. Section 4 does not provide an exception to the Rule that an order of Court must first be obtained before an officer of the bank is summoned under Section 152 of the Code of Civil Procedure to produce and disclose particulars of the Bank Accounts of an adverse party.

In general therefore evidence of the Banker's Books or copies of entries thereof of the Accounts of third parties can be obtained subject to one of the exceptions in Section 38(1) (b) (i) to (iv), of the Financial Institutions Act.

As regards the third ground of relevancy, Mr Boulle submitted that he does not propose to cross-examine the Bank Manager, and that all what he would do is to ask him whether the copies he was producing were from the books in the custody of the bank and that whether they were entries made in the ordinary course of business. He further submitted that the documents are not being produced to prove any payment to the Plaintiff. He stated that in cross-examination the Plaintiff had admitted making monetary gifts to her son, and hence he would be relying on such evidence, supported by the particulars of the Plaintiffs account to contend that just as she made such gifts to her sons, a similar gift was made to her daughter, the Defendant. On a perusal of the evidence, I find that the Plaintiff stated in cross-examination that Roy, one of her sons, did some construction work on the land and that his father, told him before his death, that the mother would give him R50,000 for such work. She stated that she honoured that promise and gave R50,000 to Roy after selling the property. She also stated that she lent some money to Roy on an agreement made before Mr B. Renaud Attorney at Law, and that he was repaying that amount in installments. Mr Renaud, in his evidence, corroborated the Plaintiff and

stated that an agreement was made whereby the Plaintiff paid Roy R120,000, and that sum is being repaid through the bank on a standing order for R2500 per month. Hence there is no evidence of a "gift", as submitted by Mr Boulle.

In any event, evidence must be relevant to the pleadings. There is no averment in either the plaint or the defence to justify any consideration of gifting or at least distributing the proceeds of sale by the Plaintiff to any of her children. Hence the copies of the Plaintiffs bank statements sought to be produced are not relevant to the case.

The objections of Learned Counsel for the Plaintiff are therefore upheld.

Record: Civil Side No 55 of 2001

Camille & Ors v De Sergio

Negligence – quantum of damages – parents and siblings

The First Plaintiff had a son who was working on board the Defendant's fishing vessel. While the son was loading fish on to an on board machine, another employee switched it on. The son got caught in the machinery and died from his injuries. At the time of the accident, the deceased had been living with his mother (the First Plaintiff). The Second to Sixth Plaintiffs are the deceased's siblings. The Plaintiffs claimed that the accident was caused solely by the Defendant's employee who was operating the machine. The First Plaintiff claimed that she was dependent on the deceased who was financially supporting her. They claimed a total of R400,000 for pain and suffering and loss of maintenance and support for the first Plaintiff. The Defendants denied all liability.

HELD:

(i) The deceased died of injuries sustained during the course of employment while he was on board the Defendant's vessel;

(ii) The accident was caused solely by the negligence of the Defendant's employee. The Defendant is vicariously liable in damages for the negligence of its employee;

(iii) Grief over the death of a family member cannot be used as an opportunity to gain a pecuniary advantage; and

(iv) The death of the deceased did cause pain and suffering to the Plaintiffs as members of the deceased's immediate family. The

Defendant is liable for that in moral damages.

Judgment for the Plaintiffs. Total damages awarded R50,000 (moral damages for first Plaintiff R20,000; loss of material/financial support for first Plaintiff R10,000; moral damages for other Plaintiffs R4000 each).

Legislation cited
Civil Code of Seychelles, art 1383

Cases referred to
Dubois & Ors v Albert & Anor (1988) SLR 189
Elizabeth & Ors v Morel & Ors (1979) SLR 21
James v Jumeau (1966) SLR 260
Louise & Ors v Union Lighterage & Co Ltd (1988) SLR 98

Foreign judgments noted
Gopal v Mooneram (1936) MR 37
Rahiman v Gopal (1937) MR 106

France BONTE for the Plaintiff
Bernard GEORGES for the Defendant

Appeal by the First Plaintiff was allowed on 5 December 2003 in CA 03 of 2003.

Judgment delivered on 17 February 2003 by:

KARUNAKARAN J: At all material times, one Michel Camille, a young man, aged 26 hereinafter referred to as the "deceased" was employed by the Defendant, to work as labourer on board a Spanish Fishing Vessel, "Mar De Sergio". It is not in dispute that on 7 October 1995, at around 9.15 am when the deceased was working in the vessel he met with an accident, which occurred due to operation of a machine on board the vessel. As a result, the deceased suffered fatal

injuries and died instantaneously.

The deceased was unmarried. He had no children. He is survived by his mother, brothers and sisters. They are the Plaintiffs in this action. The mother of the deceased namely, Plaintiff No: I and the brothers and sisters of the deceased namely, Plaintiff No: 2 to 6 have now jointly instituted this action against the Defendant for damages alleging that the death was caused solely by the negligence of the Defendant's employee.

On the other side, the Defendant in its statement of defence totally denies liability and the claim of the Plaintiffs. However, the Defendant adduced no evidence in support of defence or in rebuttal of the evidence adduced by the Plaintiffs.

It transpires from the evidence on record that one Nigel Pillay, a co-worker who was working on the vessel with the deceased witnessed the accident. He gave a statement - exhibit P3 - to an Insurance Company explaining as to how and why the said accident happened. According to this witness, the accident occurred due to the negligence of another employee of the Defendant, a Spanish national who was operating the machine at the material time. The said operator having had an involved conversation with one of his friends carelessly switched on the machine whilst the deceased was still loading the fish on a conveyor belt attached to the machine. As a result, according to this eyewitness the deceased was caught into the machine, suffered fatal injuries and died on the spot.

On autopsy, the medical examination revealed that the deceased had sustained a 5 c. m laceration over left cheek, multiple abrasions over skull, neck, shoulders, back arm, and forearm. There was also compound fracture of the right humerus, multiple fractures of 1-4 ribs of right rib cage, fracture of right scapula and metacarpal bones of hands. The

pathologist who did the autopsy concluded that the death in the deceased had occurred due to haemorrhagic shock because of "polytrauma" with multiple fractures and haemothorex.

In these circumstances, the Plaintiffs contend that the said accident was caused solely by the negligence of the Defendant's agent or servant who was operating the machine at the relevant time. Further, the Plaintiffs contend that consequent to the death of the deceased they all underwent pain, suffering, and loss of moral comfort for which the Defendant is liable in moral damages, which is estimated by the Plaintiffs at R200,000 for the First Plaintiff and R40,000 for each of Plaintiffs No: 2 to 6. It is also the case of the Plaintiffs that the deceased during his life-time, had lived with his mother the First Plaintiff and was contributing towards her maintenance and welfare. Hence, the mother claims that she suffered loss of maintenance and support because of the sudden demise of her son. Therefore, the Plaintiffs pray this Court for a judgment ordering the Defendant to pay damages in the total sum of R400,000 with costs.

Having carefully considered the entire evidence on record I find the following facts have been established - on the preponderance of probabilities - and to my satisfaction:

1. On 7 October 1995, Michel Camille died of the injuries he sustained in the accident, which occurred during the course of his employment with the Defendant on board the fishing vessel "Mare De Sergio."

2. The accident was caused solely by the negligence of the Defendant's employee, the operator of the said machine.

3. The Defendant is vicariously liable in damages for the negligent act committed by its employee.

4. The First Plaintiff is the mother and Plaintiffs 2 to 6 are the brothers and sisters of the deceased Michel Camille.

5. The death of the deceased did cause the Plaintiffs suffering, pain and loss of moral comfort for which the Defendant is liable to them in moral damages.

6. The Plaintiffs in their respective capacities as a parent, brothers and sisters are entitled to moral damages in light of the principles applied in *James v Jumeau* (supra).

On the assessment of damages, I remind myself of the principles laid down in the Mauritian cases of *Gopal v Mooneram* 1936 MR 37 and *Rahiman v Gopal* 1937 MR 106 and in the local case of *Louise and ors v Union Lighterage and Co Ltd* 1988 SLR. I respectfully agree with them in that grief or affliction over death should never be allowed as an opportunity for coining profit and to turn a family bereavement into pecuniary advantage. Obviously, the Plaintiffs were not dependent on the deceased in this case. At any rate, there is no evidence on record to that effect. In the circumstances, I find that the Plaintiffs did not sustain any financial loss consequent to the death of the deceased. Moreover, I note, since the death was concomitant with the injuries the legal heirs of the deceased could only sue in their own rights and they may be awarded only moral damages- vide *Elizabeth and ors v Morel and Ors* (supra).

Undisputedly, the deceased had been living with his mother the First Plaintiff, providing financial and moral support to her. It is therefore reasonable to hold that the mother of the

deceased suffered more mental anguish and grief due to loss other son, than the ones suffered by his brothers and sisters. In assessing the quantum of moral damage payable to the Plaintiffs I take into consideration the amounts awarded in the following cases:-

1. In *Elizabeth and ors v Morel* (supra) the brothers and sisters of the deceased were awarded R3000 jointly as moral damage for the pain, distress and anxiety suffered by the deceased before her death and R2,000 each as moral damages in their own right for the grief caused to them by the death of the deceased.

2. In *Louise and others v Union Lighterage Co Ltd* (supra) the adult children of a 54 year-old deceased were awarded R1500 each save the last child a minor dependent was awarded R16,500 as material damage.

3. In *Dubois and Ors v Albert and Another* (supra) following the death of a 16 year old boy, which occurred 30 minutes after the injury, apart from awards "ayant droit" in their own capacity the mother was awarded R16,000 and the siblings were awarded R3000 each as moral damages.

Basing my assessment on the quantum of damages determined in the above cases, as well as taking into account the fact that the cost of living has considerably increased since those determinations, I would award the Plaintiffs the following sums in this matter:

- Moral damage for the first
  Plaintiff in the sum of R20,000

- Loss of material or financial

support for the first Plaintiff
globally in the sum of R10,000

- Moral damage for Plaintiffs No: 2 to 6, at R4000 each, totaling in the sum of R20,000

Total **R50,000**

In the result, I enter judgment for the Plaintiffs in the total sum of R50,000 with costs.

Record: Civil Side No 255 of 1999

Avalon (Pty) Ltd & Ors v Berlouis

Equity – stay of judgment

A civil judgment ordered the Applicants to pay R1,000,000 in damages to the Respondent. The Applicants lodged an appeal. In spite of the pending appeal the Respondent attempted to enforce the judgment. The Applicants applied for a stay of execution of the civil judgment. The Respondent challenged the application.

HELD:

(i) A stay of execution of judgment is an equitable remedy. There is no specific statutory provision which empowers the Court to grant a stay as a legal remedy to protect the interest of an appellant/judgment debtor pending appeal;

(ii) The Court will exercise its discretion to grant a stay of execution sparingly. The Court will not without good reason delay a successful Plaintiff from enforcing the judgment obtained. However as a Court of Equity, the Court will not deny an unsuccessful Defendant the possible benefit from any appeal process. The Court must consider whether there are other legal remedies available to an appellant/judgment debtor to prevent an irreversible or irreparable injury which is substantial and which could not be adequately remedied or atoned for by damages if the judgment which has been executed is reversed by the appellate Court; and

(iii) Before granting a stay the Court should be satisfied that appellant has valid or substantial grounds of appeal. It is unnecessary to examine the merits or likely chances of success of the appeal. Equally the Court should consider the balance of convenience, hardship and loss the parties may suffer. The appellant/judgment debtor must show that the likely injury suffered by them is greater than any suffering by the Respondent if the stay is granted. The Court will take into account all relevant facts, competing interests and circumstances of the case and decide whether in the pursuit of justice to grant or refuse a stay of judgment execution. On that basis the principles set out in relevant previous cases do not restrict what considerations the Court must be satisfied with in order to grant or refuse a stay.

Ruling: Application for stay of execution granted.

Legislation cited
Courts Act, s 6
Seychelles Code Civil of Procedure Act, s 230
Supreme Court Rules, ord 47 r 1, ord 57 r 1

Foreign legislation noted
Debtors Act 1869 (UK)
Execution Act 1844 (UK), s 62
Supreme Court Act (UK), s 19

Cases referred to
Laserinisima v F Boldrini (1999) CS No 274
MacDonald Pool v Despillay William (1996) SLR 192

Philippe BOULLE for the Applicants
Francis CHANG-SAM for the Respondent

Appeal by the Defendant was allowed on 5 December 2003 in CA 25 of 2002.

Ruling on Application for a stay of execution delivered on 8 September, 2003 by:

KARUNAKARAN J: This is an application for a stay of execution of the judgment, delivered by the Supreme Court on 7 November 2002 in the suit - Civil Side No: 150 of 2001- whereby the Court ordered the Applicants to pay R1,000,000 in damages to the Respondent. By the way, the Applicants and the Respondent herein were respectively the Defendants and the Plaintiff in the original suit. The application is resisted by the Respondent on a number of grounds and hence this ruling.

It is not in dispute that the Applicants being aggrieved by the said judgment have lodged an appeal against it to the Seychelles Court of Appeal. The appeal had already been set for hearing during the last session of the Court of Appeal. However, at the instance of an application made by the Applicants the case was adjourned, which now stands posted for hearing in the forthcoming session of the Court of Appeal. In the meantime, the Respondent is attempting to execute the judgment ignoring the fact that the matter is still pending before the Court of Appeal for final determination. Faced with a clear threat of execution of the judgment, the Applicants have now come before this Court with the present application, seeking a stay of execution pending the outcome of the appeal in this matter.

In essence, the Applicants contend that they have valid grounds of appeal and stand a good chance of success in the appeal. According to the Applicants, if the Respondent is

allowed to execute the judgment before the determination of the appeal, the Applicants would suffer irreparable loss and hardship in that, they wouldn't be able to realize the fruits, in the event of their success in the pending appeal. Moreover, the First Applicant in this matter is a company, which has sufficient means and assets to satisfy the said judgment. Admittedly, this company owns an immovable property worth of R5million as its fixed assets. The Respondent is on the verge of enforcing the judgment against this property in order to recover the said judgment debt of R1 million. According to the Applicants, if this property is sold in execution of the judgment, the company will suffer irreparable loss, inconvenience and hardship. Moreover, the company has no intention of selling this property pending appeal in this matter. In any event, this asset according to the Applicants would be more than sufficient to satisfy the judgment debt. Further, it is the contention of the Applicants that since no interest has been awarded in the judgment to accrue on the debt the Respondent would not incur any pecuniary loss, if the stay is granted for the interim period. For these reasons, Mr Boulle, the learned counsel for the Applicants submitted that it is just, reasonable and necessary that a stay of execution should be granted in this matter. In the same breath, the learned counsel indicated that the Court may even grant a stay subject to a condition that the Applicant company should not dispose of the said immovable property pending appeal.

On the other hand, the Respondent vehemently opposed to the granting of the stay in this matter. According to the Respondent, the Applicants do not have valid grounds to seek a stay of execution. It is the contention of the Respondent that such a stay would only deprive him of the fruits of the judgment, which he has obtained in his favour. In his submissions, the learned counsel for the Respondent Mr Chang- Sam invited this Court to apply the principles, which were reiterated in the case *Mac Donald Pool v Despillay William* Civil Side No: 244 of 1993 and *Laserinisima v F.*

Boldrini Civil Side No: 274 of 1999, setting out the grounds on which the Court may grant a stay of execution. According to the counsel, the instant case does not satisfy any of the five grounds spelt out in those cases in order for the Court to grant a stay of execution. Therefore, the learned counsel urged the Court to refuse the stay and dismiss this application. I carefully perused the entire record of the proceedings in the file including the grounds of appeal as well as the affidavits filed by the parties.

I meticulously went through the authorities cited supra. I gave diligent thought to the submissions made by the counsel for and against this application. First of all, I note Section 230 of the Seychelles Code of Civil Procedure reads thus:

> An appeal shall not operate as a stay of execution or of a proceeding under the decision appealed from unless the Court or the appellate Court so orders and subject to such terms as it may impose. No intermediate act or proceeding shall be invalidated except so far the appellate Court may direct.

From the above section of law, although one may logically presume the Courts in Seychelles to have the power to stay execution of judgments, there is no specific statutory provision in our laws, which expressly empowers the Courts to grant a stay as a legal remedy to protect the interest of an appellant/judgment debtor pending appeal. However, in the United Kingdom the position is different since there are specific statutory provisions under different statutes, which expressly empower the Court to grant a legal remedy of this nature. For instance, apart from a general power to stay proceedings under the Supreme Court Act, Section 19, and the power to make instalment orders under the Debtors Act 1869, the Courts in the UK have wide powers under the Rules of the Supreme Court to grant a stay of execution. In fact, under Order 47, r. 1, if a judgment is given or an order made

for the payment of money the debtor may apply then or later for a stay. The judge or master, if satisfied that there are special circumstances which render it inexpedient to enforce the judgment, may stay execution either absolutely or for such period and subject to such conditions as he thinks fit. Besides, under the Execution Act 1844, Section 62, a judge also has discretion to suspend or stay any judgment, order or execution if he is satisfied by evidence that a debtor is unable to pay due to sickness or unavoidable accident. Moreover, it is pertinent to note under Order 59, r. (1) of the Supreme Court Rules the Court of Appeal and the Court below may stay execution pending appeal. The statutory power to grant a stay of execution, thus conferred on the English Courts by those English legislations is not applicable in Seychelles. They are indeed, legal remedies as opposed to equitable ones. They are provided by statutes. They cannot be imported into our jurisdiction for obvious reasons. This Court therefore, cannot grant a stay of execution as a legal remedy pending appeal as no such power has been conferred on it, by any statute. However, the lack of such statutory power in my view cannot prevent the Court from exercising its equitable powers conferred by section 6 of the Courts Act in order to grant a stay of execution as an equitable remedy. This can be done only, if justice so requires in a particular case, when no sufficient legal remedy is provided by any statute for the judgment-debtor/appellant to obtain this protection of a stay pending appeal. Section 6 of the Courts Act reads thus:

> The Supreme Court shall continue to be a Court of Equity and is hereby invested 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 the law of Seychelles.

It is truism that the Court will not without good reason delay a successful Plaintiff in realizing the fruits of his judgment

obtained from the trial Court. At the same time as a Court of Equity it cannot also deny an unsuccessful Defendant the fruits of his judgment from the Court of appeal in the event of his success if any, in the appeal. In the circumstances, it is the duty of the Court to take into account all relevant facts and circumstances peculiar to each case on hand and weigh the conflicting interest of both parties so as to determine what justice requires in that particular case whether to grant or refuse a stay. Therefore, I hold that the principles governing the stay of execution and the exercise of the Court's power to grant a stay in this respect cannot be restricted to or pigeonholed within the five grounds as canvassed by the learned counsel for the Respondent quoting the authorities cited supra. In the circumstances, the question as to the granting of a stay is to be determined not on the basis whether the case satisfies any or none of the five grounds or of the chances of success in the appeal but primarily on the basis whether granting of such a stay is necessary for the ends of justice in the given set of facts and circumstances. I decline, therefore to ask myself: What are the grounds or special circumstance required for the Court to grant a stay of execution? I prefer to ask: What does justice require, whether to grant or refuse a stay in the given case on hand? Hence, in my considered view, the principle that ought to be applied in matters of this nature may be formulated as follows:

> The stay of execution is a discretionary remedy as it 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, as no other legal remedy is available to an appellant/judgment debtor in order to prevent an irreversible or irreparable injury, -which is substantial and could not be adequately remedied or atoned for by damages, if the judgment is reversed by the appellate Court once it has been executed. In matters of such a stay, first the Court should be

> satisfied ex facie the pleadings that the appellant has valid or substantial grounds of appeal. It should not venture to examine the merits and speculate on the chances of success in the appeal. In addition, the Court for granting or refusing a stay it should also equally consider the balance of convenience, hardship and loss the parties may suffer. Where the appellant/judgment debtor claims that he has valid or substantial grounds of appeal, the burden is on him to show that the injury he will suffer due to inconvenience, loss and hardship by a refusal of stay is greater than that which the Respondent will suffer by the grant of the stay. Thus after taking into account all relevant facts and circumstances of the case the Court ought to determine what justice and equity requires in each case and then should grant or refuse the stay accordingly.

In the light of the above principle, I approach the case on hand. First, having diligently, perused the pleadings I find that the appellants have valid or substantial grounds of appeal. Secondly, I weigh the conflicting interest of both parties by taking into account all relevant facts and circumstances of the case. I equally consider the balance of convenience, hardship and loss the parties may suffer in granting or refusing the stay. In so doing I find that the injury the Applicants will suffer due to inconvenience, loss and hardship by a refusal of stay is greater than that which the Respondent will suffer by the grant of the stay. I quite agree with the submission of Mr Boulle in this respect. Whatever be the arguments advanced by the counsel for and against the stay, the fact remains that if the stay is granted, in the worst possible scenario for the Respondent, it would simply delay him the fruits of his Judgment under appeal. On the contrary, if the stay is refused, in a similar scenario for the Applicants, it would in effect deny them the fruits of the judgment obtained from the appellate Court. In my view, the fruits of a judgment may be

delayed but should never be denied to anyone. Hence, having given careful thought to all relevant facts and circumstances of this case and in the light of the principle formulated supra, I find that a stay of execution is necessary for the ends of justice in this matter. For the reasons given above, I order a stay of execution of the judgment in question pending the outcome of the appeal. This order is made subject to a condition that the Applicants should not dispose of or encumber the immovable property comprised of Title PR423 and PR422 until the final determination of the appeal in this matter. The application is granted accordingly.

Record: Civil Side No 150 of 2001

Adrienne v Pillay

Evidence – admissibility of oral evidence – land transactions

The Plaintiff claimed a right to build on land now owned by the Defendant. The Defendant objected to evidence from the Plaintiff on the alleged consent given by the previous landowner. The objection was based on article 1341 of the Civil Code. The Plaintiff had no written proof of the right claimed.

HELD:

(i) A distinction must be made between a juridical act (fait juridique) and a mere act (fait materiel). Juridical acts involve the manifestation of the will, such as for the creation of rights or obligations. Evidence to show that a person has consented, or that permission was granted would involve the manifestation of the will of that person, and hence the person relying on it cannot give oral evidence; and

(ii) A third party to an agreement that purports to establish a right of droit de superficie between a claimant and a previous landowner does not have a right to raise an objection under Article 1341 of the Civil Code. Article 1341 applies only between contracting parties.

Ruling: Objection overruled. Evidence on oral consent admitted.

Legislation cited
Civil Code of Seychelles, art 1341

Land Registration Act, s 25

Cases referred to

De Silva v Baccarie (1978-82) SCAR 45
Faure v Vidot CS 203/1991
La-y-La (Pty) Ltd v Adelaide CS 185/2000 (Unreported)

Foreign cases noted

Jumeau v Savy (1933) MR 44
Soondrum v Curpen (1936) MR 139

Charles LUCAS for the Plaintiff
Philippe BOULLE for the Defendant

Ruling delivered on 5 November 2003 by:

PERERA J: The Plaintiff's claim is based on the alleged right of a droit de superficie or in the alternative a claim for a sum of Rs.350,000 being the value of the plants, structures and improvements erected on the Defendant's property. The instant ruling arises from an objection raised by Mr Boulle, Learned Counsel for the Defendant when the Plaintiff, in the course of his evidence, sought to testify regarding an alleged consent given by a previous co-owner to occupy the land, and to construct a building thereon, It was submitted that such matters being "fait juridique", no oral evidence was admissible in the absence of a writing, as required by Article 1341 of the Civil Code.

Mr Lucas, Learned Counsel for the Plaintiff contended that the agreement or consent the Plaintiff seeks to testify about, was given by one of the co-owners before the parent land was subdivided and sold to the Defendant. He submitted that the Defendant being a third party to such agreement could not raise the objection. Further, he submitted that the Plaintiff was seeking to establish the consent constructively by testifying regarding the circumstances in which he came to the land and built the house and to produce documentary

evidence in proof of his expenses incurred in the building. He conceded that there was no written proof of the consent to build.

Article 1341 of the Civil Code provides that "*any matter*" the value of which exceeds Rs.5,000 would require a writing, and that no oral evidence shall be admissible beyond such document or in respect of what is alleged to have been said prior to or at or since the time when such document was drawn up. It is settled, that in defining the word "any matter; a distinction must be drawn between juridical acts (fait juridique) and mere acts (fait materiel). Juridical acts involve the manifestation of the will, as for example the creation of rights or obligations. Hence evidence that to show that a person has consented, agreed or that permission was granted would involve the manifestation of the will of that person, and hence the person relying on it cannot strictly give oral evidence. Mr A. Sauzier states in his booklet on *Evidence* that :

> The fact of building without hindrance may be proved by oral evidence, but the giving of permission to build must be proved by a document if oral evidence is objected to. One cannot presume permission from the fact of building without hindrance.

The Seychelles Court of Appeal, in the case of *De Silva v Baccarie* (SCAR 1978-82) 45 expressed a similar view and stated inter alia that:

> such consent would amount to a "fait juridique" which normally would have had to be proved in accordance with the provisions of Article 1341 et seq of the Code.

However Lalouette J A was of the view that an agreement to build need not be witnessed by a written document, although,

if no document exists, difficulty may arise to prove the existence of the right by oral testimony. He further stated that a "*droit de superficie"* is a real right severed from the right of ownership of land and, conferred on a party, other than the owner of the land, to enjoy and dispose of the things rising above the surface of the land, such as constructions, plantation and works.

In an editorial note in the case of *DeSilva* (supra) it is stated that it is a moot point whether a “droit de superficie″ may be claimed in respect of land on the land register, as the land Registration Act does not make provision for such an interest in land. It is my view however that a "droit de superficie" would be "an overriding interest" as envisaged in Section 25 of the Land Registration Act (Cap 107) where a person is in possession or actual occupation of the land.

Admittedly, in the present case, the land in dispute is on the old land register and hence Section 25 does not apply. However notionally, such interest subsists for material purposes.

Mr Lucas submitted that even if permission to build cannot be proved by oral evidence, the Defendant is bound by the rights of the Plaintiff pursuant to the purchase of the land in July 2002. It was submitted that the Defendant inherited rights and liabilities of “the predecessor in title who had permitted the Plaintiff to build on the land, which fact was known to the predecessor in title of the Defendants. Oral evidence of the fact of building without hindrance would be admissible. A ″droit de supeificie″ can be established only where a person builds on a land belonging to a third party without consent. Such consent can be proved by a document.

The initial issue to be decided in this ruling is whether the Defendants who purchased from a co-owner of the land, and thereby is a third party to any consent or agreement allegedly

given by another co-owner, has the right to raise an objection under Article 1341 of the Civil Code, as is being done now.

It was contended by Mr Boulle that the Defendant is not a third party in the sense that she has inherited the rights and liabilities of the previous owner and hence would be entitled to raise all defences available to that owner. The weight of authority however is to the contrary.

In *Jumeau v Savy (*1933) MR 44, Petrides CJ stated ".... I may however state that in my opinion Article 1341 applies only as between contracting and not third parties". In *Soondrum v Curpen* (1936) MR 139 the Court stated:

> In the case of *Jumeau v Savy* this Court has already decided that prohibition against oral evidence is applicable only as between the parties to a contract and not in regard to third parties. Here the Defendant not being a party to the contract cannot avail himself of the prohibition contained under Article 1341...

In *Faure v Vidot* (CS 203 of 1991) in similar circumstances, I ruled that - "there is therefore no doubt as to the requirement of writing to prove "consent to build", which is a contract”. However an objection under Article 1341 of the Civil Code can only be raised by parties to such a contract". More recently in the case of *La-y-La (Ptv] Ltd v Adelaide* (185 of 2000), Juddoo J citing the above authorities with approval stated:

> The Plaintiff pleads that no consent was granted for the Defendant to build on his land. The Defendant claims that such consent had been granted by the Plaintiff's predecessor in title. Hence the contract to consent to build, if any, is alleged to have been between the Plaintiff's predecessor in title and the

> Defendant. Accordingly the Plaintiff being a third party to the alleged contract cannot avail itself of the prohibition under Article 1341.

In the present case therefore, the Defendant being a third party to the alleged "consent to build", which was a contract, cannot avail herself of the prohibition contained in Article 1341. Accordingly, the objection is overruled.

Record: Civil Side No 20 of 2003

Chang-Tave v Chang-Tave

Equity – stay of execution

The Applicant lived in a house owned by the Respondent. The Respondent obtained a writ of habere facias possessionem after the Court found that the Applicant was an illegal occupant. The Applicant failed to file an appeal in time. Eventually the Applicant applied for a stay of execution pending an appeal on the basis that an application for legal aid to appeal the judgment had been made and that the appeal had overwhelming chances of success. The Respondent resisted the application.

HELD:

(i) Although the Court will not without good reason delay a successful party in obtaining the fruits of judgment, it has the power to stay execution of judgment if justice requires that the other party whom the judgment has been given should have this protection;

(ii) Circumstances in which a stay of execution should be granted or refused is entirely a matter to be considered within the discretion of the Court, on the facts and circumstance of each case. This discretion should be exercised by the Court judicially not arbitrarily in exercise of its equitable jurisdiction; and

(iii) United Kingdom case law states that a stay of execution will only be granted if two necessary elements were satisfied: without a stay the appellant would be ruined, and

the appeal has some prospect of success. That principle would better serve the interest of justice rather than a determination based on a single ground or combination of grounds as it balances the interest of the parties by minimising the risk of possible abuse by the appellant.

Ruling: Application for stay of execution refused.

Legislation cited
Code of Civil Procedure, s 229
Courts Act, s 6
Seychelles Court of Appeal Rules 1978, r 53

Cases referred to
Falcon Enterprise & Anor v Eagle Autoparts Ltd CS 139/2000
Pool v Despillay William (1996) SLR 192

Foreign cases cited with approval
Linotype-Hell Finance Ltd v Baker [1992] All ER 887

Frank ELIZABETH for the Applicant
Danny LUCAS for the Respondent

Ruling delivered on 6 March 2003 by:

KARUNAKRAN J: The Applicant herein is in occupation of a dwelling house, hereinafter referred to as the "premises" situated at Bel Ombre, Mahe. Indisputedly, the Respondent herein is the owner of the said premises. In June 2002, the Respondent petitioned this Court for a writ habere facias possessionem to issue against the Applicant on the ground that the Applicant was in illegal occupation of the premises. This Court after considering the said writ-petition on the merits delivered its judgment on 5 September 2002 wherein the Court found the occupation illegal and ordered the Applicant

to vacate and quit the premises forthwith. The Applicant did not file any appeal to the Court of Appeal against the said judgment within the statutory period 30 days after the date of the judgment nor has he complied with the order of the Court. However, on 3 October 2002, the Applicant has filed an application before this Court seeking a stay of execution of the said judgment. Now, this is the application that forms the subject matter of the ruling hereof.

The Applicant seeks a stay of execution on the following grounds:

1. He has made an application for Legal Aid in order to appeal to the Court of Appeal against the said judgment.

2. He has overwhelming chances of success in his appeal. Hence, it is just and necessary that execution be stayed pending the final determination of the case by the Court of Appeal.

In a nutshell, the learned counsel for the Applicant Mr Elizabeth submitted that the Applicant stands overwhelming chances of success in his appeal. According to the counsel the learned trial judge in his judgment failed to consider the fact that the Respondent has lied in his affidavit, filed in support of the writ-petition wherein the Respondent has on the issue of illegal occupation given totally a different version from the one he gave under oath before the Rent Board. This failure by the trial judge, Mr Elizabeth contends is a valid ground for the Court of Appeal to reverse the judgment in question. In the circumstances, the counsel urged this Court to grant a stay of execution in this matter.

On the other side, the learned counsel for the Respondent Mr D. Lucas vehemently resisted the application. He argued that the Court never grants a stay of execution merely on the

ground that the appellant stands overwhelming chances of success in the appeal. In addition, there must be other grounds as well, of which the Court should be satisfied before granting a stay of execution pending appeal. They are:

1. The appellant would suffer loss, hardship that could not be compensated in damages.

2. The appeal involves a substantial question of law; and

3. There exist some special circumstances to justify granting a stay of execution.

According to Mr Lucas, none of the above ground exists in this particular case to warrant a stay of execution in favour of the Applicant. Therefore, he moved the Court to dismiss this application.

I carefully consider the submissions of the counsel on both sides and perused the relevant case laws in this regard. Although the Court will not without good reason delay a successful party in obtaining the fruits of his judgment, it has power to stay execution if and only if justice requires that the other party against whom the judgment has been given, should have this protection. In fact, there is no specific legal provision under any of our statues directly and expressly granting this Court power to stay execution of judgment pending appeal except the inference of such power one may draw from Section 229 of our Code of Civil Procedure, which provides thus:

> An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from, unless the Court or the Court of Appeal so orders and subject to such terms as it may impose. No intermediate act or

> proceeding shall be invalidated except so far as the Appellate Court may direct.

Rule 53 of the Seychelles Court of Appeal Rules 1978 also has an identical provision. As rightly observed by His Lordship Justice Perera in *Falcon Enterprise and another v Eagle Autoparts Ltd* Civil Side No 139 of 2000, neither of these provisions stipulate any ground/s or provide guidelines as to the circumstances in which a stay of execution should be granted or refused. Hence, it is entirely a matter to be considered within the discretion of the Court, upon the facts and circumstances of each case. As I see it, this discretion however, should be exercised by the Court judicially not arbitrarily that indeed, in exercise of its equitable jurisdiction in terms of Section 6 of the Courts Act.

Having said that, I note in the case of MacDonald *Pool v Despillay William* Civil Side No 244 of 1993, this Court identified five grounds, which may be considered in granting a stay of execution of judgment pending appeal. They are:

1. The appellant would suffer loss, which could not be compensated in damages.

2. Where special circumstances of the case so requires.

3. There is proof of substantial loss that may otherwise result.

4. There is a substantial question of law to be adjudicated upon at the hearing of the appeal; and

5. Where, if the stay is not granted the appeal if successful, would be rendered nugatory.

Therefore, the principle of case law in our jurisprudence suggests that the existence of one or more of these grounds singly or in combination would entitle an appellant to a stay of execution pending appeal. However, it appears the principle of case law in the United Kingdom differs from that of ours in that, the English Courts grant stay only when two basic ingredients co-exist in combination to constitute a single legitimate ground. They are:

> (i) Without a stay the appellant will be ruined and
>
> (ii) The appeal has some prospect of success.

This is evident from the dictum of the Lord Justice Staughton in the case of *Linotype-Hell Finance Ltd v Baker* [1992] 4 All ER 887, which reads thus:

> Where an unsuccessful Defendant seeks a stay of execution pending an appeal to the Court of Appeal, it is a legitimate ground for granting the application that the Defendant is able to satisfy the Court that without a stay of execution he will be ruined and that he has an appeal which has some prospect of success.

Herein, I prefer to adopt the English principle to that of ours for it is more logical and it balances the interest of the parties by minimizing the risk of possible abuse by the appellant to delay the Respondent from realizing the fruits of his judgment by obtaining a stay of execution. In fact, one may have some prospects of success in his appeal. A stay of execution if granted for that reason alone applying the local principle, there might arise circumstances wherein such a stay may cause more loss and hardship to the Respondent than the one caused to the appellant by refusing to grant it. On the

contrary, under the English principle, even if the appellant had some prospects of success in his appeal, for that reason alone no stay will be granted unless the appellant satisfies the Court that he will be ruined without a stay of execution. Thus, the English principle to my mind, is closer to justice as it balances the interest of both parties and minimizes the risk of possible abuse by the appellant.

Coming back to the facts of the instant case, it is so evident that the Applicant has not even mentioned the fact in his affidavit that he would suffer any loss, hardship or any inconvenience, if a stay of execution is not granted Pending appeal. Legally speaking at first place there is no appeal pending against the judgment in question at this stage, as the Applicant herein has not yet even obtained the necessary leave of this Court or that of Court of Appeal to file appeal out of time in this matter. As regards the ground as to chances of success in appeal, I note that the trial judge is entitled to accept the version of the Respondent and reject that of the Applicant in their respective affidavits In any event, the finding of the trial judge on the issue of illegal occupation is a question of fact and the appellate Court is normally reluctant to interfere with such findings of fact unless a stronger reason exists to do otherwise. In this matter, there exists no such reason - at any rate - I do not find any.

In light of all the above, applying the above English principle to the facts of the instant case, I find that the Applicant has failed to satisfy this Court that without a stay of execution he will be ruined and that he has an appeal, which has some prospect of success.

For these reasons, the application for stay of execution is dismissed with costs.

Record: Civil Side No 153 of 2002

Katerina Khvedelidze v Dell Olivio

Civil procedure – application for new trial

The Plaintiff sought specific performance of a promise of sale. The Plaintiff claimed that a deposit of R300,000 was made to the Defendant pursuant to the alleged agreement. The Defendant admitted the deposit had been made but averred that it had been forfeited by the Plaintiff on the basis of a breach in the agreement. The first hearing was adjourned by the parties' agreement. The second hearing was adjourned because the Plaintiff who was an overseas resident could not attend. At the third hearing the Court was informed that the Plaintiff's counsel was very ill and had been admitted to hospital. The Plaintiff and her local representative were not in Court because they had been advised by counsel not to attend. The Defendant objected to a further adjournment and sought a dismissal which was granted. The Plaintiff applied for a new trial under Section 194(c) of the Code of Civil Procedure.

HELD:

> Where a claim is dismissed because of non-appearance of the plaintiff, the process that should be followed is to seek a new trial rather than an application to set aside. Therefore the Court needs only to consider whether there are special circumstances to grant a new trial.

Ruling application for new trial granted.

Legislation cited
Code of Civil Procedure, ss 69, 133, 186, 194, 196

Cases referred to
Walter Constance v Roy Change-Fane SCA 9/2002

Morel v Hoareau (1971) SLR 127
Cedric Petit v Marghita Bonte SCA 9/1999
Naiken v Pillay (1968) SLR 101

Frank ALLY for the Plaintiff
Pesi PARDIWALLA for the Defendant

Appeal by the Plaintiff was allowed on 11 April 2003 in CA 18 of 2002.

Order delivered on 10 February 2003 by:

PERERA J: This is an application under Section 194(c) of the Code of Civil Procedure, seeking a new trial. In the main case, the Plaintiff is seeking specific performance of a promise of sale. It has been averred, inter alia that the Plaintiff made a deposit of R300,000 with the Defendant pursuant to the agreement. This is admitted by the Defendant who claims a forfeiture of that sum on the ground of a breach of agreement by the Plaintiff. On the whole, the pleadings disclose a serious cause of action.

The case was first listed for hearing on 4 December 2000, when it was adjourned to 31 May 2001 upon a joint application made by Counsel for the parties. On 31 May 2001, Mr Frank Ally, Attorney at Law replaced Mr France Bonte as Counsel for the Plaintiff. A further adjournment was sought by Mr Ally on the ground that his client who is resident in Moscow had been unable to attend Court. Mr Pardiwalla, Learned Counsel for the Defendant objected on the ground that previous adjournments had been granted for the same reason. The Court thereupon stated:

> I will grant a last postponement to this matter.
> No more postponements would be granted.

Accordingly the case was fixed for hearing on 3 and 6

December 2001. On 3 December 2001, Mr Chang Sam, Attorney at Law stood in for Mr Ally and informed Court that Mr Ally was sick and had been admitted to hospital. There has now been produced a medical certificate dated 6 December 2001, issued by the D'Offay Ward certifying that Mr Ally was admitted to hospital on 2 December 2001. However on 3 December 2001, Mr Pardiwalla, in objecting to an adjournment did not rely on the absence of Mr Ally due to illness. Instead, he applied to the Court for a dismissal of the case on the ground that despite Mr Ally's incapacity the Plaintiff ought to have been present in Court either in person or through her representative. The Court thereupon made the following order –

> This case was earlier fixed for hearing on 31st May 2001. At the hearing date, all parties were present except the Plaintiff, who according to her Counsel had missed a connecting flight from Moscow to Seychelles. Despite objections on behalf of the Defendant to any postponement, such motion was granted with the express permission (sic) that it would be a last postponement.
>
> I understand that Counsel is unable to attend today for Medical reasons. But there Is no excuse for the Plaintiff not to be present at this already postponed hearing. If the Plaintiff is not present. Counsel would in any case have been unable to proceed.
>
> In such circumstances, I find that the absence of the Plaintiff cannot be condoned. Further the plaint is dismissed with costs.

There was however no order made on the counterclaim filed by the Defendant. Hence, a counterclaim being for all practical purposes a "separate action," the Plaintiff, having filed a defence to the counterclaim is still before Court.

Be that as it may, the application for a new trial has been made within the time specified in Section 196 of the Code of Civil Procedure. Although Learned Counsel for the Plaintiff has, in his affidavit in support of the application sworn to facts establishing his absence on 3 December 2001 due to medical reasons, it is apparent from the order of the Court that the case was dismissed on the basis that the Plaintiff had not prosecuted the case with due diligence.

Mr Pardiwalla, Learned Counsel for the Defendant submitted that on several previous occasions, the Plaintiff had failed to attend Court despite her Counsel being present. This submission is not borne out by the record of proceedings. After the pleadings were closed, the first trial date was 4th December 2000. On that day the adjournment was granted to 31 May 2001 by mutual agreement. No reasons were adduced to Court. On 31 May 2001, it was disclosed that the representative who was to testify on behalf of the Plaintiff had missed his connecting flight from Moscow. Mr Ally in his affidavit avers that he was admitted to hospital on 2 December 2001 (as is evident from the medical certificate filed) and that he informed a representative of the Plaintiff that he would not be able to appear in Court the next day and that hence there was no necessity for either the Plaintiff or any representative to attend Court. He also informed his employer in the Law Chambers, Mr Francis Chang Sam, to stand in for him and make an application of an adjournment. Admittedly, Mr Pardiwalla was also informed of these developments through Mr Vidot of his Chambers before he attend Court. It was perhaps for this reason that Mr Pardiwalla did not seek a dismissal of the case due to the absence of Mr Ally.

In civil proceedings, a plaint can be dismissed for want of prosecution only under Section 186 of the Code of Civil Procedure, which provides that:

> All causes and matters are extinguished for want of prosecution when no proceeding has been taken therein during three years.

If however, the parties default appearance, or their witnesses absent themselves on trial dates for good cause or otherwise, the opposing party is invariably compensated with an order for costs. In terms of Section 133 of the Code of Civil Procedure it is only when the parties and their lawyers default appearance on a trial day without sufficiently excusing their absence, that the Court would Act in terms of either of the provisions in Sections 64, 65 and 67 and either dismiss the case or fix the case for ex parte hearing.

In the recent case of *Walter Constance v Roy Change-Fane* (SCA No 9 of 2002) (decided on 20 December 2002), Counsel for the Defendant had proceeded abroad, instructing another Counsel to appear on a trial date and seek an adjournment. However neither that Counsel nor the Defendants were present in Court, and the Court entered ex parte judgment in favour of the Plaintiff. Like in the present case, Counsel for the Plaintiff-Respondent stressed before the Court of Appeal that although Counsel for the Defendant-Appellant had a valid excuse, the Defendant ought to have been present in Court.

The Court of Appeal, on a consideration of the totality of the circumstances ordered a trial de novo.

As was held in the cases of *Naiken v Pillay* (1968 SLR 101) and *Morel v Hoareau* (1971) SLR 127), as a general principle, a new trial under Section 194(c) ought not to be granted except in very special circumstances. In the case of *Naiken* (supra) Sir Campbell Wylie CJ stated that principles of natural justice require that a (party) should have reasonable opportunity to be heard and, in the case of non-compliance by him with a Rule of procedure, he should not be deprived of

that opportunity, unless his behaviour, or the nature of the defence or (the cause of action) indicates that he is making an abusive use of Court procedure.

Mr Pardiwalla contended that the instant application for a new trial was incompetent, and that the Plaintiff ought to have filed an Appeal against the refusal of the trial Judge to grant an adjournment. Mr Ally cited the case of *Cedric Petit v Marghita Bonte* (SCA no 9 of 1999) where an action was dismissed when both the Plaintiff and her Counsel were absent. The trial Judge entertained an application under Section 69 of the Code of Civil Procedure and set aside the order of dismissal. However in Appeal, the Court of Appeal held that in these circumstances, an application under Section 69 was improper and that, the proper course was the filing of an application under Section 194(4) of the Code of Civil Procedure.

The present Plaintiff has therefore followed that ruling. The only consideration that is relevant now is whether there are special circumstances in the present matter to grant a new trial. As I stated earlier, no order has been made in the counter claim, which is based on matters arising out of the subject matter of the main action. Further the Court accepts the averments in the affidavit of Mr Ally that he had taken all necessary steps to inform Counsel for the Defendant of the application for an adjournment and also informed the representative of the Plaintiff not to attend Court on that day. In these circumstances, the order of Court granting the final adjournment on 31 May 2001, cannot be construed as a rigid and inflexible order which is applicable whatever the circumstances may be. Hence on a consideration of the circumstances in the case, lack of diligence cannot be ascribed to the Plaintiff. Further on a consideration of the seriousness of the cause of action in the case, I order a new trial under Section 194(c) on the ground that a trial is necessary "for the ends of justice". The Defendant will be entitled to the costs of 3 December 2001.

There will however be no order for costs in respect of the instant application.

Record: Civil Side No 41 of 1999

Clothilde v Henry

Road accident – personal injury – child victim

The Plaintiff, a 6 year old, sued the Defendant, the owner and driver of a motor vehicle, for damages for personal injury caused by the Defendant in a road accident. The Defendant denied liability and claimed that the Plaintiff's negligence was the sole cause of the accident. The Plaintiff claimed R100 for damage to clothing, R75,000 as moral damages for extreme pain, suffering, anxiety and discomfort, R50,000 for loss of amenities and R25,000 for loss of enjoyment of life. He testified that the accident had affected his ability to run and had often gave him headaches and red eyes. A further R200 was claimed for the issuing of the medical report.

HELD:

(i) A presumption operates against the driver of a moving vehicle. A driver is liable in a road accident unless it is proved the damage was caused solely by the other party; and

(ii) The accident occurred when the Defendant overtook a stationary bus. There was no contributory negligence by the Plaintiff.

Judgment for the Plaintiff. Total damages awarded R31,000 (R100 for damage to clothing; R30,000 for moral damages; R1,000 for 12 days hospitalisation).

Legislation cited
Civil Code of Seychelles, art 1384

Cases referred to
James Hoareau v Franky Aglae CS 109/1990 (Unreported)

Wvne Gendron v Joyce Lame CS 84/2001 (Unreported)
Frank ELIZABETH for the Plaintiff
France BONTE for the Defendant

Judgment delivered on 19 September 2003 by:

PERERA J: The Plaintiff, a boy aged 6 years at the time of a road accident, sues the Defendant, the owner and driver of motor car bearing no. S. 5134, for damages in respect of personal injuries suffered by him on 12 May 1998. The Defendant denies liability, and avers that "he saw two children running on the road, when one of them, the Plaintiff, recklessly and carelessly rushed on the road and hit himself against (the) vehicle".

In terms of Article 1384 (2) of the Civil Code a presumption operates against the driver of a moving vehicle, that he is at fault and hence liable, unless he can, inter alia prove that the damage was caused solely due to the injured party.

The Plaintiff, who is now 12 years of age was permitted to testify on oath, upon the Court being satisfied that he understood the nature of the oath. According to him, around 3.30 p.m. that day, he was standing on the edge of the mountain side of the road at Anse Aux Pins. A bus stopped on the opposite side of the road. The Defendant's car, which came behind the bus, overtook it. In the process of the Defendant's car crossing to the mountain side where, the boy stood, the car dragged him and threw him to the main road. Consequently, he had a fractured arm, injuries on his ear and neck, several bruises and a bleeding nose. On being cross examined, he denied that he was running on the road with another boy.

Wilson Esparon (Pw2) was standing by the sea at the time of the accident. He heard the sound of brakes being applied, and when he went towards the road, saw the Plaintiff lying on

the road. Before that he saw a boy standing on the mountain side of the road. He also saw a bus stopped on the sea side bus stop and other vehicles moving behind it. After hearing the brakes he no longer saw the boy standing. He denied seeing two boys running.

The Defendant in his testimony stated that he was not driving from Victoria towards Anse Royale on the sea side of the road, but towards the opposite direction. He also stated that the accident occurred between 4.30 p.m. and 5 p.m. on that day.

According to him, the road was straight for about 15 metres and clear, and there was not much traffic. He was driving at a speed of about 30-35 k.p.h. when he heard a noise as if a coconut had fallen on the car. He then applied the brakes. This is consistent with the averment in paragraph 2 of the defence that the Plaintiff running along the road "rushed on the road and hit himself against the vehicle."

The Defendant also stated in his testimony that he saw two boys running and the Plaintiff crossed the road without stopping and he was hit by the car. The other boy who was about 5 metres behind him ran away on seeing the accident. He further stated that the front wheel and the bonnet of his car was slightly damaged by the impact. On being questioned by Court he stated that the damage to the bonnet was towards its middle.

<u>Liability</u>

There are several inconsistencies in the Defendant's case as regards the accident. The most material is that, while the Plaintiff and his witness categorically stated that the Defendant was driving towards Anse Royale and that the accident occurred when he overtook a stationary bus, the Defendant stated that he was driving in the opposite direction.

Unfortunately, the Police sketch of the accident was not produced by either party as the file is said to be lost. In any event, the Defendant testified that he saw two boys running along the road and the Plaintiff crossing suddenly. That contradicts his own version that he did not see anything until he heard something like a coconut falling on the car. If the Plaintiff hit the car, as he claimed, he would have hit it sideways and not towards the middle of the bonnet. For the Plaintiff to hit the middle of the bonnet, he would have been in front of the car and probably been run over. Further, if he saw the boys running, he, as a prudent driver, ought to have been more vigilant and anticipated any irrational movement by them. However, on a balance of probabilities I accept the version of the accident as testified by the Plaintiff and his witness. I find that the accident occurred when the Defendant overtook the stationary bus, and hence in the circumstances not even contributory negligence can be attributed to the Plaintiff. Hence the Defendant having failed to rebut the presumption in Article 1384(2) of the Civil Code, he is held liable for the accident.

Damages

According to the medical report (*exhibit D1*) the Plaintiff received the following injuries-

1. Brain concussion and loss of consciousness for 3 - 5 minutes.

2. Multiple bruises over left knee and both arms.

3. Bleeding laceration of right pinna (that is, the part of the ear formed of cartilage and skin.)

4. Fracture of the right clavicle (that is, the bone which runs from the upper end of the breast bone towards the tip of the shoulder across the root of the neck).

He was treated by suturing the laceration, and cleaning the abrasions. The clavicular fracture was strapped and a neck collar fitted. He was also given analgesics and antibiotics.

He was discharged from hospital on 20 May 1998, that is, 12 days after the accident. After follow-up treatment in the Surgical Outpatients Clinic, the final assessment on 9th September 1998 confirmed that the fracture of the right clavicile was healed and so also the lacerations and abrasions. There was also no complication to his head injury. It was recommended that he resumed school, and he could lead a normal life.

In the case of *James Hoareau v Frankv Aglae* (CS 109 of 1990), a 10 year old boy was injured in a similar accident. He suffered bruises on the face, and abrasions on the chest. There were however no fractures. It was averred that the boy had "intellectual deterioration" as a result of trauma. That aspect was not medically established. On a consideration of all the circumstances of the injuries I awarded a sum of Rs.35,000 for pain, suffering, shock and loss of amenities. In *Wyne Gendron v Joyce Lame* (CS 84 of 2001) a boy 13 years old was injured by a motor car while he was standing on the grass verge near the edge of a road. He had a fracture of the shaft on the left femur requiring intomedullary nailing and skin grafting. He also had injuries to his teeth, chin and the mouth. The Plaintiff claimed R50,000 in respect of pain, suffering, distress discomfort and anxiety. I awarded a sum of R35,000 under that head of damages, and a further R5000 in respect of a permanent scar on the leg, making a total award of R40,000.

In the present case, the Plaintiff claims R100 for damage to clothing. Although that was not proved, yet due to the nature of the bleeding injuries he suffered, it is reasonable that his bloodstained and torn clothes could not be used again. Hence R100 is awarded under that head. He also claims

R75,000 as moral damages for extreme pain, suffering, anxiety and discomfort. On a consideration of *James Hoareau* (supra) and *Wvne Gendron* (supra), I award a sum of R30,000. The Plaintiff also claims R50,000 for loss of amenities and R25,000 for loss of enjoyment of life. He testified that he could not run as usual, had severe headaches and often the eyes become red. The medical report does not support these claims. However as he was immobilised in hospital for 12 days during which period he, as a playful boy of 6 years, could not enjoy life and was deprived of basic amenities, I award a sum of R1,000. The medical report tendered to Court as the exhibit had been issued by the hospital to the Police. Hence as it had been issued for official purposes free of charge, no payment in reimbursement is due to the Plaintiff. Accordingly, the claim of R200 for medical report is disallowed.

Judgment is accordingly entered in favour of the Plaintiff in a total sum of R31,000, together with interest and costs.

Record: Civil Side No 15 of 2001

Government of Seychelles v Ramrushaya

Agreement to remain in Seychelles because of bond – injunction to restrict freedom of movement – constitutional rights

The Government of Seychelles filed a plaint claiming that the Defendant had agreed to bonded service for 5 years after sponsorship to complete a degree at an Australian University, and now the Defendant is seeking to leave the Seychelles for good without refunding a sum of R196,721. The Applicant requests an interim injunction preventing the Defendant from leaving the country. The Government claimed that the Defendant holds a ticket to depart Seychelles and has no assets in Seychelles.

HELD:

(i) Under normal circumstances, an application for an injunction should be served on the Defendant before an order is made. However, it is impractical to serve notice on the Defendant and to make an order after hearing him given the urgency of the circumstances; and

(ii) If the Defendant leaves the Seychelles for good, there will be financial loss to the Government as the Defendant has no assets in the Seychelles. Therefore the preservation of public funds is a valid reason to grant the injunction and limit the Defendant's freedom of movement as this is within the spirit of the derogation from fundamental rights contained in article 25(3)(a) of the Constitution.

Judgment for the Government. Injunction granted.

Legislation cited
Civil Procedure Code, s 305
Seychelles Constitution, art 25

Cases referred to
A-G v Deltel (1954) SLR 277
France Bonte v Inovative Publications (Pty) Ltd CS 200/1993

Basil HOAREAU for the Applicant
Respondent (not served)

Order and Addendum delivered on 14 August 2003 by:

PERERA ACJ: The Government of Seychelles has filed a plaint wherein it is averred that the Defendant, who had agreed to be bonded for service for five years, consequent to a sponsorship to complete a University Degree in Australia, is seeking to leave Seychelles on 16 August 2003 for good, without refunding a sum of R196,721 as agreed. The motion before Court is for the granting of an interim injunction preventing the Defendant from leaving the jurisdiction until sufficient security is provided or until the final determination of the matter. This motion is supported by the affidavit from the Principal Secretary, of the Ministry of Education, wherein it is averred inter alia that the Defendant has applied for leave to proceed to Australia and has supplied copies of his Airline tickets. The Airline ticket shows that he is due to travel to Mauritius by flight no. HM 055 on 16 August 2003 at 8.55 am, and leave for Perth, Australia, by flight MK 940 on 18 August 2003 at 13.40 hours. The date of return from Australia to Mauritius is open. There is also no ticket from Mauritius, back to Seychelles. It is also averred that the Defendant has no assets in Seychelles.

The said bonding Agreement has been guaranteed by one Mr

Ralph Rampal. However he has by affidavit, averred that the Defendant has informed him of his intention to go to Australia for good, and that hence, he has requested the Ministry to discharge him as a guarantor to the bond. Although Section 305 of the Civil Procedure Code requires that an application for an injunction should be served on the Defendant before an order is made, yet tomorrow (15 August 2003) is a Public Holiday, and moreover the Defendant has to be served with notice in Praslin. He is also due to leave Seychelles on 16 August 2003 at 8.55 am. Hence it is impracticable to serve notice on the Defendant and to make an order after hearing him.

This Court, in the case of *Attorney General v Deltel* (1954) SLR 277, and more recently in the case of *France Bonte v Innovative Publications (Ptv) Ltd* (CS no. 200 of 1993) issued interim injunctions on a consideration of the urgency involved and the impracticality of serving notice on the Respondent in time before the Act or Event complained of occurs. In *Deltel* (supra), the Attorney-General sought an injunction against the Defendant Mr Alexandre Deltel, who was elected as a member of the Legislative Council for the South Mahe District, from sitting and voting at the session of the Legislative Council to be held the next day, on the ground that he was disqualified to hold such Office by virtue of Section 11(5) (a) of the Seychelles (Legislative Council) order in Council, 1948. The application was filed on 16 December 1954, and the Legislative Council sitting was to be held on 17 December 1954. The Court granted an injunction on the basis that:

> The prestige of the Council and the standard of Public business in the Colony could be lowered should someone be there taking part in the proceedings who had no right to be there.

Further, in that case, the Court invoked the equitable jurisdiction vested in Clause 7 of the Seychelles Judicature

Order in Council, 1903. (Now Section 6 of the Courts Act (Cap 52).

In the case of _Bonte_ (supra), the "Seychelles Independent" newspaper published the text of a telephone conversation between the Plaintiff in his professional capacity as a lawyer, and a client. The newspaper, in the same issue informed its readers that other parts of that conversation would be published in the next issue, which was due to be circulated within three days when the application was filed. I, as trial Judge in that case invoked the equitable jurisdiction of the Court on a consideration of the impracticability of serving notice on the Defendants and holding an inter partes hearing, and granted an interim injunction returnable eight days later, when the Defendants were required to appear in Court and show cause against the order.

In the present case, if the Defendant leaves Seychelles for good on 16 August 2003 there would be financial loss to the Government as the Defendant has no other assets in Seychelles. Hence the preservation of public funds is a valid reason to limit the fundamental right of freedom of movement within the spirit of the derogation contained in Article 25(3) (a) of the Constitution.

As I stated before, tomorrow being a public holiday, it is impracticable to serve notice on the Defendant in Praslin. Moreover as 16 August 2003 is Saturday, when the Court does not usually sit, the earliest day for the hearing would be Monday, 18 August 2003. Hence, invoking the equitable jurisdiction of the Court, I grant an ex parte interim injunction, restraining the Defendant from leaving Seychelles without paying the bonded sum of R196,721, or furnishing sufficient security for such payment to the satisfactory of the Ministry of Education.

This order will remain in force until Monday 18 August 2003 at

1.45 pm on which day and time, the Defendant will be required to attend Court, and show cause, if any, against the extension of this order until the final disposal of the matter.

Copies of this order to be served forthwith on the Defendant, and on the Doctor General of Immigration who shall not permit the Defendant to leave Seychelles without a further order of this Court.

ADDENDUM

Since delivering the above order, I have been informed by the Attorney-General that on instructions received by him from the Ministry of Education, the Defendant has furnished sufficient security to the satisfaction of that Ministry, and that in the circumstances, the injunction need not be served on the Defendant.

Accordingly, the serving of the injunction is withheld, and the case is adjourned *sine die.*

Record: Civil Side No 225 of 2003

In the matter of a Letter Rogatory issued by United States District Court Eastern District Of New York

Evidence – letter rogatory – Hague Convention 1965

A letter rogatory was issued from a New York Court through the Ministry of Foreign Affairs of Seychelles on an attorney in Seychelles. The letter states that evidence from the attorney should be obtained to be used by a foreign Court in New York.

HELD:

(i) Civil law countries generally see the actions of foreign Courts which exercise their power outside of their jurisdiction, such as the obtaining of evidence, as offending the sovereignty of the state;

(ii) If evidence is to be obtained in civil law countries, official intervention is required through bilateral and multilateral conventions;

(iii) The domestic evidence law found in the Evidence Act is only of local application; and

(iv) The Republic of Seychelles has ratified the Hague Convention on the Service abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, but it has not brought it into domestic law, which must be done before it can have force.

Judgment
There is no jurisdiction to issue a summons on the attorney pursuant to the letter rogatory.

Legislation cited
Evidence Act, s 11

International Documents
Hague Convention 1965 on Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters.

Ruling delivered on 6 June 2003 by:

PERERA J: In the case of *Vicunha Nordeste S/A, Textil Basquit (TEBASA) and Ors v Global Container lines Ltd and Ors*, case no. 02 civ 3596 (ERK) (RML) of the United States District Court - Eastern District of New York, a letter rogatory has been issued on Mr Philippe Boulle, an Attorney at Law of Seychelles, through the Ministry of Foreign Affairs of Seychelles. The letter rogatory states that the sworn testimony of Mr Boulle on 47 questions posed therein, "shall be used at the trial of the action" and that it is not sought as part of the pre-trial discovery process" of that action. In effect, Mr Boulle would then be a witness in a trial before a foreign jurisdiction.

Generally, civil law countries view the obtaining of evidence as part of the judicial function, and the actions of Agents of a foreign Court may be seen as offending the sovereignty of the state in its judicial aspect. Hence if evidence is to be obtained in such countries, official intervention will be required through bilateral and multilateral civil procedure Conventions.

Dicey and Morris on Conflict of Laws (11 ed) state at 8 thus:

> In England, unlike some continental countries and the United States, international Treaties and Conventions do not have the force of law merely by reason of having been ratified by the Government, at least in so far as the rights and

> duties of private persons are concerned. In the United Kingdom, a Treaty provision does not become law until it has been implemented by statute or statutory instrument.

The domestic law of Seychelles, as contained innSection 11 of the Evidence Act (Cap 74) is of purely local application.

The Republic of Seychelles has ratified the "Service abroad of judicial and extrajudicial documents in Civil or Commercial matters" of the Hague Convention of 1965, on 18 June 1981 and acceded to it on 1 July 1981 but it has not been implemented by any statute or statutory instrument. The United States of America ratified the same convention on 24 August 1967. What is relevant in the present matter is the Hague Convention on the Taking of Evidence Abroad in Civil and Criminal Matters 1970. That convention was ratified by the United States of America, but not by Seychelles. However, in respect of criminal matters, the Mutual Assistance in Criminal Matters Act 1995, has been enacted to provide for the implementation of the Commonwealth scheme relating to mutual assistance in criminal matters within the Commonwealth, and also to provide such assistance in Criminal Matters between Seychelles and a foreign country other than a Commonwealth country. There is however no corresponding domestic law in respect of civil matters. Hence, this Court has no jurisdiction to issue summons on Mr Philippe Boulle, Attorney at Law pursuant to the letter rogatory.

Record: Civil Side No 96 of 2003

Joseph v Payet

Detention of vehicle – order for release – security for outstanding debts – damages for inability to use vehicle

The Plaintiff delivered goods to the Defendant's residence in his pick-up truck. The Plaintiff claimed that after delivery, the Defendant closed and padlocked his gates preventing the Plaintiff from removing his pick-up. The Plaintiff claimed for loss of use of his pick-up and for the cost of hiring other vehicles to carry out work in the meantime. The Plaintiff stated that a chain was put on the pick-up preventing it from being moved and that he made a complaint to the police. When the police officers asked the Defendant to remove the chain locking the vehicle up, he refused. The Plaintiff filed a motion seeking an order for the Defendant to release the vehicle. The Court granted the order. The Defendant says that he obstructed the pick-up because he was owed money by the Plaintiff and because the goods were delayed.

HELD:

(i) The neglect on the part of the Plaintiff to obtain a copy of the Court order means that his claim for loss of use of the pick-up will be limited to the time up until the granting of the order;

(ii) The detention of the pick-up by the Defendant, even for the purpose of seizure in order to obtain payment from the Plaintiff is not allowed. A motor vehicle cannot be provisionally seized under Section 280 of the Civil Procedure Code after an action has been instituted;

(iii) The Defendant has decided to release the pick-up from seizure and to pursue his claim against the Plaintiff in a separate suit. Therefore, he will be liable for the economic loss caused to the Plaintiff through his own folly; and

(iv) The Plaintiff usually hired other vehicles in addition to his own, to transport materials and workers. Therefore, the claims of costs by the Plaintiff were inequitable as they were based on the premise that the seized pick-up was the sole vehicle used each day.

Judgment for the Plaintiff. Damages awarded R16,392.10.

Legislation cited
Civil Procedure Code, s 280
Civil Code of Seychelles, art 533

Cases referred to
Balusamy Pillow v J Bonne CS 448/1999 (Unreported)

France BONTE for the Plaintiff
Dora ZATTE for the Defendant

Judgment delivered on 23 July2003 by:

PERERA J: The case for the Plaintiff is that, on 27 February 2002, he delivered a load of "crusher dust" at the Defendant's residence at Point Larue in his pick up bearing no. S. 4944. He avers that the Defendant thereafter "closed and padlocked his gates" and has prevented him from removing his pick-up. He claims R36,600 for loss of use of his vehicle and for hiring other vehicles to transport workers and materials.

The Defendant in his statement of defence denies that the

pick-up vehicle is being detained by him since 27 February 2002 and avers that the Plaintiff was, by letter dated 8 March 2002 informed that he could remove it from the premises.

The Plaintiff testified that on 27 February 2002, after he delivered a load of crusher dust, the Defendant fixed a chain across the vehicle and padlocked it, thus preventing the vehicle from being moved. He made a complaint at the Anse Aux Pins and Cascade Police Stations. The Police Officers asked him to remove the chain, but he refused and threatened to block the vehicle with a big boulder.

On 10 June 2002, the Plaintiff filed a motion seeking an order, on the Defendant to release the vehicle. This Court by order dated 4 November 2002 granted the order. However the Plaintiffs stated that he did not go to remove the vehicle as he did not receive a copy of the order. As there has been negligence on his part in obtaining a copy, his claim for loss of use, will be limited up to 4 November 2002.

At the hearing of 17 February 2003 Learned Counsel for the Defendant informed the Court that the Defendant had no objections to the pick up being removed by the Plaintiff at any time. Accordingly an order was made on 17 February 2003, by consent of both parties that the Plaintiff be permitted to enter the Defendant's premises and remove the pick-up. It was further agreed and ordered that the Defendant shall remove the chain and other obstructions to enable the Plaintiff to remove the pick-up peacefully. That order, if not already complied with, is confirmed in this judgment.

The remaining issue is therefore the quantum of damages claimed by the Plaintiff. The Plaintiff testified that he was a building contractor, and that he employed workers. He stated that the Defendant did blasting work for him, but that he did not owe him any money. He further stated that the Defendant blocked his pick-up, not because he owed him money but

because he had delayed delivering the load of crusher dust.

The Defendant testified that he did blasting work for the Plaintiff. There were three invoices for payment, but the Plaintiff asked him to wait till he received payment from his clients. On the first invoice for R40,000, he paid R30,000 by a cheque drawn on Habib bank. He promised to pay him another R25,000, but instead paid him only R5,000. Thereafter, the Plaintiff did not make any payments, hence he decided to "seize" his pick-up, until he received his payments. He ordered 3 tons of crusher dust, but the Plaintiff took nine days to deliver it. So he obstructed the pickup with his car, and fixed a chain with a lock, across, preventing it from being moved. When the Police Officers came he told them that the pickup could be removed when the Plaintiff made the payments. The Plaintiff came once and removed a spanner and an iron bar from the pickup, but did not come to remove the vehicle.

The Defendant also testified that he saw the Plaintiff using hired vehicles to transport his workers and building materials. He sent a letter dated 8 March 2002 through his lawyer requesting the Plaintiff to remove the pick up after payment of his invoices, but he did not come. The Defendant further testified that the Plaintiff used his own pick-up, together with hired vehicles in most of his construction work, and transporting of his workers.

At the conclusion of his evidence, the Defendant agreed to allow the Plaintiff to remove the pickup and stated that he would claim the amount due to him in another case which he had already filed in this Court.

On the basis of the evidence in the case, it is admitted by the Defendant that he detained the Plaintiffs pick up after a load of crusher dust was delivered at his place. Although the Plaintiff claims that such detention was done to spite him for

delaying the delivery, it is more plausible that it was done, more as a "seizure" to obtain payment claimed by the Defendant. Was the Defendant entitled so to "seize" or detain the Plaintiffs vehicle? As was held by this Court in *Balusamy Pillow v J Bonne* (C.S. 448 of 1999), a motor vehicle cannot even be provisionally seized under Section 280 of the Civil Procedure Code after an action has been instructed. That was on the basis of the interpretation of Article 533 of the Civil Code which provides that the word "movable" does not include, inter alia, vehicles, the extra judicial "seizure" of a motor vehicle, admittedly being used by the Plaintiff in the course of his profession as a building contractor was therefore unlawful. Neither was he empowered to detain the vehicle as security for a debt owed. The Defendant has only now decided to release the pick-up from "seizure" and to pursue his claim against the Plaintiff in a separate suit. He will therefore be liable in damages for the economic loss caused to the Plaintiff through his own folly.

The Plaintiff testified that in the course of his business, he had to hire pick up vehicles to transport materials and his workmen to building sites during the time the Defendant detained his own pick up. He also had to hire cars. In the particulars of damages, the Plaintiff claims for loss of use of his vehicle from 15 March 2002 to 30 April 2002 and continuing damages thereafter up to date of judgment, at the rate of R205 per day. He testified that although his vehicle was detained by the Defendant on 27 February 2002, he has claimed only for actual days when it became necessary to hire a pick up. Up to 30 April 2002 therefore he claims only for 44 days. That, at the rate of R205 per day, would be R9,020. However, the invoice issued to the Plaintiff by one Ivan Anacoura, the owner of pick up bearing no. S. 7101 (exhibit PI) substantiates the claim for 24 trips done in transporting building materials for him. At the rate of R205 per day, as claimed, the total amount would be R4920. The invoices from Ronny Barallon (exhibit P2) shows that 58 trips had been

done at the rate of R150 per trip. Hence the total amount would be R8,700. The Plaintiff also produced receipts from Norman's Car Hire, one dated 17 June 2002 for R8,525 and another a deposit for R4,500.

There was also produced receipts, from "Tropicar" one dated 4 October 2002 for R3,500 and another dated 30 October 2002 for R7,100. (exhibit P3) two other receipts dated 4[t] December 2002 and 3 February 2003 are not considered as relevant as this Court had by order dated 4 November 2002 permitted the Plaintiff to inspect and remove the pick-up.

Admittedly, the Plaintiff was engaged in building construction work on three sites simultaneously during the relevant period. The Court agrees with the Defendant that the Plaintiff usually hired other vehicles among his own, to transport building materials and workers. Indeed the load of crusher dust was delivered at the Defendant's premises in the pickup of the Plaintiff.

The claim for loss of use has been based on the premise that the Plaintiffs pick up had been solely used daily, and due to the "seizure", an alternative vehicle had to be hired. Hence in view of the finding of this Court that the Plaintiff would have hired other vehicles even before his own vehicle was "seized", it would be equitable that only 50% of the costs claimed be awarded. I would therefore quantify the award as follows-

1.	Amount paid on Ivan Anacoura's Invoices (15.3.02 to 29.4.02)	= Rs.4,920	50% 2,460.00
2.	Amount paid on Ronny Barallon's Invoices (28.5.02) to 11.6.02)	= Rs. 8700	4,350.00
3.	Amount paid to Norman's Car Hire (17.6.02)	= Rs. 8525	4,282.10
4.	Amount paid to "Tropicar" (4.10.02 and 30.10.02)	= Rs. 10,600	5,300.00
			16,392.10

Judgment is accordingly entered in favour of the Plaintiff in a sum of R16,392.10 together with interest and costs taxed on the Magistrates' Court Scale of Fees and Costs.

Record: Civil Side No 188 of 2002

Ernesta v La Passe Football Club

Sports ticket holder – banned from premises – damages

The Plaintiff watched football games in a sports complex belonging to the Government of Seychelles. The Defendant, a football club, responsible for the organisation, management and conduct of the home matches using the complex. The Plaintiff was banned (by way of a letter sent to him by the Defendant) from entering the football matches because he had been heckling the players with insults. He did not attempt to get his ban revoked, but tried to enter the complex to watch a match. He was prevented at the gate. He claimed that because it was a Government-owned complex, he could not be banned. The Plaintiff claimed R50,000 from the Defendant for loss and damage suffered as a result of a fault of the Defendant (R25,000 moral damages for humiliation, embarrassment and anxiety caused; and R25,000 for tarnishing of his reputation). The Defendant resisted the claim and stated that a criminal case had been registered in the Magistrates' Court as a result of the Plaintiff's behaviour.

HELD:

(i) Any prudent person would have acted in the same manner as the Defendant did in issuing the ban;

(ii) Although the Government holds the legal ownership of the complex, this does not make it a thoroughfare for the general public, giving them the right to enter without authority;

(iii) The Defendant is a club that has possession of the complex for social purposes. Therefore the Plaintiff cannot

claim any right of admittance to enter the complex during matches without authority from the Defendant; and

(iv) The tickets granted to those going to a match set out codes of behaviour for the attendees. A ticket is a licence for the specific purpose of watching the match. Once the licensee breaks the conditions of the licence then their entry into the premises becomes unlawful and the licensee becomes a trespasser ab initio.

Judgment for the Defendant. Claim dismissed.

Legislation cited
Civil Code of Seychelles, art 1382

Frank ELIZABETH for the Plaintiff
Charles LUCAS for the Defendant

Judgment delivered 31 October 2003 by:

KARUNAKURAN J: This is an action in delict, wherein the Plaintiff claims a sum of R50,000 from the Defendant for loss and damage suffered in consequence of a "fault" allegedly committed by the Defendant.

The facts of the case as transpire from the evidence are as follows.

The Plaintiff is a resident of La Digue and a self-employed taxi driver. He is an active football fan. He is also an executive member of the Anse Reunion football team of La Digue. He loves watching football matches. As an ardent fan, he used to watch the regular matches held almost every week in the La Digue "Multi Purpose Sports Complex", the premises of which

undisputedly belongs to the Government of Seychelles. According to the Plaintiff, watching those matches was the only entertainment he had and one could have on La Digue in the weekends. Be that as it may.

The Defendant is a football club known as "La Passes Football Club", which is an affiliate of the Seychelles Football Federation. Although the Defendant is a separate entity managed by a committee of its own, it is subject to the rules and regulations made by the Federation. Thus, the Federation appears to exercise control over the management of the club. Generally, the Federation supplies the club the tickets for the home matches and the club in turn sells those tickets to the spectators and remits a 20 of the sales- amount to the Federation. It is not in dispute that the Defendant is responsible for the organization, management and conduct of the home matches using the stadium in the Complex. According to Mr Wilhem Boniface-PW2- the Secretary General of the Federation the Defendant being the home team, it is solely responsible for the security of the match officials, visiting teams and spectators vide exhibit D4. The Plaintiff testified that on 10 May 1999 the Defendant issued him with a notice of ban and prevented him from entering the Complex to watch football matches. He produced the said notice exhibit P1in evidence, which reads thus:

> La Passe Football Club
> La Digue
>
> 10th May 1999
>
> Mr Jemmy Ernesta
> Anse Reunion
> La Digue
>
> Dear Sir,

> Ref: Insulting La Passe Players During Home Matches
> We wish to inform you (that) in regard to the above, certain decisions have been taken by the management of the team.
>
> We have found it necessary to prevent these continues and aggravating insults to your fellow Diguois players while playing, which is becoming embarrassing and annoying as well. It is not our intention to stop you from enjoying a high level of Football Match rarely played outside Mahe, but despite the fact that you have shown disrespect to the foreign players as well we have decided to ban you from entering the La Digue Sports Complex during all La Passe matches until further notice.
>
> We look forward to your cooperation and understanding,
>
> Thank you
> Yours sincerely
> (Sd) F. Franchette (Mr)
> La Passe Sports Club Secretary
>
> CC: La Digue Police Station
> La Digue District Administration
> Seychelles Football Federation
> La Passe Fan Club

After receiving the above notice, the Plaintiff did not take any steps to get the ban revoked by the Defendant. However, on 15 May 1999 he admittedly, attempted to enter the Complex to watch a football match, using a ticket bought by one of his friends, a sample of which was also produced in evidence and marked as exhibit D3. The officials of the Defendant at the

gate refused the Plaintiff admittance into the Complex. Moreover, the Plaintiff stated that since the Sports Complex belongs to the Government of Seychelles, the Defendant had no right to stop him from entering the Complex. The Plaintiff further testified that he never caused any disturbance during any of the matches held in the said Complex. He never insulted any of the players. He did not have any criminal case filed against him before the Magistrate's Court. In the circumstances, the Plaintiff testified that because of those unlawful acts of the Defendant he suffered humiliation, embarrassment and anxiety for which he claims damages in sum of R25,000 from the Defendant. In addition, he testified that his good reputation as a taxi driver and a football fan has been tarnished in the eye of the public because of those unlawful acts, for which he estimated damages in the sum of R25,000. According to the Plaintiff, the Defendant's unlawful acts amount to a "fault" in law. As a result, the Plaintiff claims that he suffered loss and damage in the total sum of R50,000 for which the Defendant is liable to make good. Hence, the Plaintiff seeks this Court to enter a judgment against the Defendant accordingly.

On the other side, the Defendant denies the Plaintiffs claim in its entirety. Mr Gerald Lablache- DW1- the chairperson of the Defendant-club testified that the Plaintiff on 10th of May 1999 came to watch a match on the stadium. He was sitting on the side of the grand stand. During the match, he started causing disturbances. He insulted and disturbed a group of players as they were playing on the pitch and provoked their supporters. Despite several requests, he did not stop but continued his insulting behaviour and created disorder and commotion during the match. After the match, he again went to the same group of players and continued insulting them. He also went to their home and wanted to fight with them. The Defendant reported the matter to the police. The police registered a criminal case - Criminal Side No: 129 of 1999 - against the Plaintiff before the Magistrate's Court of La Digue. The Court

accordingly convicted the Plaintiff of the offences of criminal trespass and using obscene language in a public place. A copy of the relevant judgment was produced in evidence and marked as exhibit D1. According to DW1, the Plaintiff also insulted the coach of La Passe Team, a Ghanaian national and particularly two players in the team namely, Mr Ahmed Aboudo and Mr Bruna Sandina. DW2 in his evidence stated thus:

> The Federation has sent us a letter saying that the security for all matches on home ground is the sole responsibility of the committee and if the security is not (provided) to the standard all matches would be cancelled on the Island (La Digue) so we had no option. At the same time, we had the interest of the public of La Digue on all matches. It was either we let Mr Ernesta (Plaintiff) continue doing what he was doing or we have the matches cancelled.

For these reasons, Mr Lablache testified that the Defendant had to ban the Plaintiff from entering the Complex and refused him entry to watch matches. In the circumstances, the Defendant denies fault, liability and damages. Hence, it seeks a dismissal of the action with costs.

I meticulously perused the entire evidence available on record including the documents produced as exhibits in this matter. Obviously, this action is based on Article 1382 of the Civil Code of Seychelles, which reads thus:

> 1. Every act whatever of man that causes damage to another obliges him by whose fault it occurs to repair it.
>
> 2. Fault is an error of conduct, which would not have been committed by a prudent person in the special circumstances, in which the

damage was caused. It may be the result of a positive act or omission.

3. Fault may also consist of an act or an omission the dominant purpose of which is to cause harm to another, even if it appears to have been done in the exercise of a legitimate interest.

4. A person shall only be responsible for fault to the extent that he is capable of discernment, provided that he did not knowingly deprive himself of his power of discernment.

5. Liability for intentional or negligent harm concerns public policy and may never be excluded by agreement; however, a voluntary assumption of risk shall be implied from participation in a lawful game.

Now, the fundamental question before the Court is whether the acts of the Defendant in banning and preventing the Plaintiff from entering the Complex to watch the football matches amount to a "fault" in law.

First, on the question of credibility I believe DW1 as a truthful witness. I accept his evidence in that, the Plaintiff on 10 May 1999 insulted the players on the pitch and caused disturbance to the detriment of the match and continued to insult them even at their home. The copy of the judgment in exhibit D1. corroborates this fact. Indeed, the evidence adduced by the Defendant in this respect is clinching, cogent, reliable and consistent. I do not attach any credibility to the testimony of the Plaintiff to the contrary. Accordingly, I find that the Plaintiff did behave in a manner not only causing a security threat to the players, the coach and the spectators alike but also likely to cause a breach of the public peace and tranquility in the

small island of La Digue. These unlawful acts of the Plaintiff have evidently, warranted the Defendant to issue the ban in question. Any prudent person in the given matrix of facts and circumstances would have acted in the same way as the Defendant did. Indeed, the Defendant was the one who has unlawfully attempted to gain entry into the complex by clandestine means of using a ticket, which was not sold to him. As testified by Ms. Juliana Ah Kon -DW2- she would not have sold the ticket to any third party, if she had known that the Plaintiff would be using that ticket to gain entry into the Complex. In the circumstances, I find that the Defendant did not commit any error of conduct in issuing the ban or in preventing the Plaintiff from entering the Complex to watch the matches. Obviously, the act of issuing the ban against the Plaintiff was not intended to cause any harm or damage to him for any reason whatsoever, but rather to secure public peace and order during football matches in the larger interest of the community and so I find.

Turning now to the question of ownership it is true that the Government holds the legal ownership of the Sports Complex in La Digue. However, it does not mean that the Complex is a public thoroughfare and every citizen has the right to enter and loiter without authority. The ownership held by the Government on premises cannot be taken as a licence by any citizen to enter the premises without any authority and to commit unlawful acts therein. Especially, when an entity like Social Club or any other Institution for that matter is lawfully holding the possession of those premises for the purpose of conducting its business then such entity to my mind, is deemed to be the special owner of the premises, as long as it holds the possession thereof. In the present case, it is clear that the Defendant was holding the possession of the premises for the purpose of conducting the home matches on the stadium. In the circumstances, I conclude that the Plaintiff cannot claim any right of admittance to enter the Complex during the hours of the match without authority from the

Defendant.

Having said that, it is quite obvious, when one reads the ticket - exhibit D3 - the conditions No: 6 and 9 thereof stipulate as follows:

> 6. A spectator will not cause a civil disturbance or conduct himself in a manner detrimental to the maintenance of discipline in the stadium.
>
> 9. Any person in breach of the above conditions will be removed from the stadium and repeated offences by the same person may result in a ban from entering the stadium during football matches.

Indeed, a ticket issued to a spectator in this respect to watch any match on the stadium is nothing but a licence granted to that person for a specific purpose. It is the common law principle that once the licensee breaks the conditions of a licence, then the very entry of the licensee into premises shall become unlawful and the licensee shall become a trespasser ab initio. The licensee therefore, will lose all the privileges given under the licence. In this case, obviously the Plaintiff has been in breach of condition 6 of the licence, namely the ticket. Therefore, the Defendant has rightly denied the Plaintiff of his privileges under the ticket and banned the Plaintiff from entering the premises. Having considered all the circumstances of the case, in my judgment, the acts of the Defendant in this matter do not constitute a fault in terms of Article 1382 above. Hence, I find this action is not tenable in law. Accordingly, I dismiss this action with costs.

Record: Civil Side No 313 of 1999

Barbe v Hoareau

Joint-venture – oral agreement

The Plaintiff claimed R127,000 from the Defendant for loss due to breach of an agreement (loss of revenue R77,000; moral damage R50,000) regarding a motor vehicle. The parties were friends who had intended to start a joint venture in the transport business. They had purchased the vehicle, the profit from which could be shared between them. The bank lent them money for the purchase of the vehicle on a number of conditions. The ownership was registered in the name of the Plaintiff. The parties entered into an oral agreement as to how the business would run. The arrangement worked well for some time until a dispute arose after which point the Defendant continued the business without sharing any of the profits with the Plaintiff. The dispute included issues arising about the arrangements for the repayment of the bank loan. The Plaintiff sought a Court order directing the Defendant to return the vehicle to the Plaintiff. The Defendant contested the Plaintiff's claim.

HELD:

(i) There are inconsistencies and inexplicable gaps in the evidence given by both parties. The following facts are established –

(a) the parties did enter into a partnership where they jointly purchased a vehicle for commercial use to share the profits;

(b) there were no clear terms agreed upon by the parties as to profit sharing, who would contribute to

capital investment, and who should pay what for the initial expenditures;

(c) the parties never agreed upon anything or made provision as to what should be done if the partnership dissolved;

(d) the agreement is silent in respect the crucial terms that are necessary for the determination of the issues that arise before the Court in this matter; and

(e) the Court must steer the law towards the administration of justice rather than the administration of the law, in order to come to a just and equitable solution.

Judgment: Plea in limine dismissed. The Defendant must pay R40,000 to the Plaintiff with interest at the rate of 10 per annum, as from the date of the complaint. Upon receipt of the said sum, the Plaintiff must transfer ownership of the vehicle to the Defendant.

Legislation cited
Civil Code, arts 1134, 1135, 1834, 1835

France BONTE for the Plaintiff
Wilby LUCAS for the Defendant

On appeal by the Plaintiff the CA remitted the case to the Supreme Court 16 November 2004 in CA 5 of 2003.

Judgment delivered 3 March 2003 by:

KARUNAKARAN J: The Plaintiff in this action claims a sum

of R127,000 from the Defendant for loss and damage, which the former allegedly suffered due to an alleged breach of an agreement by the latter. The subject matter of the said agreement is a motor vehicle namely, a commercial pick-up Registration Number S. 8973. In addition to the above money-claim, the Plaintiff seeks this Court for an order directing the Defendant to return the said pickup to the Plaintiff.

The facts of the case as transpire from the evidence are as follows:

> In the past, the parties were friends. In mid-1997 both intended to start a joint venture in transport business. They jointly obtained a loan of R214, 351 from the Development Bank of Seychelles for the purchase of a four-ton pick-up for commercial use so that the profit derived therefrom could be shared between the parties. The bank sanctioned the said loan to both of them as borrowers, on the following terms and conditions as per exhibit P3:
>
> (i) The Defendant shall create a first line mortgage on his immovable property namely, V2270 in favour of the bank as security for the loan.
>
> (ii) A pledge should be registered on the pickup as a collateral'security thereof.
>
> (iii) Motor Vehicle- Comprehensive -Insurance on the pick-up to be assigned in favour of the bank; and
>
> (iv) The loan amount shall be repayable with interests by equal monthly installments over a period of five years.

Accordingly, the parties purchased the pickup Registration

Number S. 8973, in October 1997 from a company, an importer named "South Seas Trading" for a total price of R316,000/- availing the bank loan. In compliance with the conditions of the said loan agreement, the Defendant mortgaged his immovable property V2270, a pledge was registered on the pick-up and the motor insurance was assigned in favour of the bank accordingly. However, for reasons best known only to the parties, the ownership of the pick-up was registered solely on the name of the Plaintiff with the Seychelles Licensing Authority. Be that as it may. According to the Plaintiff, the parties entered into a verbal agreement for a joint venture whereby the Plaintiff would be a sleeping partner and the Defendant would drive the pick-up for commercial use to make earnings and should submit the accounts of the income to the Plaintiff. The revenue generated thereof would be shared equally between the parties. The Plaintiff testified that he paid a sum of R40,000 to one Mr Morin, the Manager of South Seas towards the purchase -price of the pick-up. The Plaintiff admitted in his evidence that the Defendant also paid a sum of R40,000 towards the purchase price. Further, the Plaintiff testified that from October 1997 until March 1998 he was collecting the business-income from the Defendant and was repaying the bank loan. During that period according to the Plaintiff, he used to get around R5000 to R6000 per month as his share from the net profit. At the same time he stated that the business was sometimes down and he got his share of profit ranging from R4000/- to R5000/- per month. According to the Plaintiff, this arrangement worked well until the dispute arose between the parties in April 1998. Thereafter, the Defendant continued the business on his own giving no share of profit to the Plaintiff. In this background, now the Plaintiff makes his claim in the plaint against the Defendant as follows:

Loss of revenue from June 1999 to the date of the plaint at R3,500 per month	R 77,000

Moral damage	R 50,000
Total	**R127,000**

Moreover, the Plaintiff seeks this Court for an order directing the Defendant to return the said pick-up to the Plaintiff with immediate effect.

On the other side, the Defendant testified that he transferred a sum of R40,000 to the Plaintiffs bank account and gave Plaintiff a total of R22,500 in cash as Defendant's contribution for the purchase of the pick-up. Further, the Defendant testified that during the first one and a half year period he was earning a gross income of about R25,000 to R30,000 per month from the business. During that period, the Plaintiff was collecting all the money from the Defendant: and making repayments of the bank loan. As the Plaintiff defaulted, the bank asked the Defendant to resume the loan repayments. As a result, the Defendant stopped all the dealings of his partnership with the Plaintiff and took over possession of the pick-up without giving any accounts to the Plaintiff. Since then, the Defendant has been repaying the loan directly to the bank. Now, a total of R103,776 remains due and payable on the said loan account with the bank. In these circumstances, the Defendant denies the claim of the Plaintiff and seeks dismissal of this action.

I carefully perused the pleadings, the testimony and documentary evidence adduced by the parties in this matter. First, as regards the plea in limine litis raised by the Defendant, as I see it, the plaint is not grounded on two causes of action as alleged by the defence but only one cause of action namely, the breach of an agreement. Hence, the Plaintiff has prayed for damages for the breach and as a consequential relief thereof, has prayed for a mandatory injunction for the return of the pick-up. In the circumstances, I do not find anything improper or irregular in the pleadings of the plaint. Accordingly, I hold that the plea in limine is devoid

of merits. Therefore, I dismiss the plea in limine litis raised by the Defendant in this matter.

Now, let us move onto the merits of the case. It is evident that the testimony of the Plaintiff does not tally with the pleadings in the plaint on the material particulars of the claim. There is also a considerable variation between the pleadings and documentary evidence adduced by the parties. There are inconsistencies and inexplicable gaps in the evidence given by both parties. It lacks cogency. However, in the overall assessment of the entire evidence on record I find on the preponderance of probabilities that the following facts and circumstances are established to my satisfaction: -

1. The parties did enter into a partnership venture whereby they jointly purchased a pick-up for commercial use with a view to share the profits.

2. Then were no clear terms agreed upon by the parties as to profit sharing, as to who should contribute what towards capital investment and as to who should pay what for the initial expenditures.

3. The parties never agreed upon anything nor made provision as to what should be done when the partnership is dissolved; and

4. The agreement is silent in respect the crucial terms that are necessary for the determination of the issues that arise before this Court in this matter.

Having said that, I note that a partnership agreement must be drawn up in writing when the object exceeds the value of R5000 and no oral evidence shall be admissible against and beyond the terms of the agreement vide article 1834 of the Civil Code. However, the parties did not object to, during trial

and thus the evidence in this respect came in, that would have otherwise been rendered inadmissible. Therefore, I have to rely and act upon the evidence to the extent as it has been admitted to render justice to the parties. In my considered view, this Court in the given circumstances of this case has no other choice but to steer the law towards the administration of justice rather than the administration of the letter of the law.
It is truism that all agreements lawfully concluded shall have the force of law for those who have entered into them. They shall not be revoked except by mutual consent or for causes, which the law authorizes. They shall be performed in good faith. See Article 1134 of the Civil Code.

Article 1135 of the Civil Code reads as follows:

> Agreement shall be binding not only in respect of what is expressed therein but also in respect of all the consequences which fairness, practice or the law imply into the obligation in accordance with its nature.

Further, I note that when a partnership agreement is silent, and it shall be open to the Court to adjust the contributions of the parties upon an equitable basis, where the work, skill or know-how is such as to justify a higher participation. See article 1853 of the Civil Code.

In arriving at a just and equitable solution in this matter, I take into account the following:

1. The bank loan was secured by mortgaging the property belonging to the Defendant.

2. The Plaintiff has not contributed anything in substance to raise the bank loan for the purchase of the pick-up.

3. The Plaintiffs only contribution to the partnership business was R40,000, the sum be directly paid to the said importer of the pick-up and so I find.

4. All the loan repayments, which the Plaintiff made to the bank up to April 1998, were from the earnings of Defendant.

5. The Plaintiff in breach the terms of the agreement defaulted loan repayments with the bank and so I find.

6. The Defendant has contributed his work, in addition to his contribution of money totaling R62,500 towards the purchase-price of the pick-up.

7. Now, there is a balance of R103,776 remains due and payable by the Defendant on the said loan account with the bank as his immovable property is still burdened with mortgage.

8. Since the Plaintiff was the one who initiated the breach of the agreement, and is at fault, he is not entitled to any moral damages.

In the circumstance, though it might appear ultra petita, justice, equity and fairness dictate this Court to enter judgment in the following terms:

1. I declare that the agreement between the parties in respect the business involving motor vehicle registration number S.8973 was terminated in April 1998 by the conduct

of the parties following the breach by the Plaintiff of the terms as to loan repayment.

2. I order the Defendant to pay the sum of R40,000 to the Plaintiff with interest at the commercial rate of 10 per annum on the said sum as from the date of the plaint.

3. Upon receipt of the said sum, I order the Plaintiff to effect transfer of ownership of the said motor vehicle Registration Number S. 8973 to the Defendant.

4. I award neither damages nor costs of this suit for or against any party.

Record: Civil Side No 114 of 2000

Denise v Heirs Suzanne & Ludovic M Sullivan & Ors

Enclaved property – access to road

The Plaintiff owned a property which she claimed was not accessible from the road. She filed suit against the Defendants claiming a right of access to the public road. The first and Second Defendants denied that the Plaintiff had a right to seek access over their property. The Third Defendant had no objection to its property being used for access by the Plaintiff. The Fourth and Fifth Defendants did not resist the Plaintiff's claim. All Defendants own parcels of land which are found between the Plaintiff's plot and the road. The Plaintiff averred that the only way she can get to her property is over the Defendants' properties.

HELD:

(i) The Plaintiff is entitled to a right of way under articles 682 and 683 of the Civil Code. This must be access which is the shortest distance and causes least damage to the other properties; and

(ii) The burden is on the Defendants to find the shortest and least damaging route over their properties.

Judgment for the Plaintiff.

Legislation cited
Civil Code of Seychelles, arts 682, 683

Cases referred to
Azemia v Ciseaux (1978) SLR 158
Potter v Cable & Wireless (1971) SLR 334

Danny LUCAS for the Plaintiff
Philippe BOULLE for the Defendants

Judgment delivered on 28 February 2003 by:

JUDDOO J: The Plaintiff is the owner of parcel V4884 which she claims is an enclaved portion. She had filed the instant suit against three Defendants claiming a right of access to the public road. The First and Second Defendants have resisted the claim and denied that the Plaintiff has a right to seek access over their respective property to her land. The Third Defendant has no objection to its property being used a motorable access way by the Plaintiff. The Fourth and Fifth Defendants were added as parties to the suit by virtue of a Court Order have not resisted the Plaintiffs claim. All the Defendants own parcels of land which are found in between the Plaintiffs plot of land and the public road.

The unchallenged relevant plans produced (Exhibits P7, P8 & K) show that the Plaintiffs parcel of land, V4884, is an enclaved plot. It has no access to any road and is enclosed on all sides by other plots of land. Accordingly, the Plaintiffs claim falls to be decided under Articles 682 & 683 of the Civil Code of Seychelles (Cap 33) and which read as follows:

Article 682:

> The owner whose property is enclosed on all sides and has no access or inadequate access to the public highway either for private or business use of his property 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 compensation.

Article 683:

> A passage shall generally be obtained from the

> side of the property from which access to the public highway is nearest. However, account shall be taken of the need to reduce any damage to the neighbouring properties as far as possible.

The Plaintiff claims that the only way she can get to her property from the main road is through the Defendants' properties. She averred that since 1991 she had been using a motorable road over parcel V8593, over V7838 along its boundary with parcel V6399 and V4371 and over parcel v 4885" to get access to her land. The identified parcels of land belongs to the following parties respectively; V8593 to the 3d Defendant, V7838 to the First Defendant, V6399 to the Fourth Defendants, V4731 to the 5th Defendant and V4885 to the Second Defendant.

The Plaintiff is entitled to a right of way, by operation of law, under Articles 682 & 683 of the Civil Code on the side on which access would be the shortest way to the public road and at a place at which it would cause the least damage to the person on whose land the crossing was made. It has been established in a string of cases that once the enclave has been proved the burden lay on the Defendant (or Defendants) on whose land access was being sought by the Plaintiff to prove that the shortest and least damageable way to the public road was not through his property. - vide *Potter v Cable & Wireless* (1971) SLR 334*, Azemia v Ciseaux* (1978) SLR 158.

The evidence on record shows that one passage to grant access to the Plaintiff would be through the path of what is termed by the Plaintiff as a motorable road used by the latter as averred in her plaint. This passage, as it presently stands, has been demarcated in the sketch plan produced as exhibit K and labeled as "Drive". It starts from the public road and encroaches along Parcels V8593, V6399, V4731, V7838

(which is incorrectly labelled as V9838 in Exhibit K) andV4885 in order to access the Plaintiffs land.

The other possibility canvassed has been from the public road through v 8593, onto the reserved access V8597 and/or onto parcel V6399 where part of the reserved access proves impracticable, onto V4731 and leading to the Plaintiff's land.

There is no denial from the evidence on record that the motorable access labeled "Drive" in exhibit K is one that is currently used by the inhabitants of the land in the area including users of parcel v 8593 (Third Defendant) which is itself an access road, the occupants V6399 (Fourth Defendant), parcel V4731 (Fifth Defendant), V4885 (Second Defendant), and was used by the Plaintiff to access her plot of land (V4884). The "Drive" encroaches over Parcel V7838 (belonging to the Defendant) but is not used as an access road by the owner of the said parcel who has its own access directly to the main road. Part of the "Drive" is of solid concrete structure.

The Plaintiff gave evidence that the most accessible way for her to reach her plot of land from the public road is by being allowed the use of motorable access which she was using for the past years but is now unable to do so by virtue of certain obstructions caused by the occupants of the surrounding plots of land.

The other possible access route runs from V8593 at V8597. It does not in its present state link to Parcel V4884 which belongs to the Plaintiff. Jeffrey Wamyna testified that this planned access reserve belongs to the third Defendant "but this Government access stops on the boundary between V4731 and V6399". The witnesses added that the reserved access plot V8597 was demarcated in order to serve the adjoining plots ofV2687 and V2686 but it had not been intended to go further and access other plots including V4884

belonging to the Plaintiff.

Yvon Fostel gave evidence that there is a stream which runs over the demarcated access reserve V8597. In his own words:

Q. What did you find on the site....?
A. There is a stream as indicated on the plan. This stream runs between that bit which is between the drive and the boundary to V2687.
Q. Would it be fair to say that the stream occupies most of that right of way in terms of the lands between V8597 and V6399?
A. Yes.
Q. How feasible would it be for someone to use that access?
A. From my observation it seems that the stream doesn't make it all that easy.
Q. It is not feasible at all.
A. Although we can construct on a stream but I would say it is difficult.
Q. If we cannot access V8597 from the drive then that would make the official access way worthless.
A. Yes, I would say so, unless one is to spend enough money. There is a stream there. Myself I wouldn't construct there..."

The evidence as disclosed above clearly shows that the demarcated reserve access parcel V8597 could be of little practical use given the major impediment of there being a stream which runs across a significant part of that parcel. This also goes to explain why the reserved parcel V8597 had not since been used as a motorable access to reach the parcels which were intended to benefit therefrom, namely V2687 and V2686. Moreover, I am not convinced by the

argument that the passage over part of parcel V8597 could be moved sideways onto parcel V6399 in order to avoid the stream. Even if this were so, the access route to parcel V4884 belonging to the Plaintiff would have to cross parcel V4731 belonging to the Fifth Defendant over a part of the land where the dwelling house is situated. This access would inevitably require that the veranda to the house on the said land be demolished to give way to a motorable road adjoining the house itself. I find this alternative not be the shortest way which causes the least damage.

From the overall evidence on record, I find that the shortest motorable access from the Plaintiffs laid (V4884) to the public road which will cause the least damage to the adjoining properties remain the access track labelled "Drive" m the sketch plan produced as exhibit K. This motorable access as per the demarcation in the plan is to cross over parcels V8593 (belonging to the Third Defendant), V6399 (belonging to the Fourth Defendant), V4731 (belonging to the Fifth Defendant), V7838 (belonging to the First Defendant) and V4885 (belonging to the Second Defendant) respectively. I do not find that the Defendants have satisfied the Court that the passage on their respective parcel of land is not the shortest and least damageable motorable access from the public road to parcel V4884 belonging to the Plaintiff. Accordingly, I grant the Plaintiffs claim and declare that she has a motorable right of way over the Defendants' properties complying in as much as possible with the passage labelled as "Drive" in the sketch plan produced before this Court, Exhibit K. Accordingly, the motorable access is to cross over parcels V8593 (Third Defendant), V6399 (Fourth Defendant), V4731 (5th Defendant), V7838 (First Defendant) and V4885 (Second Defendant) respectively. There is to be no hindrance and obstruction to the said access by the Plaintiff.

Each party to bear its own costs.
Record: Civil Side No 214 of 1996

Chetty & Ors v Chetty

Intestacy – co-owners

The Respondent raised a plea in limine litis that individual co-owners cannot seek a division in a co-owned property except from through an executor acting in their capacity as a fiduciary. The petitioners are the seven children of GK Chetty who died intestate. The First Petitioner is the executor of the estate. The executor registered an affidavit with the Land Registry stating the co-owners and that they had an undivided 1/8 share each in the property. The seven petitioners propose to sell their shares to a third party, therefore excising from the totality of these parcels the share of the Respondent who is unwilling to sell.

HELD:

(i) Article 818 of the Civil Code was enacted to prevent the fragmentation of land. Therefore, the requirement that the co-owners of immovable property could only act through a fiduciary was created. However, this has changed and co-owners can seek a division without acting through a fiduciary; and

(ii) The individual "real rights" of co-ownership are preserved by the Civil Code.

Judgment plea of the Respondent dismissed.

Legislation cited
Civil Code of Seychelles, arts 818,1029
Immovable Property (Judicial Sales) Act, s 107
Land Registration Act, s 72

Foreign legislation noted
Code Civil (Fr), art 815

Cases referred to
Michel v Vidot (1977) SLR 214
Etheve v Morel (1977) SLR 251
Laporte v Sullivan & Ors (1978-82) SCAR 191
Legras & Ors v Legras (1893-87) 3 SCAR 367

Bernard GEORGES for the Petitioners
Jacques HODOUL for the Respondents

Ruling delivered on 5 May 2003 by:

PERERA J: The instant ruling arises from a plea in limine litis raised by the Respondent that individual co-owners cannot seek a division in kind of a co-owned property except through an executor acting in his capacity as a fiduciary. In the present case, the seven petitioners and the Respondent are the surviving children of one G.K. Chetty who died intestate on 8 May 1982. It is not in dispute that the 1st petitioner, Louis Camille Chetty was appointed as the executor of the estate of the said deceased, which comprised of an immovable property bearing Parcel no. T. 323 at Anse Gaulettes. After the appointment was made, the said executor, registered an affidavit on transmission by death at the Land Registry disclosing the names of the eight co-owners and acknowledging that they held an undivided 1/8 share each of the said property. Section 72(1) of the Land Registration Act (Cap 107) provides inter alia that "upon production and filing of an affidavit by them in the prescribed form, (they shall) be registered as the proprietors of the land, lease or charge of the interests and in the shares shown in the affidavit". Subsection (3) provides that:

> The Registration of any person as aforesaid

> shall relate back to and take effect from the date of the death of the deceased proprietor.

It is also not in dispute that the said Parcel T.323 is now sub-divided into Parcels T. 2150, T.2151 and T.2152. The seven petitioners propose to sell their shares to a third party, excising from the totality of these parcels, the share of the Respondent who, it is averred is unwilling to sell his share.

The issue before the Court involves the interpretation of Articles 818 and 1029 of the Civil Code and Section 107(2) of the immovable property (Judicial Sales) Act (Cap 94). Article 818 of the Civil code provides that:

> If the property subject to co-ownership is immovable, the right of the co-owners shall be held on their behalf by a fiduciary through whom only they may act.

Article 1028 provides that:

> an executor in his capacity as fiduciary shall be bound by all the Rules applicable to fiduciaries.

Article 1029 provides that:

> Executors shall represent the estate in all legal proceedings, and shall act in any legal action the purpose of which is to declare the will null...

Mr Hodoul, Learned Counsel for the Respondent in supporting the plea in limine relied on the decisions in the cases of *Michel v Vidot* (1977) SLR 214 *and Etheve v Morel* (1977) SLR 251. In the case of *Michel* (supra) the Court held that:

> The rights exercised by a fiduciary under Article 818 of the Civil Code related to the exercise of

> the right of co-ownership in so far as it relates to the immovable property itself. Article 818 does not affect the right of the individual owners to deal with their right of co-ownership. A, co-owner is therefore entitled, without acting through a fiduciary, to exercise the retrocession provided for by Article 834.

There is therefore a distinction between a situation when the whole property is involved in the "*legal proceedings*" and where only an individual right to a share is in issue. Hence, are the co-owner petitioners in the present case seeking to exercise their right of co-ownership in respect of the property itself, or only in respect of their individual rights in the property?

In the case of *Etheve (supra*) all the co-owners refused to sign an agreement as to beacons and boundaries. It was contended that they should have acted through a fiduciary. This submission failed on the ground of estoppel. However, Sauzier J stated in obiter that it was necessary that a fiduciary be appointed before a notice of objection to the Survey was lodged by the Defendants, who were co-owners.

In that case, the *whole property* was in issue and hence Articles 818 and 1029 of the Civil Code required that the co-owners could have acted only through an executor, in his capacity as a fiduciary.

In the case of *Laporte v Sullivan & Ors* (1978-82) SCAR 191, the Appellant and the Respondent were co-owners of a parcel of land. The Appellant petitioned the Court for a division in kind, in terms of Section 109(2) (now Section 107(2) of the Immovable Property (Judicial Sales) Act (CAP 94) that sub-section is as follows:

> Any co-owner of an Immovable Property may

> also by petition to a judge ask that the property be divided in kind, or, if such division is not possible, that it be sold by licitation.

In that case, the Court held that although Article 815 of the French Code has not been reproduced in the Civil Code of Seychelles, "it has found its way in another form in Section 109(2) of the Immovable Property (Judicial Sales) Act. Article 815 of the French Code, (as translated) was as follows:

> no one can be compelled to own anything undividedly, and a division can always be demanded notwithstanding am prohibition or any agreements to the contrary. It is lawful however, to agree not to proceed to a partition for a limited time. Such an agreement is not enforceable for more than five years, but it may be renewed.

Hence, the Court recognised that despite the provisions of Article 818 and 1029, a co-owner could petition for a division in kind.

The issue that concerns the present ruling came up for consideration in another case before the Court of Appeal, *Legras and Or v Legras* (1983 -87) 3 SCAR 367. In that case, the First Appellant and the Respondent were co-owners of a piece of land. The First Appellant sold an undivided portion of the land to a third party (Second Appellant), as if she were the sole owner thereof. The Respondent sought a declaration that the sale was null and void. The trial judge held that the vendor had acted unlawfully when she sold her undivided share to a third party without the intervention of a fiduciary and without the consent of the other co-owner. The Court of Appeal, by majority judgment (per Law JA and Goburdhun JA) upheld that decision. However Sauzier J A dissented, and allowed the appeal with costs.

In an editorial note to the report, Mr Sauzier states that "the majority judgments are weak and unauthoratative. They should not be followed".

In the headnote of the report, the Editor has extracted principles formulated by him as justice of appeal, in respect of issues of (1) nullity of sale (2) individual right of co-ownership (3) transfer or transmission of individual right of ownership (4) role of fiduciary under Article 818 (5) when co-owner may act alone apart from the transfer or transmission of individual right of ownership (6) meaning of exercise of right of co-ownership. Of these, only the 5th principle is relevant for present purposes, that is, that:

> A co-owner may apply to the Supreme Court without the intervention of the fiduciary:
> (i) For partition
> (ii) For licitation
> (iii) For retrocession of a share sold by another co-owner to a third party under Article 834 of the Civil Code.

Although the minority judgment of Sauzier JA in that case is not binding on this Court, yet it is consistent with the previous decision of the Court of Appeal in *Laporte v Sullivan (*supra*)* and the Supreme Court decision in *Michel v Vidot* (supra).

Article 818 of the Civil Code was enacted to prevent fragmentation of land in the context of Seychelles, where, it is estimated, that there is only about 2000 acres of arable land. The requirement that the co-owners of immovable property may only act though a fiduciary was therefore based on a similar concept as the English concept of a trust. As Chloros states:

> The reform, therefore, amounts to the effective disappearance of the undesirable consequences

> of co-ownership, while retaining the idea of co-ownership in principle. The real right survives, but it cannot be exercised as other real rights, for in practice it is only a claim of money.

Hence, as the "real rights" survive, co-owners can seek a division in kind without acting through a fiduciary. The individual "real rights" of co-ownership is preserved by Article 817 (2) of the Civil Code. Section 107(2) of the Immovable Property (Judicial Sales) Act (Cap 94) puts this position beyond dispute.

Accordingly, the plea in limine litis raised by the Respondent fails.

Record: Civil Side No 202 of 2001

Omaghomi Belive v Government of Seychelles & Or

Judicial review - writ of certiorari – immigration

The Applicant sought leave to proceed for a writ to quash the decision made by Director of Immigration that the petitioner should leave Seychelles. The petitioner, a Nigerian national, married a Seychelles national. He was informed that his visitor's permit had expired and that he should regularise his status. He gave his passport to the Immigration Officer for the purpose of obtaining an extension of his visitor's permit and was supposed to collect the passport, but it is still with the Director of Immigration. The wife made an application for a permit for her husband. The application was not approved and the Petitioner appealed. The appeal was not successful. An application for a writ of certiorari was filed. A stay order was also sought until the application was disposed of.

HELD:

Rule 5 of the Supreme Court Rules 1995 provides that before an application for a Writ of certiorari is considered, the Petitioner must obtain leave to proceed, which will be granted if the Court is satisfied that the petitioner has "sufficient interest" in the subject-matter of the petition and that the petition is being made in "good faith".

Judgment Leave refused.

Legislation cited
Constitution of Seychelles, art 12
Immigration Act, ss 14, 16
Supreme Court Rules 1995, rr 5, 6

Cases referred to
Banker v Government of Seychelles SCA 58/1996

Foreign cases noted
R v Secretary of State for the Home Office Ex parte Dooga [1990] COD 190

Antony DERJACQUES for the Applicant

Ruling on leave to proceed delivered on 12 June 2003 by:

PERERA J: This is an application for leave to proceed with an application for a writ of certiorari seeking to quash the decision dated 6 June 2003 made by the Director of Immigration, directing that the petitioner shall leave Seychelles by the 12 June 2003.

The petitioner a Nigerian National arrived in Seychelles on 17 November 2002. On 10 January 2003, he married one Barbara Fatima Labrosse, a Seychelles national at the Civil Status Office. On 5 March 2003, he was informed by the Immigration Officer that his visitors permit had expired since 28 February 2003 and that he should regularise his status before 7 March 2003. On 10 March 2003 he handed over his passport to the Immigration Officer for the purpose of obtaining a further extension of the visitor's permit, and he was requested to collect it on or after 17 March 2003. It is however submitted that the passport is still with the Director of Immigration.

The said Barbara Fatima Labrosse made an application for a dependant's permit for the petitioner. By letter dated 8 May 2003, the Director-General of Immigration informed her that the application had not been approved, and that she should make special arrangements for the petitioner to leave Seychelles by Thursday 15 May 2003. However, the petitioner did not leave the country, but instead, filed an

appeal with the Minister on 23 May 2003 through his lawyer Mr F Elizabeth. It was averred in that Appeal he was eligible to become a citizen of Seychelles pursuant to Article 12 of the Constitution, by virtue of his marriage to a Seychellois. It was also averred, alternatively, that he was entitled to a dependant's permit and hence should not be considered a "prohibited immigrant". On the same day, 23[r]May 2003, the petitioner sought an extension of his visitor's permit pending the decision of the appeal to the Minister.

By letter dated 6 June 2003, the Director-General of Immigration informed Mr Elizabeth that the appeal had not been successful; and that the petitioner should leave Seychelles by 12 June 2003. It is obvious that "the appeal" referred to therein was the appeal lodged with the Minister by the Petitioner. Hence since such Appeal failed, the application to extend the visitor's permit did not arise for consideration. The instant application for a writ of certiorari to quash that decision was filed in 10 June 2003. A stay order is also sought until this application is disposed of.

Rule 5 of the Supreme Court (Supervisory Jurisdiction over subordinate Courts, Tribunals and Adjudicating Authorities) Rules 1995 provided that before an application invoking the Supervisory Jurisdiction is considered, the petitioner must obtain leave to proceed, which under Rule 6 thereof would be granted if the Court is satisfied that the petitioner has "sufficient interest" in the subject matter of the petition and that the petition is being made in "good faith". Without furthermore, the Court is satisfied that the petitioner has sufficient interest in the subject matter of the case.

The concept of "good faith" is not to be considered in contra-distinction with the concept of "bad faith". It involves the notion of "uberrima fides" to the extent that the petitioner when filing the petition should have had an "arguable case", That is an objective consideration which has to be assessed by Court

in deciding whether leave to proceed should be granted or refused. In the case of *R v Secretary of State for the Home Office, ex parte Dooga* (1990) COD 109, Lord Donaldson of Lymington MR suggested that there were three categories of "leave" cases:

(a) Those in which there are prima facie reasons for granting judicial review

(b) Cases that are wholly unarguable and so leave should be refused.

(c) An intermediary category where it was not clear, and so it might be appropriate to adjourn the application and hold a hearing between the parties.

The facts of the present case are free from ambiguity. The basic issues are whether the petitioner is entitled to a dependant's permit under Section 14(1) of the Immigration decree, by virtue his marriage to a Seychellois national, or the extension of his visitor's permit under Section 16. Section 14(1) provides that the Minister may issue a dependant's permit if the dependent spouse is not (a) a prohibited immigrant, or (b) the holder of a residence permit or a gainful occupation permit. In terms of Section 19(1) (d) of the Immigration decree, the following persons not being, citizens of Seychelles are "prohibited immigrants".

(d) Any person in Seychelles is respect of whom a permit under this decree has been revoked, or had expired.

In the present case, the visitor's permit issued to the petitioner has, admittedly, expired on 28 February 2003. Hence when he married the Seychellois national on 10 January 2003, he was not a prohibited immigrant. However after 28 February

2003 he became a prohibited immigrant by operation of law, although grace periods were given to him subsequently to leave the country.

A similar matter arose in the case of *Gorana Banker v Government of Seychelles* (CS 58 of 1996) a young Yugoslav woman entered Seychelles on a visitor's permit. It was extended twice upon a Seychellois man furnishing a security bond. The third extension was however refused, and the woman was given grace period of a fortnight to leave the country. During that period, she got married to the Seychellois man. An application for a dependant's permit was then made, but refused.

In an application for a writ of certiorari filed to quash the decision of the Director of Immigration, the Court held inter alia that the petitioner had no legal status to remain in the country. The Court of Appeal (appeal no 46 of 1999) held that on the date of the marriage, the petitioner was a prohibited immigrant pursuant to Section 19(1) (d) of the Immigration Decree, and hence was not entitled to a dependant's permit. It was further held that the Director of Immigration had no discretion in making decisions regarding the extension of visitor's permits or the granting of dependant's permits, and hence "the question of the quality of his decision in terms of whether it was unreasonable or irrational would not arise" to be considered in an application for judicial review.

Hence, the element of "good faith" in the sense of an *"arguable case"* being lacking in this case, the case falls into the second category of Lord Donaldson's tests laid down in *Ex parte Doorga (*supra), that it is s wholly unarguable case and so leave should be refused.

Record: Civil Side No 141 of 2003

D'Offay v Hoareau

Civil procedure - leave to re-open proceedings – new evidence

An application was made for leave to reopen the defence for the purpose of producing two documents in evidence. The documents are in support of the Defendant's averment. The documents were intended to be produced through a witness, the Land Registrar, however the production of the documents was inadvertently omitted. The documents had already been shown to the Plaintiff.

HELD:

(i) Evidence inadvertently not led may be permitted to be called late as the failings of counsel should not be to the detriment of the client. However evidence which was deliberately not led at the correct time will not be allowed late; and

(ii) Evidence may be led late if there is no prejudice caused to the party against whom it is being led.

Judgment leave granted for Defendant to re-open case for purpose of producing evidence of the two documents.

Cases referred to
Savy & Co (Seychelles) Ltd v The Salisbury (1971) SLR 218

Francis CHANG-SAM for the Plaintiff
France BONTE for the Defendant

Ruling delivered on 2 October 2003 by:

JUDDOO J: This is an application for leave "to re-open the

defence for the purpose of producing as evidence in the case two documents, namely a deed of sale dated 21 January 1957, transcribed in Volume 45 no 67, between Mr Leon Deltel and Mrs Marie-Therese D'Offay, nee Deltel, and a letter to the Registrar from the late Mrs Mario Therese D'Offay, dated 17 April 1994 duly registered in the Land Registry, Volume II, folio 46, on 19 April 1994.

It is averred on behalf of the Defendant that the documents are in support of the Defendant's averment set out in paragraph 2 of the amended defence dated 4 June 2002. It is further averred that the said two documents were put to the Plaintiff in cross-examination and were intended to be produced through a witness, namely the Land Registrar. However, due to the manner in which the witness (Land Registrar) was dealt with, Learned Counsel has consented to a date for "submissions" whilst omitting to have produced the two documents.

It is not disputed that a party may apply for leave to re-open his case to supply material evidence which had inadvertently been omitted vide:

Savy & Co (Seychelles) Ltd v The Salisbury (1971) SLR 218. In addition *Cross on Evidence* (4 ed NZ) at 237 states:

> Evidence not led by inadvertence may be permitted to be called late, for the laxity of Counsel should not rebound to the detriment of his client, but not evidence which was deliberately not led at the correct time. Evidence may be led in late if no prejudice is caused to the party against whom it is tendered.

In the present case, it is disclosed from the reading of the proceedings of 22 February 2001 when the Plaintiff was facing cross-examination that the two documents, in an uncertified

form, were then in the possession of Learned Counsel for the Defendant. The two uncertified documents were put to the Plaintiff as witness and he exhibited no knowledge thereto. Accordingly, it is not surprising for Learned Counsel for the defence to have elected to await his own witness before seeking to produce copies of the documents of which he would then presumably be in possession of certified copies. The Land Registrar was duly summoned as witness. There was no compulsion to include the two documents in the precipe for summons where a party could otherwise had obtained possession certified copies and may well seek to produce them through the witness. Accordingly, I am satisfied that the Land Registrar was duly summoned.

It is certain that there had been several postponements due to the inability for certain documents to be physically brought to Court from the Land Registry and the Court embarked upon a compromise alternative to have copies of the document produced before this forum. I am satisfied that in the process, Learned Counsel inadvertently omitted to seek to produce documents which he had already put to the Plaintiff at an earlier stage of the proceedings and were, then, denied by the said witness. I am further satisfied that no prejudice is hereby caused to the Plaintiff. Accordingly, I grant leave for the Defendant to re-open their case for the purpose of seeking to produce in evidence the two documents attached to the notice of motion.

Record: Civil Side No 220 of 1999

Domingue v Landry

Joint investment in house – oral evidence

The Plaintiff claimed damages resulting from an agreement with the Defendant to jointly invest towards the construction of a house. The Plaintiff sought to adduce oral evidence in support of the agreement between the parties. The Defendant objected submitting that under Article 1341 of the Civil Code oral evidence is not admissible. The parties had been living together when the agreement was made.

HELD:

A special relationship existed between the parties, therefore it was not possible for a loan agreement between the parties to be reduced to writing.

Judgment objection overruled.

Legislation cited
Civil Code, arts 1341, 1348

Cases referred to
Vidot v Padayachy (1990) SLR 279

Danny LUCAS for the Plaintiff
Jacques HODOUL for the Defendant

Ruling on admissibility of oral evidence delivered on 31 January 2003 by:

JUDDOO J: The Plaintiff claims from the Defendant loss and damages pertaining to an agreement whereby the parties jointly invested towards the construction of a dwelling house.

The Plaintiff seeks to adduce oral evidence in support of the agreement between the parties. On behalf of the Defendant, objection has been raised thereto under Article 1341 of the Civil Code of Seychelles which prohibits the admissibility of oral evidence of an agreement where the subject matter exceeds R5,000.

It admitted in the present case that both parties have lived in concubinage from 1994 until 4 January 2001 and that they have a child from their relationship born on 29 March 1995. The agreement between the parties was within the period they cohabited together.

Under Article 1348 of the Civil Code of Seychelles, the rules under Article 1341 are inapplicable whenever it is not possible for the creditor to obtain written proof of an obligation towards him. On the basis of case law, the principle of impossibility to secure written proof has been extended to moral impossibility. In *Vidot v Padayachy* 1990 SLR 279 this Court stated (Alleear.J as he then was):

> Jurisprudence has extended the principle of impossibility to secure written proof to moral impossibility. Such moral impossibility may arise from the relationship between the parties: eg
> (a) Family relationship, husband and wife, parent and child, brothers and sisters.
> (b) Ties of affection.
> (c) Relationship as friends.
> (d) Relationship of trust between master and servant.

Proceeding from the above premise, the Court was satisfied that a special relationship existed between the Defendant and the Plaintiff who was the common law wife of the Defendant's brother. The Court held that it was not possible for a loan agreement between the parties to be reduced in writing and

allowed oral evidence in support thereof.

On the facts of the present case, the parties lived together as husband and wife as from 1994 and even had a child in 1995. They lived intimately until January 2001. During the time they lived together, it is averred that they had reached agreement as to the construction of a dwelling house. In the circumstances of the case, I find their relationship to be so intimate and close that it prevented the Plaintiff from obtaining written proof of the transaction. Accordingly, the objection is set aside and the Plaintiff is allowed to adduce oral evidence in support of the transaction.

Record: Civil Side No 204 of 2001

Albuisson v Fryars

Contract – liability to renovate – counterclaim

The Plaintiff claimed damages resulting from the Defendant's breaches of contract for failing to renovate and equip a take-away shop before handing it over to the Plaintiff's management. The Plaintiff also claimed that the Defendant prevented him from operating the shop and retaining possession of the Plaintiff's goods and possessions on the premises. The Defendant resisted the claim and filed a counter-claim which is disputed. The Plaintiff admitted that the agreement with the Defendant did not include any clause making the Defendant liable to renovate or equip the premises before handing over, but submitted that such a term ought to be implied. The Plaintiff claimed a total of R104,742.5 (Value of equipment R35,000; loss of revenue from use of equipment R10,000; loss of provisions purchased R2,000; penalties suffered by and charges levied as a result of breach R7,742.50; moral damages R50,000).

HELD:

(i) The Court will be prepared to imply a term if there arises from the language of the contract itself and the circumstances under which it is entered into, an irresistible inference that the parties must have intended the term in question;

(ii) A term is also implied if it is necessary to give efficacy to the contract. The Court will not imply a term merely because it would be reasonable to do so; and

(iii) The major renovations and repairs that were in question could not be implied under

existing terms of the contract. They went beyond the management agreement and would need to be specifically agreed to by the parties;

Judgment: No case to answer on liability for renovations. Total damages awarded R56,742.50 (value of equipment R35,000; loss of revenue for a reasonable period until the end of the month had the Plaintiff been properly notified R7,000; penalties for charges R7,742.50; moral damages taking into account the forceful and abrupt manner in which the Plaintiff was compelled to leave the premises R7,000). Counterclaim by Defendant dismissed.

Cases referred to
Storey v Storey SCA 63/1961

Foreign cases noted
Adams v A [1892] 1 Ch 369
Anon v Bobett 22 QB 548
Bow Maclachlan & Co v The Camosun [1909] AC 597
Stumore v Campbell & Co [1892] 1 QB 314
Trollope & Colls Ltd v NW Metropolitan Regional Hospital Board [1973] 2 All ER 260
Williams v Agius [1914] AC 510
Yuill v Yuill [1945] 1 All ER 183

Conrad LABLACHE for the Plaintiff
Frank ELIZABETH for the Defendant

Judgment delivered 25 July 2003 by:

JUDDOO J: The Plaintiff claims for loss and damages resulting from the Defendant's breaches of contract in failing to renovate and equip a take-away "Sandy's Take-Away" before handing it over to the Plaintiffs management. The Plaintiff also claims that the Defendant prevented him from

operating the said take-away as from 17 September 1998 and kept retention of the Plaintiffs goods and equipment on the premises. The Defendant resists the claim and has filed a counter-claim which is disputed.

The Plaintiff and his witnesses were called to give evidence in support of the plaint and in reply to the counterclaim. At the close of the Plaintiffs case, Learned Counsel appearing on behalf of the Defendant raise a submission of "no case to answer" and elected not to adduce further evidence.

A submission of "no case to answer" may be made either if no case has been established in law or the evidence led is so unsatisfactory or unreliable that the Court should hold without hearing the Defendant's evidence that the burden has not been discharged *Storey v Storey* (1961) P 63 CA and *Yuill vYuill* (1945). In pursuance thereof, I shall consider the Plaintiffs claim and the evidence adduced.

The Plaintiff's claim is twofold. Firstly, the Plaintiff alleges that there has been a breach of the terms of the contract when the Defendant failed to renovate and equip the Take-Away premises before handing over management to him. The agreement between the parties was drawn in writing as per exhibit P1. It is admitted by the Plaintiff that the said agreement does not include a clause whereby the Defendant was liable to renovate or equip the premises before handing over. It is the submission on behalf of the Plaintiff that such a term is to be implied.

The Court will be prepared to imply a term if there arises from the language of the contract itself, and the circumstances under which it is entered into, an irresistible inference that the parties must have intended the stipulation in question. A term is also implied if it is necessary, in the business sense, to give efficacy to the contract. However, the Court will not imply a term merely because it would be reasonable to do so. As

Lord Pearson stated in *Trollope & Colls Ltd v NW Metropolitan Hospital Board* (supra) at 267:

> The court will not … improve the contract which the parties have made for themselves, however desirable the improvement might be.

The evidence from the Plaintiff and his witness, Miss Louange, was that there were major renovation works being carried out including repairs to the roof, the plumbing system, put tiles on floor etc. It is also the case that the Plaintiff and the Defendant had shared in these expenses as it is admitted that the Defendant had retained contractors to do the job but thereafter left to proceed overseas before the works were finished. It is certain that such major renovation and repairs could not merely be implied under the existing terms of the contract, exhibit P1, by virtue of the fact that the business license was on the Defendant's name or by virtue of the nature of the business itself. They were matters which went beyond the management agreement and for which the parties need to have been specific and have agreed as to which any particular renovation or repair was needed and which party ought to bear the responsibility and cost thereof. Having failed to do so the Court is not at liberty to impose liability thereto by mere implication.

The second limb of the Plaintiffs claim pertained to the Defendant preventing the Plaintiff from operating the Take-Away business as from 17 September 1998 and keeping retaining possession of the Plaintiffs goods and equipment on the premises. In testimony, the Plaintiff relied on the list (annex 1) attached to its application for injunction filed in the course of the proceedings. In reply to the averment that the items were left behind at the Take-Away premises, the Defendant admitted that certain equipment were left behind but averred that part thereof were taken away by the Plaintiff (Vide affidavit dated 4 December 1998). It is certain from the

overwhelming evidence adduced by the Plaintiff and his witnesses that the Plaintiff was thrown out of the premises on no uncertain terms when the Defendant came to the premises on 17 September 1998 in the company of two Police Officers and sought his eviction.

Former Police Officer Samson who accompanied the Defendant to the premises was precise. In his words:

> He (Plaintiff) was working and shocked on the day when he saw Police Officers and the lady (Defendant) coming to remove him. At first he did not want to leave the premises as he was working, but after a while when he saw the Police Officers he agreed to leave the premises...... He was forced to leave the premises. There was an order and we assisted the lady to remove that person.

Another witness to the incident was Pascal Nanon. He was employed as a cleaner and helper by the Plaintiff at the material time. The witness confirmed that the Plaintiff was only allowed to walk out of the premises, barehanded. Pascal Nanon was then instructed by the Defendant to remain on the premises to keep watch of the "machine for roasting chicken, juice machine, meat, vegetables that Mr Albuisson had bought." He added that the Defendant operated the Take-Away for two nights thereafter to sell all the foodstuffs which had remained.

Taking account of the above, I find that there is overwhelming evidence in support of the averment that the Defendant had called to the premises on 17 September 1998 and forcefully removed the Plaintiff out of the premises in breach of their agreement. Had the Plaintiff been in breach of the payment of rent beforehand, it was open to the Defendant to proceed by service of a "mise en demeure" and seek a remedy before the appropriate forum.

For reasons given here above, I find that the submission of no case to answer succeeds on the first limb of the Plaintiffs claim pertaining to renovation and repair but fails to succeed on the second limb pertaining to the removal of the Plaintiff from the premises and retention of the equipment, utensils and foodstuffs in breach of the management agreement.
I shall now turn to the counterclaim. No evidence was adduced by the Defendant in support of the counterclaim. In *Supreme Court Practice* 1967 Vol 1 at 145, the author states:

> A counterclaim is substantially a cross-action: not merely a defence to the Plaintiff's claim. It must be of such a nature that the Court would have jurisdiction to entertain it as a separate action (*Bow Maclachlan & Co v The Camosun* (1909) AC 597: *Williams v Augius* (1914) AC 522) "A counterclaim is to be treated for all purposes for which Justice requires it to be so treated, as an independent action" (per Bowen C.J. *in Anon v Bobett* 22 QBDP 548). If after the Defendant has pleaded a counterclaim, the action of the Plaintiff is for any reason counterclaim may nevertheless be proceeded with. Thus, where the Plaintiff's claim was held to be frivolous, the Court still granted the Defendant "the relief prayed for in the counterclaim (*Adams v A* 45 Ch. D. 426 (1892) 1 Ch 369. In short for all purposes except those of execution, a claim and a counterclaim are two independent actions (per id Esher MR in *Stumore v Campbell & Co* (1892) 1 QB 314).

The averments in the counterclaim are denied by the Plaintiff in the pleadings by way of the "defence to counterclaim" filed. The admissions, if any made by the Plaintiff in his testimony were mostly qualified admissions to be viewed in the light of the evidence to be adduced by the counterclaimant. Accordingly, I find that the failure to adduce evidence on

behalf of the counterclaimant to be fatal to the substance of the counterclaim. In the result, the counterclaim is dismissed with costs and I shall now turn to the award of damages under the plaint.

The Plaintiff claims as follows:

-	Value of equipment	R35,000
-	Loss of revenue from use of equipment at R500 per day	R10,000
-	Loss of provisions purchased	R2,000
-	Penalties suffered by and charges levied as a result of breach	R7,742.50
-	Moral damages	R50,000

I find it just and reasonable to award the sums as follows:

(i)	the value of the equipment in full	R35,000
(ii)	the loss of revenue for a reasonable period until the end of the month had the Plaintiff been properly notified (R500 x 14 days).	R7,000
(iii)	Penalties for charges	R7,742.50
(iv)	moral damages taking into account the forceful and abrupt manner in which the Plaintiff was compelled to leave the premises	R7,000.00
		R56,742.50

the whole with costs.

Record: Civil Side No 304 of 1998

Republic v Simeon

Penal Code - two murder charges – automatism

The Accused killed his partner and mother. The Accused claimed he did not have the mens rea to commit murder. It was found that the two victims died because of the acts of assault and battery committed by the Accused. The Accused submitted that there was sufficient evidence to raise a reasonable doubt as to the wilfulness of the acts. The defence of automatism was raised.

HELD:

(i) The injury to the victims was caused because of acts of the accused; and

(ii) The evidence adduced proved beyond reasonable doubt that the accused acted consciously, voluntarily and deliberately.

Judgment Accused is convicted on two counts of manslaughter.

Legislation cited
Criminal Procedure Code, s 251
Penal Code, s 192

Cases referred to
F Simeon v R SCA 7/2001
Simeon v A-G CA 26/2002

Foreign cases noted
Bennett and Augustus John v R (2001) UKPC
Connelly v DPP [1964] AC 1254
DPP v Joomun (1983) MR 63
R v Greenwood (1857) 7 Cox CC 404

R v MacAlly (1611) 9 Co Rep 61

Anthony FERNANDO together with Laura VALABHJI for the Republic
Annette GEORGES together with Conrad LABLACHE for the Accused

Judgment delivered on 10 November 2003 by:

JUDDOO J: The accused stands charged with two counts of manslaughter contrary to Section 192 of the Penal Code (Cap 158). He has denied the charges and is represented by Counsel.

The particulars of the offences are that on 9 October 2000 the accused unlawfully killed Marie Celine Jacqueline Pamela Pouponneau (Pamela Pouponneau) and in the course of the same transaction unlawfully killed Greta Simeon (Greta). The accused is a duly qualified Attorney at law and the two victims were his partner, with whom he had been cohabiting, and his mother.

Under Section 192 of the Penal Code, "any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed "manslaughter"." In general terms, manslaughter is the unlawful killing without intent to kill or cause grievous bodily harm: *R v Taylor* (1834) 2 Law 215. The killing is manslaughter if it is the result of the accused's unlawful act or omission which all sober and reasonable person would inevitably realise must subject the victim to the risk of some degree of harm resulting therefrom) albeit not serious harm, whether the accused realised this or not: *R v Quatre* Criminal Side No. 11 of 1992 - unreported Judgment 25/01/93.

In *Archbold* (2002 ed) at para 19-99, the author summarises the law pertaining to an "unlawful act" manslaughter as

follows:

> In respect of manslaughter arising from the unlawful act of the accused, the following propositions appear to be established:
>
> (a) the killing must be the result of the accused unlawful act;
>
> (b) the unlawful act must be one, such as an assault, which all sober and reasonable person would inevitably realise must subject the victim to, at least, the risk of some harm resulting therefrom, albeit not serious harm;
>
> (c) harm means physical harm.

Pertaining to the mens rea, the author further states at paragraph 19-105:

> Mens rea is essential to manslaughter, but it is limited to the mens rea appropriate to the unlawful act: *R v Lamb* (1967) 2 QB 981 ... *R v Lowe* (1973) QB 702 ... Accordingly, it is unnecessary to prove that the accused knew that the act was unlawful or dangerous: *DPP v Newbury* (1977) AC 500 H.
>
> The test to be applied was stated in *R v Church* (1966) 1 QB 59... (CA approved in DPP v Newbury, at p510):
>
> > ... an unlawful act causing the death of another cannot, simply because it is an unlawful act, render a manslaughter verdict

> inevitable. For such a verdict inexorably to follow, the unlawful act must be such as all sober and reasonable people would inevitably recognise must subject the other person to, at least, the risk of some harm, albeit not serious harm."

In the present case, the prosecution relies upon the "intentional and wilful acts" of stabbing committed by the accused and resulting in the death of the two victims. The burden is on the prosecution to satisfy the Court, beyond reasonable doubt that the accused committed the said acts of stabbing and that the accused "intentionally and "wilfully" committed the said acts.

The following facts are not in dispute. On 9 October 2000, at about 9.45 pm, the dead bodies of the two victims were brought to the Casualty Department at Victoria Hospital and examined by Dr Commettant, Senior Medical Officer. In his report pertaining to Pamela Pouponneau, exhibit P, it is observed that there was a:

> large laceration about 8-10 cms on the left side precodial area part of ribs and sternum transected. Absent cardiovascular activities (zero pulse and blood pressure).

Other lacerations on her body included:

> laceration left arm - 3 cms long, 10 cms laceration medical aspect left elbow, 4 cms laceration inferior to the left breast, left posterior chest wall - 12 cms laceration, middle thoracic area posteriously - 6 cms laceration. There was also a kitchen knife embedded medical

aspect (upper) right thigh lateral to the labia majora.

The person was certified dead. In his testimony Dr Commettant confirmed that the victim Pamela Pouponneau, was about 30 -35 years old, had received seven blows with a knife with extensive force of which the laceration to the heart was fatal.

In his report pertaining to Greta Simeon, exhibit PI 3, Dr Commettant observed that there was "a 8 cms 'V' shaped laceration over the right frontal skull area with exposure of bone. A deep 8 cms laceration on the left side of the neck in the supraclavicular area" and the person was certified dead. In his testimony Dr Commettant confirmed that the cause of death of Greta Simeon was the fatal injury inflicted to her neck.

What happened on the fateful day of 9th October 2000 was related to Court by two eye witnesses, Gisele Charlotte (formely Sinon) and Trevor Pouponneau. Gisele Charlotte gave evidence that she was living at the material time at Bassin Bleu, Mahe, in the house of Greta Simeon, mother of the accused. The accused was at times living with her mother in Mahe, or else, he also lived in a house on Praslin. The accused was cohabiting with Pamela Pouponneau for some years and they had two children: Tania, a daughter and Kurt, a son. Pamela Pouponneau had children of her own including a son Trevor and a daughter Tracy.

On 9 October 2000, Gisele Charlotte left the house at Basin Bleu to go to work. Returning home, at about 4.00 p.m. she noticed several persons at the house including "Pamela, Kurt, Trevor, Tania, Patrick, Carlos, Annette, Franky, Christopher".

In her own words:

> What I recall is that when I arrived there everybody was there. Franky was sitting down. He was completely different. We all sit down and we all tried to help him in the way that we could and he was not well. He said himself he was not well and he asked us to pray for him. I was outside and Tania was in my arms when I heard him call Pamela for the first time. I heard a cry. For the first time I hesitated but then I ran inside. I do not remember with whom I left Tania. When I went inside, I saw them trying to pin Franky down and I saw Pamela running in the bedroom. There was a knife in her back and I removed the knife. After I remove the knife from her back, she turned towards me and she looked in my face and I could see the look of fright in her face. I told her to run away. I ran after her and when I got to the veranda I fell down. The accused jumped over me and ran after her and I cried out. I got up and ran after them and I saw the accused stabbing Pamela and Pamela fell down. When Pamela fell down the accused was a bit fainted or weak. I took the opportunity and shake him. I said "Franky, you are my brother and I love you". After I told him that, he stabbed me on the forehead. After that my aunty crossed before me and took hold of Franky. And the last thing I recall her saying "what have you done to my son". After that I ran away. When I turned back I saw the accused stabbing Pamela.

Under cross-examination, the witness agreed that the accused "was not himself that day. He was asking the whole family to pray for him." He had also asked that they all remove their jewellery and do not wear the colour red (except for her mother). The witness explained that when she came

home that evening all the mirrors and the television set had been covered. Her aunty Greta Simeon, had placed two knives criss-cross on the floor and the accused had been given a herbal bath. The witness added that at the time she had approached the accused and talked to him, the latter was not "registering (what she was telling him)". In her own words "because after Pamela had fell down, Franky was dazed. He was weak and I seized this opportunity and shook him up and I repeated those words (Franky do not do this my brother I love you). I do not think he registered because it was at that time that he stabbed me. The witness agreed that at a party, earlier to the 9 October 2000, the accused had made a speech that he was giving up his own practice and was supported by Raymond. Both Pamela Pouponneau and Greta Simeon were against such a prospect.

Trevor Pouponneau gave evidence that on 9 October 2000, he came over to Mahe from Praslin together with his mother Pamela Pouponneau and the children: Tracey, Tania and Kurt. They had travelled by boat and reached Mahe at about 11.00 a.m. Reaching Mahe, they proceeded to the house of Greta Simeon at Bassin Bleu. There, they met with Greta Simeon, Gisele Charlotte and the accused. Later, in the evening whilst Trevor Pouponneau was outside the house in the yard, he heard the accused calling his mother. In his own words:

Q. When you were outside did anything happen? Where was your mother at the time?
A. Somewhere in the kitchen and I heard Franky calling my mother.
Q. You heard Franky calling your mother, then what happened, did your mother go to Franky?
A. The first time he called her, she did not go.
Q. Thereafter, what happened?
A. He called her again, still she did not go.
Q. He called a second time your mother did not go,

then what happened?

A. Franky told her if she was running to Tony.

Q. Was it the first time you heard Franky mention the name of Tony?

A. No.

Q. He had mentioned about one Tony on any occasion?

A. When we were on Praslin the day before.

Q. Did your mother reply him?

A. I do not know.

Q. So on the day, the evening of the incident when Franky told your mother if she was running to Tony what happened thereafter?

A. Franky came and dragged my mother, he was naked. He pulled her into the room and I saw my mother coming out of the room.

Q. Where did she come to?

A. Near the kitchen.

Q. When you say Franky pulled her into the room, which room are you referring to?

A. To his room.

Q. She came out then what happened?

A. Franky came again and grabbed her and take her to his room.

Q. What happened thereafter?

A. I went to Franky's room.

Q. Did you go inside the room?

A. Near the door.

Q. What did you see?

A. I saw Franky taking my mother's clothes off and forcing himself to my mother, trying to have sex with her.

Q. What happened thereafter?

A. I remember my mother coming out of the backdoor of the room and to the yard.

Q. Where was Franky?

A. I cannot remember where he was but when I

followed my mother he was there with my mother.

Q. What did you see what happened?

A. I saw my mother lying on the ground and Franky was on top of her and I remember I pushed Franky on the ground.

Q. Why did you push Franky to the ground?

A. He was holding my mother down and then I see his hand doing like this for about three times (witness demonstrates with his hand up and down) and this is why I pushed Franky on the ground then he turned against me and I ran down some steps.

Q. Where did you go to?

A. I ran, I followed the road I did not know where I was going, I continued following the road and I met Christophe, Gisele and my sister then we ran until we reached near a house........

Q. When you saw your other running out of that room was she wearing anything?

A. No, she was naked........."

Under cross-examination, Trevor Pouponneau agreed that on or about 4 October 2000, the accused with one Raymond De Silva came to Praslin where the witness and her mother were staying. The next day, 5 October 2000, the accused and Raymond left Praslin for La Digue. On Friday 6 October 2000, the witness accompanied by Pamela Pouponneau, Tania, Kurt and Tracy joined them at La Digue. The accused spend time with Raymond. In the afternoon of Saturday 7 October they all went to watch a football match.

During the football match, the accused was reading a children's book. After the football match, the accused was not acting "normally" and had requested that others join him in picking up trash from the football pitch. Later in the evening, the accused returned to the residence in La Digue. He had a

small prayer book, had gone into a bedroom, locked himself inside, and did not talk to anyone. Raymond De Silva came back and helped to prepare the dinner. After the dinner, the accused came out, sat in an armchair with his prayer book and started crying. Pamela Pouponneau asked from Raymond De Silva what was happening to the accused to which the latter replied "do not ask me anything what is happening to Franky".

The next day, Sunday 8th October 2000, they all returned to Praslin. However, the accused and Raymond travelled separately from the rest. In the afternoon, when the witness reached Praslin he met the accused and Raymond De Silva walking on the road going towards their house. When the witness reached their residence, he noticed other persons present including "Dave Appasamy, Patrick Henriette, Champa....." At about 6.00 p.m, Raymond had left after handing over a shirt to the accused. That evening, the accused started to act strangely and, at a certain moment, the witness found him naked in the yard. Pamela Pouponneau asked that "Dave" fetched Raymond De Silva. The latter came, fetched a white book from a neighbouring house under construction, and went towards the beach. He removed his shirt and then went off.

The accused was brought to his bed and later in the night he woke up and wanted to know what had happened to him. In the early hours of the next morning, Raymond De Silva returned back with a white book in his hand and the accused told him "to go away from my place you know what you have done with me and I do not want to see you again". Thereupon, Raymond De Silva turned his back and went away with the white book in his hand. Trevor Pouponneau also agreed towards the end of September 2000 there was a party held at Bassin Bleu and attended by Raymond De Silva amongst others. At the party the accused had made known his intention of giving up his law practice.

Returning to the 9 October 2000, Trevor Pouponneau explained that the accused was not the "normal Franky". He had requested that people not to wear clothes that have designs, to cover objects that made reflections (mirrors, television set, clocks etc), and to remove all items of jewellery. The accused was given an infusion to drink as well as a herbal bath. The witness agreed that two knives were placed criss-cross on the floor leading to the kitchen. Lastly, the witness maintained that he saw the accused forcing Pamela Pouponneau to have sex with him.

Detective Inspector Sylvia Chetty, Scientific Support Unit Officer, gave evidence that on 9 October 2000 at 9.50 pm., she reported to the locus at Bassin Bleu. She picked up a stainless steel knife, which had a blade of about 7 inches long (exhibit P2), outside the house near a bedroom. She took photographs outside of the house (exhibit P8) and sealed the house before leaving. The next morning the witness returned to the site to take further photographs outside and inside the house. She picked up a light green blouse (exhibit P3a), a light green skirt (exhibit P3b), a belt (exhibit P3c), a sanitary pad (exhibit P4) and a torn knickers' (exhibit P6). She also recovered a pink coloured bra with lace on the iron board in the bedroom (exhibit P7). She went to the mortuary and took the photographs of the two victims. She had also been handed a second knife removed from the body of Pamela Pouponneau (exhibit P9). Under cross-examination, the witness agreed that when she first arrived at the house of Greta Simeon, there were no lights shining inside or outside the house. On the next morning when she had entered the house, she noticed torn electrical wiring in the ceiling of the bedroom and the dining room and there was a broken bulb lying in the premises.

It is the premise of the defence that the accused, at the material time, had acted in a state of automatism. In that

respect, it is submitted that the accused has no recollection of the alleged acts and the said acts occurred independently of the will of the accused as a result of "manipulation by a 3rd party", namely Raymond De Silva.

The accused elected to make an unsworn statement from the dock, as was his right. On behalf of the defence no further evidence was adduced. It is on record that one "Fr. Gerald 'O' Shaw Tssf", whom the Defendant intended to call as his expert witness, informed Learned Counsel for the defence, by a message dated 29 September 2003, that "I am sorry but, as much as I wish to be present to testify on behalf of Franky, the pressures of my diary and various personal matters will not allow me to participate at his forthcoming trial. If I can be of help at distance please make contact". Learned Counsel for the accused states that her unequivocal interpretation to the message received is that the said witness who resides overseas "cannot come, will not come and will never come to attend Court in the present case". No postponement of the hearing was sought on behalf of the defence for the purpose of attempting to convince the witness to attend Court when the "pressures of his diary" and his "personal matters" would have been more accommodating nor any postponement sought to adduce other evidence. It is also on record that on record that no postponement had been sought for the purpose of calling D/ASP Banane as a defence witness. It is conceded by the defence that "given that we have been informed of how sick Inspector Banane is, I think and I believe and my client has confirmed that it would not be human to even force him to come to Court to depone......."

The right of the accused to make an unsworn statement from the dock is preserved by section 251 of the Criminal Procedure Code. The evidential value of an unsworn statement by the accused is as follows (vide: *Archbold* (41 ed) para 4-400:

> Where a Defendant makes an unsworn statement from the dock, the Judge need not read out the statement to the jury, but he should remind them of it and tell them that though it is not sworn evidence which can be the subject matter of cross examination, nevertheless they can attach to it such weight as they think fit and should take it into consideration in deciding whether the prosecution has proved their case. Such a statement is certainly, more than mere comment, and in so far as it is stating facts, it is clearly something more and different from comments in Counsel's speeches: *R v Frost and Hale* (1964) 48 Cr. App. R. 284.
>
> What is said in such a statement is not to be altogether brushed aside, but its potential effect is persuasive rather than evidential. It cannot prove facts not otherwise proved by the evidence but it might show the evidence in a different light. The jury should be invited to consider the statement in relation to the evidence as a whole. It perhaps is unnecessary to tell them whether it is evidence in the strict sense but it is right to tell them that a statement not sworn to, and not tested by cross-examination, has less cogency than sworn evidence *R v Coughan (Joseph)* (1977) 64 Cr. App. R 11 at..."

The first determination is whether the accused committed the alleged acts of assault and battery which led to the death of each of the victim. There is no challenge to the testimony of Dr Commettant to the effect that Pamela Pouponneau died as a result of receiving blows with a knife with extensive force as a result of which the laceration to the heart proved to be fatal. There is equally no challenge to the testimony of the said witness that Greta Simeon died as a result of a deep 'V"

shape laceration of 8 cms on the left side of her neck which was fatal. The testimony from Gisele Sinon and Trevor Pouponneau establishes that the accused dealt several blows to Pamela Pouponneau with a knife and that Gisele had removed a knife from the back of the said Pamela during the struggle. Accordingly, the evidence sufficiently established that Pamela Pouponneau died as a result of injuries inflicted by the accused with two knives.

The circumstantial evidence, namely the fact that the accused was acting violently with the knives in his possession, chased Pamela Pouponneau with the knife, struck Pamela several times with the knife, and that Greta Charlotte, as did Trevor Pouponneau, attempted to interfere, inevitably, point to the fact that Greta Simeon had attempted to stop the accused and was dealt the fatal blow by the accused in the process. It is also disclosed, by photographs 60, 61, and 62, that the Greta Simeon had cut injuries to the palm other hand and laceration to her finger which indicates that she had attempted either to protect Pamela Pouponneau or received those injuries whilst attempting to protect herself from the accused. Lastly, the nature and extent of the injury received by Greta Simeon to her neck, as disclosed in the medical report and the photographs 57 and 58, excludes the possibility that the injury could have been self-inflicted. Taken as a whole, the circumstantial evidence firmly establishes, beyond a reasonable doubt, that the death of Greta Simeon resulted from injuries received as a result of a fatal blow from a knife dealt to her by the accused.

The second determination is whether, at the material time he committed the acts the accused had acted "intentionally and wilfully".

Learned Counsel, for the accused, drew attention to the following:

(i) The testimony of Gisele Charlette that on the evening of 9 October 2000 before the incident, the accused was seen not to be himself, had said that he was not well and asked persons around to pray for him, was "completely different, after having stabbed Pamela was "a bit fainted or weak", did not "register" what the Gisele Sinon told him when the accused dealt her a strike with the knife and injured her at the forehead.

(ii) The testimony of Trevor Pouponneau that on 9 October 2000 the accused was not "the normal Franky", the prior behaviour of the accused on Saturday 7 October 2000 when he had carried a children book to read at the football match, had called upon all of them to pick up trash from the field, had closed himself into one room, thereafter sat in an armchair and started crying, the prior behavior of the accused on the 8 October 2000 when he was handed a shirt by Raymond De Silva and the accused started to act strangely and was later found naked in the yard and wanted to know what had happened to him.

(iii) The version of both Gisele Sinon and Trevor Pouponneau as to the friendship between the accused and Raymond De Silva, that the accused had stated he wanted to abandon law practice at a birthday party at the end of September, that on the fateful day the accused had requested that red clothing, design and jewellery be removed and the reflective

objects be covered; he had a herbal bath and wore a white shirt.

(iv) The presumed behaviour of the accused in pulling down the electrical wires and remaining 'naked' until the arrival of the police.

(v) The unsworn version of the dock statement made by the accused

Taking all the above into account, it is submitted that there is sufficient evidence to raise a reasonable doubt as to the "wilfulness" of the alleged acts and as to whether the accused had the necessary mens rea. The submission is premised on the defence of automatism raised. There is academic dispute as to whether "willfulness" forms part of the actus reus or the mens rea (vide *Smith & Hogan*, 9th ed, 37). Suffice it is to state that where the issue of automatism is raised, it brings forth the"mental irresponsibility" of the accused for the alleged acts. Quoting from Devlin J in *Hill v Baxter* [1958] 1 QB 277 at 285:

> For the purposes of criminal law there are two categories of mental irresponsibility, one where the disorder is due to disease and the other where it is not. The distinction is not an arbitrary one. If the disease is not the cause, if there is some temporary loss of consciousness arising accidentally, it is reasonable to hope that it will not be repeated again and that it is safe to let an acquitted man go entirely free. But if disease is present, the same thing may happen again, and therefore, since 1800, the law has provided that persons acquitted on this ground should be subject to restraint.

In the present case, there is no challenge to the legal presumption of sanity arising under Section 12 of the Penal Code. The issue is as to whether the accused, being of sound mind, was nevertheless "mentally irresponsible" for the acts committed. This is commonly referred to as the defence of "non-insane automatism".

In *Archbold* (2002 ed) para 17-5 and 17-6 the author states:

> The so-called defences of insanity, automatism, drunkenness and duress... are developments of the doctrine of mens rea as applied to particular situations ... The act which the mens rea must accompany must be voluntary in the sense that it is the produce of the will of the Defendant.

Moreover, in *R v Shepperd* [1981] AC 394 HL, Lord Diplock giving explanation to the legal term "wilful" stated that:

> the physical act relied upon as constituting the offence must be wilful, for which the synonym in the field if criminal liability that has now become the common term of legal art is "voluntary".

In *F Simeon v R* CA 7 of 2001, the Seychelles Court of Appeal identified the basis and approach to be followed when a defence of non-insane automatism is raised, summarised as follows:

> 1. As a legal defence non-insane automatism flows directly from section 10 of our Penal Code which is couched in these terms:
>
> > 10. Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for an act or

omission which occurs independently of the exercise of his will, or for an event which occurs by accident (at 11).

2. For the defence to arise, it is cardinal that an act or omission occurs independently of the exercise of one's will, that is, where such act or omission is 'unwilled' or 'involuntary' (at 12).

3. The basis for the inference that an act done by an apparently conscious actor is willed or voluntary can be removed by evidence that the actor was not of sound mind, or was insane or was of sane mind but his act was unwilled when it was done ... this is in keeping with the basic motion of criminal law namely: that a person is responsible only for his conscious, voluntary and deliberate (or negligent) acts of omissions (at 13).

4. When an act is done by an apparently conscious actor, an inference that the act is willed must be drawn - not as a matter of law, but as a matter of fact - unless it can be shown that the actor, being of sound mind, has been deprived of the capacity to control his actions by some extraordinary event (at 14).

5. Where the defence of automatism is raised, premised on a malfunctioning of the mind of a transitory nature caused by the application to the body of some external factor, the use of descriptions

such as psychological manipulation, brainwashing, sleepwalking, personality disorder, dissociative state, hypoglycemia, physical trauma, et cetera, should not be allowed to obscure the fact that, in terms of section 10 of the Penal Code, the fundamental question is whether the act or omission in respect of which the accused has been charged occurred independently of the exercise of his will (ibid).

6. The issue for the Jury is one of fact: did the accused suffer from or experience the alleged condition at the material time. As the prosecution must always prove that an accused acted voluntarily, the onus rests upon it at this stage to prove the absence of automatism beyond a reasonable doubt (at 16).

7. A useful warning was sounded by Dickson J, in *Rabey* at 546: "There are undoubtedly policy considerations to be considered. Automatism as a defence is easily feigned. It is said that the credibility of our criminal justice system will be severely strained if a person who has committed a violent act is allowed an absolute acquittal on a plea of automatism arising from psychological blow."

And at 552:

In principle the defence of automatism should be available where there is evidence of unconsciousness

> throughout the commission of the crime that cannot be attributed to fault or negligence on his part. Such evidence should be interpreted by expert medical opinion that the accused did not feign memory loss and that there is no underlying pathological condition which points to disease requiring detention and treatment (emphasis furnished)" (at 17).

In the light of the above, the burden remains on the prosecution to satisfy the Court, beyond a reasonable doubt, that at the time he committed the alleged acts charged, the accused was in a conscious state, had acted voluntarily and deliberately.

Before proceeding further, I find it useful to refer to two following English cases. In *Bratty v A- G for Northern Ireland* (1961) 46 Cr App Rep 1, the appellant was travelling with a girl in a car. At a certain moment he broke a small bone in her neck and caused her death by taking one of her stockings and tying it tightly round her neck. The appellant was charged with murder. He attempted to plead the defence of automatism. No medical evidence was adduced which was at all directed to the question whether on the assumption that the appellant was sane he might yet for some reason have acted unconsciously. The non-medical evidence which was relied upon was the sworn testimony of the appellant himself and all the evidence as to his general behaviour and backwardness and his characteristics and all the evidence relating to the circumstances attending the death of the deceased. The House of Lords found that no proper foundation has been laid for the defence of automatism to have been said to arise.

In his speech, Lord Denning said at pages 16, 409, 413,

respectively:

> The requirement that it should be a voluntary act is essential, not only in a murder case, but also in every criminal case. No act is punishable if it is done involuntarily: and an involuntary act in this context - some people nowadays prefer to speak of it as automatism - means an act which is done by the muscles without any control of the mind, such as a spasm, a reflex action or a convulsion; or an act done by a person who is not conscious of what he is doing, such as an act done whilst suffering from concussion or whilst sleepwalking.
>
> The term involuntary act is, however, capable of wider connotations: and to prevent confusion it is to be observed that in the criminal law an act is not to be regarded as an involuntary act simply because the doer does not remember it. When a man is charged with dangerous driving, it is no defence to him to say "I don't" know what happened. I cannot remember a thing, see Hill v Baxter (1958) 42 Cr. App. R51. Loss of memory afterwards is never a defence in itself, so long as he was conscious at the time, see Russell v H. M. Advocate (1946) SC (R 37, Padok (1859) 39 Cr. App. R. 220. Nor is an act to be regarded as an involuntary act simply because the doer could not control his impulse to do it... In order to displace the presumption of mental capacity, the defence must give sufficient evidence from which it may reasonably be inferred that the act was involuntary. The evidence of the man himself will rarely be sufficient unless it is supported by medical evidence which points to the cause of the mental incapacity. It is not sufficient for a

> man to say “I had a ‘black-out” for black-out as Stable J. said in Copper v McKenna, ex p. Cooper (I960)) Qd LR 406 *“is one of the first refuge of a guilty conscience and a popular excuse.”*

In the determination as to whether the act was voluntary, the Court is to look at all the circumstances including the act itself. The approach taken in *R v Charlson* (1955) 39 Crim App R 37 is of interest. The accused invited his son to look out of a window at a rat in the river below and for no apparent reason, injured his son by hitting him on the head with a mallet and throwing him into the river. The defence was automatism supported by medical evidence. Barry J directed the jury in these words:

> The intention of the prisoner can, of course, only be inferred from the circumstances which have been proved before you. Neither you or I can ever look into the mind of an accused person and say, with positive certainty, what his intention was at any particular time. A jury is entitled to infer a man's intention from his acts ... in ordinary circumstances a man is presumed to intend the normal and usual consequences of his act. If a man consciously and deliberately strikes another person with a mallet of this kind, in ordinary circumstances any jury would feel entitled to say that it must have been intended to do some serious injury. You cannot hit a person on the head with a mallet, or strike him on the chest with a knife without the extreme probability that serious injury will occur, and, therefore, other circumstances being equal a jury is perfectly entitled to infer the intention from the mere act himself.

> However, that is not an inference which must always be drawn, and before it can be drawn, you should look at all the surrounding circumstances and ask yourselves whether that inference can be drawn in this particular case." (emphasis added).

In his unsworn version, the accused states that:

> after she had given me one of those herbal baths, I recall stepping over two knives to get to my room. I also recall asking my mother for my Court shirt. It was a long white sleeve shirt. I recall shortly after, the same feeling of an incredible force taking hold of me and fighting me. The same feeling I had on Sunday on Praslin. But this time my lord it was more powerful. I recall my hands rubbing those two knives in a feeling of being threatened. From that moment on I had no recollection of what happened.

The extent to which a Court can rely on the unsworn statement of an accused, which has not been subjected to cross-examination, has been canvassed earlier.

Examining the facts and circumstances, I find the extent of the injuries inflicted upon Pamela Pouponneau as per the testimony of Dr Commettant includes:

> on the chest there was a large laceration about 8 cms on the left heart area with part of the ribs and external transected ... other lacerations noted included a laceration on the left arm of the lateral side about 3 cms long. 10 cm laceration in the middle aspect of the left elbow, 4 cms laceration behind the chest wall and 6

> cm laceration in the middle area on the back. There was a knife embedded in the middle aspect of the upper right thigh of the vagina.

Pertaining to the fatal blow, Dr Commettant added:

> you can see from photograph 43, a deep laceration which has really cut the bone, the ribs and the middle bone. If we go to photograph 50 which shows the inside of the rib cage. If you put these two photographs 43 and 50 together you can see that the laceration in the photograph 43 and the injuries in photograph 50 which specifically shows the heart which has been transected.

The extensive nature of the fatal injury directed to the heart and the fact that the vagina area has been targeted do not support the basis for an automatic behaviour where the mind had no control over the limbs. The fatal wound to the heart had been inflicted with more violent force than to the other areas of the body since it "has really cut the bone" of the chest area. The injury to the vaginal area and the knife left embedded in that position, inexorably, has a sexual connotation.

There is no challenge to the testimony of Trevor Pouponneau that at the material time he "heard Franky calling my mother. The first time he called her she did not go. He called her again, still she did not go. Franky told her if she was running to Tony ... Franky came and dragged my mother, he was naked. He pulled her into the room (his room) and I saw my mother coming out of the room. Franky came again and grabbed her to take her to his room." This represents the sequence of events before the accused, as per his unsworn version, had caught hold of the two knives which had been laid down on the floor at the door leading to his room.

It is material that at this stage, the accused had already removed all his clothes. He was naked and called for Pamela Pouponneau to join him in his room. It is equally material that Pamela Pouponneau refused to join the accused in his room despite his call. The accused insisted once again and called her a second time. She still refused to join him to his room which prompted the remark as to whether she "was running to Tony". Not satisfied with the said refusal, the accused came to Pamela Pouponneau and exercising his 'natural' physical force' dragged her to his room. She still refused him, and came out of the room, to which the accused "grabbed" hold of her once again to bring her to his room.

Next to the clothes of Pamela Pouponneau lying in the bedroom was also found a pair of knickers (presumably belonging to her given that she was seen running naked shortly after). The pair of knickers was torn which indicates that some element of force was used to remove it. In his testimony, Trevor Poponneau states "I saw Franky taking my mother's clothes off and forcing himself to my mother trying to have sex with her". Although the latter part of the said sentence was challenged under cross-examination, the earlier part was unchallenged (namely that "Franky had removed my mother's clothes.)". Accordingly, any element of force to remove the pair of knickers would emanate from the accused.

The testimony of Trevor Pouponneau that he had seen the accused "forcing himself to my mother to have sex" stands alone. The version was challenged under cross-examination. Reference is made to the fact that the witness had failed to make mention, thereof, in his statement given to the police days after the incident. In his sworn testimony, the witness maintained that he saw Franky "forcing" his mother to have sex with him. This is the second occasion that Trevor Poponneau is being called upon to stand in the witness box and relate to Court the events on the fateful evening leading

to the death of her mother and Greta Simeon. It is by no doubt a painful and difficult experience for the witness. However, I have to admit that Trevor Pouponneau strikes me as a person of great courage and integrity. He is endowed with an unfettered sense of truth. I find, beyond reasonable doubt, that he speaks the truth when he gave material evidence in Court.

The above form the basis of events immediately before Pamela Poponneau would next be heard to utter a cry (no doubt a loud one as it was heard by Gisele Charlette who was outside the house) and she would be seen running in the bedroom, naked, with a knife struck 'planted' in her back and “the look affright in her face.” At the time she entered the bedroom Gisele Charlette testified that she saw “them trying to pin Franky down”. There is no evidence at this stage that the accused was not in a conscious state or acting like an ‘automaton’. In actual fact, the accused was resisting every effort by others to interfere between himself and Pamela Pouponneau. He did not strike anyone that came before him haphazardly or ‘mechanically’ but was rather ‘hot on the heels’ giving the chase to Pamela Pouponneau. When the accused managed to liberate himself from others, attempting to pin him down, he ran after Pamela Pouponneau who had then gone outside the house. He 'jumped' over Gisele Charlette, who had fallen down, to catch up with his victim. He caught up with Pamela Pouponneau dealt her several blows with the knife. Trevor attempted to intervene and pushed the accused to which the latter *'turned against me*' and he had to fled. Gisele Charlette tried to talk to the accused but was dealt a blow to her forehead. Greta Simeon tried to stop the masacre and suffered 'defensive injuries' to her hand, a blow to her head and a fatal blow to her neck.

I have carefully examined the unsworn version of the accused, the last statement by Greta Simeon on the fateful evening (what have you done to my son), the events leading

to the 9 October 2000, the testimony that the accused was 'not the normal Franky' weak, 'dazed' and 'not registering' and the submission made by learned Counsel for the defence (referred earlier). I find that the evidence adduced by the prosecution satisfies this Court, beyond a reasonable doubt, that at the time he committed the acts of assault and stabbing upon Pamela Poponneau and Greta Simeon, leading to their death, the accused acted consciously, voluntarily and deliberately. I do not find the behaviour of the accused, after the incident, that he pulled the electric wires and caused the house to fall into darkness to be indicative of an 'automatic behaviour'. It confirms that the accused continued on his violent course including at the moment of the arrest of the accused which occurred at a substantial time after the incident of stabbing of Pamela Pouponneau and Greta Simeon (past 6.00 pm until 1947 hours when Sergeant Bell arrives). That the accused had remained naked until then is explained by the fact that there were no light which enabled him to search for his clothes inside the house.

In the end result, taking into account all the facts and circumstances, I find the accused guilty of the crime of manslaughter under Section 192 of the Penal Code, for having, on 9 October 2000, unlawfully killed Marie Celine Jacqueline Pamela Pouponneau and I convict him of the charge under Count 1.

I further find the accused guilty of the crime of manslaughter under section 192 of the Penal Code for having, on the 9th October 2000, in the course of the same transaction unlawfully killed Greta Simeon and I convict him of the charge under Count 2.

Record: Criminal Side No 9 of 2000

Republic v Simeon

Murder charge – manslaughter conviction – re-hearing – constitutional – due process – role of trial court

The Appellant was charged with two counts of murder. He was convicted of manslaughter. The Appellant then appealed against conviction. The Court of Appeal held that there had been a serious miscarriage of justice, and ordered a re-hearing on both counts of manslaughter. The Appellant petitioned the Constitutional Court on the grounds that the proceedings against him contravened section 192 of the Penal Code and were likely to contravene article 19 of the Seychelles Charter of Fundamental Human Rights and Freedoms. The Constitutional Court held that this petition should be heard before the trial Court. The Appellant then appealed to the Court of Appeal on the grounds that the Constitutional Court erred in not making a specific finding in relation to the petition. The Court of Appeal held that the trial process was flawed due to the inability of the accused to adduce the correct evidence and as a consequence the trial Court had misdirected itself.

The appellant now moves that the order for a re-hearing breached his constitutional rights.

HELD:

(i) The appellant was, on charges of murder, convicted of manslaughter. Because the murder charge resulted in a manslaughter conviction this does not mean that the appellant was acquitted. On this ground alone the plea of autrefois acquit fails;

(ii) The Court of Appeal order for a fresh trial was made under Article 19(5) of the

Constitution. Accordingly, proceedings on the order were made by a superior Court in the course of appeal proceedings and the plea of autrefois acquit cannot succeed;

(iii) The order made by the Court of Appeal for the re-trial cannot be challenged before this Court as the Appellant had specifically raised the issue before the Constitutional Court and the matter was fully and finally determined; and

(iv) When the appellate Court makes an order for a re-hearing, it cannot be said that the proceedings against the person charged have been brought to a conclusion.

Judgment: Motion set aside and re-hearing ordered on the two charges of manslaughter.

Legislation cited
Constitution of Seychelles, art 120
Seychelles Charter of Fundamental Human Rights and Freedoms, art 19
Criminal Procedure Code, ss 115, 324
Penal Code, ss 192, 193, 196, 196A
Court of Appeal Rules 1978, rr 41, 44

Cases referred to
R v Quatre Crim Side 11/1992
Simeon v R SCA 7/2001

Foreign cases noted
Bratty v A- G for Northern Ireland (1961) 46 Cr App Rep 1
Hill v Baxter [1958] 1 QB 277
R v Charlson (1955) 39 Crim App R 37
R v Taylor (1834) 2 Law 215

Anthony FERNANDO for the Republic
Bernard GEORGES for the Accused

Ruling delivered on 3 July 2003 by:

JUDDOO J: By the instant motion the Applicant seeks a declaration to the effect that "the institution of proceedings against the Applicant under Section 192 of the Penal Code:

(a) amounts to the Applicant being tried again, on the same facts, for an offence for which he had been acquitted, and

(b) contravenes and the continuation of the said proceedings is likely to contravene Section 115 of the Criminal Procedure Code as read with Article 19 and 19(5) of the Seychelles Charter of Fundamental Human Rights and Freedoms.

On 13 October 2000 the Applicant was charged with two counts of murder contrary to Section 1 93 of the Penal Code. Following his trial, the Jury returned a unanimous verdict "not guilty of murder, guilty of manslaughter" on each count. The Applicant was convicted of manslaughter on both counts and sentenced to concurrent terms of 15 years imprisonment. Following the Applicant's appeal against his conviction and sentence, *F Simeon v R*, CA 7 of 2001, the Seychelles Court to Appeal found that:

> a serious miscarriage of justice has occurred and that the conviction for manslaughter on both counts is unsafe and unsatisfactory and should be set aside...

In addition the Court of Appeal determined that:

> a re-hearing of the case is called for in the

> interests of fairness and the integrity of the criminal Justice system, especially since the merits of the appellant's defence of non-insane automatism was not properly dealt with during the trial process.

In pursuance of the above determination, the following order was made:

> (1) The appeal against the conviction for manslaughter on both counts is allowed and the said conviction is accordingly set aside. Consequently, the sentence falls away;
>
> (2) There shall be a re-hearing on the two counts of manslaughter and for the avoidance of doubt the appellant shall remain in custody pending his trial.

It is common ground that subsequent to the above-quoted judgment delivered by the Seychelles Court of Appeal, in April 2002, the Learned Attorney-General swore to an information charging the Applicant with two counts of manslaughter contrary to Section 192 of the Penal Code.

On 21 May 2002, on behalf of the Applicant, a petition was filed before the Constitutional Court of Seychelles seeking, inter-alia, under paragraph 3 of its prayer:

> a declaration that the institution of proceedings against him (the Applicant) under Section 192 of the Penal Code contravened, and the continuation of the said proceedings was likely to contravene Article 19 and 19(5) of the Seychelles Charter of Fundamental Human Rights and Freedoms.

In the examination of the said petition the Constitutional Court found that "prayer 3 based on Article 19(5) is a plea that my case be taken before the trial Court".

Being dissatisfied and aggrieved by the above decision, the Applicant filed an appeal before the Seychelles Court of Appeal, seeking, inter alia:

> 3. Having but partly considered the arguments placed before it in respect of the declaration sought under prayer 3 of the petition, the Constitutional Court erred in not making a specific finding to the effect that the institution of proceedings against the appellant under Section 192 of the Penal Code contravened, and he continuation of proceedings was likely to contravene Article 19 generally and specifically Article 19(5) of the Seychelles Charter of Fundamental Human Rights and Freedoms.

In its judgment, delivered on 9 April 2003, (*F Simeon v A-G* CA 26 of 2002) the Seychelles Court of Appeal stated:

> We re-iterate what we stated to Counsel of the appellant in Open Court, namely that the decision of the Seychelles Court of Appeal (Criminal Appeal no 7 of 2001) dealt eventually with two fundamental issues:
>
> (1) the whole trial process became flawed on account of the refusal of the trial Court to refuse the motion of the defence to adduce expert evidence on the question of non-insane automatism; and

(2) the trial Court misdirected itself on the issue of diminished responsibility, So that certain grounds of appeal, including the two grounds relied upon by the appellant in this case, became "unnecessary" for consideration, With regard to the third ground of appeal, we have again to observe that the appellant is once more questioning an order relating to fresh trial made by the Seychelles Court of Appeal...... The appellant cannot question this order of the Seychelles Court of Appeal made under Article 19(5] of the Constitution.....

Taking the above into account, the issue raised under the first limb of the motion is what is commonly known as the plea of "*autrefois acquit'*. The burden of proving "*autrefois acquit*" is on the Defendant vide *DPP v Joomun* (1983) MR 63. Learned Counsel for the Applicant referred this Court to the case of *Connelly v DPP* [1964] AC 1254, which in establishing out the scope of the plea "autrefois acquit", at common law, directed that a person may not be tried for a crime in respect of which he could in some previous indictment have been lawfully convicted as a statutory or common law alternative to the offence for which the Defendant was convicted or acquitted. It is undeniable that the common law principle, as set out under the plea of *"autrefois acquit",* has to take into account the statutory powers provided to a higher Court in its appellate jurisdiction. In that respect, it is pertinent to observe that ever in Archbold, *Criminal Pleading Evidence and Practice*, (43 ed) at paragraph 4 - 480, the author spells out that the common law principle set out in *DPP v Connelly,* supra, is subject to the express proviso which at the bottom of the said paragraph reads as follows:

The powers of the Court of Appeal (Criminal

> Division) under the Criminal Appeal Act 1968 S 3 (power to substitute conviction of alternative offence) and S 7 (power to order new trial) should be noticed in this context..........

In the local context, by virtue of Section 324 (1) of the Criminal Procedure Code, as amended by Act 14 of 1998, any person convicted, other than on a plea of guilty, is entitled to appeal against his sentence and conviction on a trial held by the Supreme Court. Where this is the case, Rule 41(1) of the Court of Appeal Rules 1978, as read with Article 120(4) of the Constitution, provides that the Seychelles Court of Appeal:

> may thereupon confirm, reverse or vary the decision of the trial Court, or may order a re-trial or may remit the matter with the opinion of the Court thereon to the trial Court, or may make such order in the matter as to it may seem just, and may by such order exercise any power which the trial Court might have exercised.........

The exercise of the appellate powers should be within the confines of Article 19(5) of the Constitution which provides that a person who has been tried by a competent Court for an offence and either convicted or acquitted, shall not be tried again:

> for that offence or any other offence of which the person could have been convicted at the trial save upon the order of a Superior Court in the course of appeal......proceedings relating to the conviction or acquittal.

On behalf of the Applicant it is contended that the Applicant having been "acquitted" of the offence of murder under Section 193 of the Penal Code also stands acquitted of the offence of manslaughter at common law following *Connelly v*

DPP, supra, and could not be re-tried for that offence.

Firstly, it is trite law that at common law on an indictment for murder, a person may be convicted of manslaughter, vide: *Mac Kelly's case* (1611) 9 CO Rep 61*, R v Greenwood* (1857) 7 Cox CC 404. An examination of the verdict delivered by the Jury disclose that they unanimously found the Applicant "not guilty of murder but guilty for manslaughter." They did not qualify their verdict further to state that they had found the Applicant guilty of manslaughter "by virtue of diminished responsibility" although this may be presumed to be so given the summing up of the Learned trial Judge. However, it is also of record that the conviction entered by the trial Court reads as follows:

> The accused was charged with the offence of murder on two counts. The jury unanimously convicted him of the offence of manslaughter contrary to Section 192 and punishable under Section 195 of the Penal Code on each Count.

By contrast a conviction for manslaughter by virtue of diminished responsibility proceeds under S 196A of the Penal Code and the sentence is delivered under Section 196A (3) of the said Code under which provision the trial Court is additionally empowered to order that the convict be detained during the President's pleasure. Accordingly, on the face of the record, the Applicant was convicted of manslaughter "contrary to Section 192" of the Penal Code. Having been so "convicted" it can hardly be said, without more, that the Applicant was "acquitted" thereof. On this ground alone the plea of "autrefois acquit" would fail.

I shall additionally consider the matter if one were to presume from the Learned Trial Judge's summing up that the Applicant had been found "not guilty of murder but guilty of manslaughter by virtue of diminished responsibility" and the

convictions entered by the trial Court amounted to convictions under Section 196 A of the Penal Code. Article 19(5) of the Constitution provides that a person tried and either convicted or acquitted shall not be tried again "for that offence or for any other offence of which the person could have been convicted at the trial for that offence, save upon the order of a Superior Court in the course of appeal or review". It is submitted on behalf of the Applicant that the appeal proceedings related to the conviction of the Applicant for manslaughter by virtue of diminished responsibility and that the Applicant could not be tried again for manslaughter, simpliciter, under Article 19(5) of the Constitution. What is relevant for the operation of Article 19(5) is that the appeal proceedings pertained to an indictment for the offence of two counts of murder on which indictment the Applicant could have at common law been convicted of the lesser offence of manslaughter on each count. In F. Simeon v. R CA 7 of 2001 the Seychelles Court of Appeal made an order in the course of appeal proceedings that for the Applicant to be tried again on two counts of manslaughter. The said order could not relate to manslaughter by diminished responsibility for the Appellate Court found that "both sides agree that, in the event of the Court allowing the appeal, a re-trial for manslaughter only may be ordered......" Had the Appellate Court intended the Applicant to be retried for murder and for which he could have, successfully or not, raised the issue of diminished responsibility in order to reduce the charge of murder to manslaughter it would have expressly said so. In *F Simeon v R* CA 26 of 2002, the Seychelles Court of Appeal held that the order for fresh trial was one made under Article 19(5) of the Constitution. Accordingly, I find that the instant proceedings is in pursuance of the order made by a Superior Court in the course of appeal proceedings and the plea of "autrefois acquit" cannot succeed.

I shall now consider paragraph (b)of the instant motion before this Court. The said motion repeats the claim brought before

the Constitutional Court (under paragraph 3 of the prayer to the petition) with the surplusage of Section 115 of the Criminal Procedure Code. In its judgment *F Simeon v AG* CA 26 of 2002, the Seychelles Court of Appeal expressed serious concern against the attempt to:

> rehearse the same arguments or adduce further arguments on a review of the merits of the decision of the Seychelles Court of Appeal which is, it should be underlined again, the highest Court, and the final Court of Appeal, of the lord.

Such a course of action it is observed would amount to "seriously compromising the fundamental principle of finality of judgment of the Seychelles Court of Appeal". In conformity with the above, the order made by the Seychelles Court of Appeal for the Applicant to stand trial (by way of re-hearing) for the two counts of manslaughter cannot be challenged before this forum in view of the fact that the Applicant has specifically raised the issue before the Constitutional Court and the matter was fully and finally determined when the Seychelles Court of Appeal held that:

> The Appellant cannot question this order of the Seychelles Court of Appeal made under Article 19(5) of the Constitution of Seychelles......In the light of the wording of Article 19(5) cited above, it cannot be seriously argued that this Court has no jurisdiction to order a new trial in the matter.

The remaining issue, therefore, will be an examination of the propriety, or otherwise, of the Learned Attorney General swearing to a fresh information on two counts of manslaughter.
It is certain that once a criminal charge has been preferred against an individual he is to be tried upon the information

until a final verdict is reached by the Competent Court. The Competent Court is empowered to decide the matter unless the complaint is sooner withdrawn under Section 178 of the Criminal Procedure Code or a *nolle prosequi* is filed under Section 61 of the said Code.

Where, after hearing and determination by the Competent Court, the convicted party challenges the conviction and sentence of the trial Court by way of an appeal to the highest Court the matter is to be conclusively determined by the decision of the Appellate Court. Accordingly, when the Appellate Court makes an order to the effect that there shall be a re-hearing, it can hardly be said that the proceedings against the person charged have been brought to a conclusion. The proceedings continue in compliance with the order from the Court of Appeal until it is brought to finality.

Learned Counsel on behalf of the Applicant has drawn attention to the case of *Bennett and Augustus John v R* (supra). Suffice it is to say that the powers and rules of the Appellate Court being largely statutory in nature it is to the local rules that one has to resort to in priority. Under Rule 44 of the Seychelles Court of Appeal Rules (1978), as read with Article 120(4) of the Constitution, it is provided as follows Article 120(4) Constitution:

> Subject to this Constitutional and any other law, the authority, jurisdiction and power of the Court of Appeal may be exercised as provided in the Rules of the Court of Appeal.

Rule 44 Seychelles Court of Appeal Rules (1978) unamended by S.I. 49 of 2000:

> (1) Whenever a criminal appeal or matter is decided, the judgment or order of the Court shall be embodied in a formal order

by the Registrar and a sealed copy of such order shall be sent by the Registrar to the Registrar of the Supreme Court......

(2) The trial Court shall thereupon make such orders as are comfortable to the order of the Court and if the record shall be amended in accordance therewith.

In pursuance of Rule 44(2) of the Seychelles Court of Appeal Rules, I find no contradiction in the decision of the Learned Attorney General to swear in to two counts of manslaughter against the Applicant. Accordingly, I adopt the charges sworn to and amend the proceedings of the trial Court in pursuance thereof, and in conformity with the order made by the Appellate Court in case of *F Simeon v R* bearing case number CA 9 of 2001.

In the end result, I set aside the motion and order that the re-hearing of the Applicant of the two charges of manslaughter under Section 192 of the Penal Code as sworn in, adopted and made part of the proceedings, is to proceed on the merits.

Record: Criminal Side No 9 of 2002

Dodin v Arrisol

Relationship property – concubinage – breakdown of relationship – unjust enrichment

The Plaintiff and the Defendant had lived together for 14 years. The Plaintiff claimed that there was a parcel of land brought by her, but registered in the name of the Defendant, and that the house was renovated with joint contributions. The Plaintiff further claimed that the Defendant caused her to move out of the property, taking the child, which caused the Defendant to become unjustly enriched. The Plaintiff sought 50% of the property, and a further R50,000. The Defendant averred that the house was financed solely by him with no contributions from the Plaintiff. He averred that the Plaintiff moved out of the house on her own accord taking all her movable property. The Defendant averred in a counterclaim that he jointly purchased the land with the Plaintiff, but that it was registered in the sole name of the Plaintiff for convenience. There is now a dispute as who has rights over the property in question. The Plaintiff based her claim on the principle of unjust enrichment. The Defendant submitted that there were other avenues in law to obtain redress.

HELD:

(i) The claim of unjust enrichment is dismissed;

(ii) No property adjustment is done in cases where the parties have lived in concubinage; and

(iii) The property and the house which are registered in the name of the Defendant shall belong to the Defendant.

Judgment: The Plaintiff shall receive from the Defendant a sum of R23,880 being the actual and ascertainable loss proved in the case. The property which is registered in the name of the Defendant and the house on it shall belong to the Defendant. There is no adjustment of property.

Legislation cited
Civil Code of Seychelles, arts 553, 555, 1376, 1381
Courts Act, s 5

Cases referred to
Dingwall v Weldsmith (1967) SLR 53
Michel Larame v Neva Payet (1983) 3 SCAR 355
Reine Hallock v Philippe D'Offay (1983-1987) 3 SCAR 295

Antony DERJACQUES for the Plaintiff
Jacques HODOUL for the Defendant

Appeal by the Defendant was dismissed on 16 November 2004 in CA 6 of 2003.

Judgment delivered on 6 March 2003 by:

PERERA J: This is an action based on the principle of unjust enrichment contained in Article 1381 - 1 of the Civil Code. Admittedly, the Plaintiff and the Defendant had lived together in concubinage for fourteen years. The Plaintiff has two children by a previous union, and one child, Sylvette Arrisol, born on 3 November 1981, by the Defendant.

The Plaintiff avers that in 1984, a parcel of land bearing no. C. 1059 at Mont Plaisir, Anse Royale, was purchased by her, but registered in the sole name of the Defendant for convenience. She avers that the house thereon was renovated with joint contributions.

The Plaintiff further avers that on 28 April 1994, the Defendant

caused her to cease co-habiting with him and to move out of the premises with the child Slyvette Arrisol. She therefore avers that the Defendant has unjustly enriched at her expense and claims 50% of the land. Parcel C.I 059 and the house thereon, which she values at R100,000. She also claims a further R50,000 in respect of movables, listed in a schedule to the amended plaint.

The Defendant, in his amended defence avers that Parcel C.1059 which is in his sole name, and the house thereon were financed solely by him, and that the Plaintiff made no contributions whatsoever. As regards movables, he avers that the Plaintiff moved out of the house on 28 April 1994 on her own accord, taking with her all her movable properties, except a cooker, a television set, a stove and a fridge, which are still in a store awaiting collection. As a matter of law, the Defendant pleads prescription against all claims made against him and in respect of rights in title C.1059.

The Defendant, in a counterclaim, avers that he and the Plaintiff jointly purchased a Parcel of land bearing no. S. 329 at Anse Aux Pins for R35,000 contributing equally towards the purchase price. He avers that that property was registered in the sole name of the Plaintiff for convenience. He further avers that he solely financed the construction of a partly completed house on that property to the extent of R94,870 without any contribution from the Plaintiff. This contribution, he avers, was stopped when the cohabitation ended in 1994. He values the land and the house on Parcel S.329 at R232,770, being R137,900 for the land and R94,870 for the partially built house. He avers that the respective interest of the parties in Parcel S.329 would be as follows:

(i) The Plaintiff is entitled to one half share of the value of the land (R68,950)

(ii) The Defendant is entitled to the balance half share of the land

(iii) The Defendant is entitled to the full value of the partly constructed house by virtue of Article 553 of the Civil Code (R94,870).

The Defendant therefore counterclaims a sum of R163,820 from the Plaintiff.

In the answer to the counterclaim, the Plaintiff avers that Parcel S.329 was purchased solely by her upon a loan obtained from Barclays Bank, and that the construction of the house thereon was also done solely by her with a loan from the Seychelles Housing Development Corporation. She avers that she ceased construction upon initiating this action on 7th April 1994. She therefore claims the ownership of the entirely of the land and the partly built house thereon.

Preliminary Objections

The Plaintiff has based her claim on the principle of unjust enrichment as contained in Article 1381-1 of the Civil Code and not on a Societe de fait, a partnership, a contract or a quasi-contract. Article 1381-1 is as follows:

> If a person suffers some detriment without lawful cause and another is correspondingly enriched without lawful cause, the former shall be able to recover what is due to him to the extent of the enrichment of the latter. Provided that this action for unjust enrichment shall only be admissible if the person suffering the detriment cannot avail himself of another action in contract, or quasi -contract, delict or quasi delict; provided also that the detriment has not been caused by the fault of the person suffering it.

In the case of *Michel Larame v Neva Payet* (1987) SCA 4 Eric Law JA commenting on the nature and scope of enrichment without cause, stated thus:

> no enforceable legal rights are created or arise from the mere existence of a state of concubinage, but the cause of action "de in rem verso" can operate to assist a concubine who has suffered actual and ascertainable loss and the other party has correspondingly enriched himself by allowing the party who has suffered loss to recover from the other party who has benefited. Concubinage itself does not confer rights or obligations, but the action "de in rem verso" will operate to compensate a concubine who has suffered detriment without lawful cause to the advantage of the other party to the concubinage. Other examples of cases where a concubine can recover damages are when the parties to the concubinage have established a "societe de fait or have acquired enforceable rights based on implied or quasi - contract.

Mr Hodoul, Learned Counsel for the Defendant submitted that the Plaintiff had other avenues in law to obtain redress and that hence the action based on Article 1381-1 should be dismissed in limine. He submitted that as Parcel C.1059 is registered in the name of the Defendant, she could have brought a "real action" for a right of co-ownership or claimed a refund of her alleged contribution under quasi-contract pursuant to Article 1376 of the Civil Code. That Article is as follows:

> A person who, *in error* or *knowingly, receives what is not* due to him, shall be bound to make restitution to the person from whom he has improperly received it.

The remedy contained in this Article has no application to the

facts of the present case, as the Plaintiff has clearly pleaded that she purchased the land from her own funds but that the house thereon was constructed jointly, and that the land was registered in the name of the Defendant for convenience. She has further averred that the Defendant has now retained possession, and thereby unjustly enriched himself at her expense. The Plaintiff does not therefore allege that there was an error, or that the Defendant improperly received title to the land. What she claims in the plaint is a declaration that she has interests in the property and for an order on the Defendant to pay the value of the share, which she assesses at R100,000. This is the extent of the enrichment she avers the Defendant has benefitted from her contributions and the sum by which she had correspondingly become impoverished. Hence the action, as presently constituted has been correctly instituted.

For the same reasons, the Plaintiff could not have brought a "real action" for a right of co-ownership, as she had no legal right to the land which was registered in the sole name of the Defendant.

The submission of Learned Counsel for the Defendant that the Plaintiff had remedies under Articles 553, 554 and 555 of the Civil Code has no merit as the "third party" involved in the present matter is a concubine who claims to have contributed to the venture which would not create legal rights to property. In such circumstances, the proper remedy was a claim based on unjust enrichment.

As regards the movable property. Learned Counsel for the Defendant submitted that as the Plaintiff has alleged that the Defendant has refused to return them to her, the remedy would have been an action in delict or for unlawful possession. The Defendant has in his amended defence claimed that the Plaintiff had removed all her personal belongings when she moved out of the house, leaving only a

TV set, a stove, and a fridge, which he averred could be removed by her anytime. The Defendant has further averred that all the movables were purchased from his own funds. Section 105 of the Code of Civil Procedure permits different causes of action to be joined in the same suit provided that they be between the same parties and that the parties sue and are sued respectively in the same capacities. There was therefore no necessity for the Plaintiff to institute a separate delictual, or a possessory action.

In any event, the Defendant joined issue with the Plaintiff who had based her claim on unjust enrichment and not raised any objections to the pleadings as presently constituted. Hence he could not have raised those matters for the first time in the submissions.

The only ground that is pleaded in limine is contained in paragraph 8 of the amended defence, wherein it is averred that all the claims made against the Defendant and in respect of rights in title C. 1059 are prescribed. It is clear that a cause of action for unjust enrichment arises only when a person suffers a detriment without lawful cause, and another is enriched thereby without lawful cause. The Plaintiff avers that the Defendant caused her to leave the house on 28 April 1994. The present case was instituted on 7 June 1994. She testified that the Defendant used to drink a lot, was aggressive and also threatened her with a knife. Hence she left the house and came back with Police Officers to remove some of her personal belongings. The Defendant on the other hand avers that the Plaintiff left of her own accord without lawful cause and came back on 27 May 1994 with Police Officers to collect her balance belongings. The Defendant in his testimony stated that there was an incident involving the Plaintiffs son, one Eddie regarding the feeding of a dog, and that he went out thereafter. On his return he found that the Plaintiff had left the house. On the basis of the evidence I accept the evidence of the Plaintiff that she left because of the

intolerable behaviour of the Defendant and that therefore unjust enrichment by the Defendant at the expense of the Plaintiff commenced from that day. Further, it was held in the case of *Dingwall v Weldsmith* (1967) SLR 53 that the 5 year period of prescription cannot be pleaded as a defence to a claim in an action de in rem verso. Hence the ground of prescription fails.

The Law

In the case of *Reine Hallock v Philippe D'Offay* (1985) SCA 1) the parties had lived together in concubinage for 27 years. The Appellant sought a declaration that she was entitled to a share of the Respondent's house. Sauzier JA in a dissenting judgment stated in obiter that the powers of the Supreme Court to make property adjustment orders when cohabitation ends lay in Section 5 of the Courts Act which empowers the Court to exercise equitable jurisdiction. Goburdhun JA and Law JA disagreed. Goburdhun JA stated-

> We are here not to judge moral or social matters. We are here to interpret and apply the law as it stands. In case the law needs some change to meet special situations, it is better left to the wisdom of the legislature.

The law, as it stands gives no recognition to rights of those living in concubinage. It is generally considered that a concubine goes to live with a man, expecting to be housed, fed, clothed and maintained in return for which she runs the household and looks after the children if any. However where she renders services additional to those normally rendered by a concubine, such as assisting in the man's business, or contributing her own funds to purchase property or to construct a house, the position would be different. Even in such situations, property adjustment orders of the nature granted to married parties on dissolution of marriage would not be made. What then would be the rights of a concubine to

recover contributions made by her during theperiod of the cohabitation?

Amos and Walton in the *Introduction to French Law* states thus:

> The amount recoverable is limited on the one hand by the value of enrichment. More than this the solvens cannot recover and the value is assessed not, as in gestion d'affaires at the time of the intervention but at the date of the action. If at the date the value of the benefit has disappeared, the action will fail. The amount recoverable is limited on the other hand by the amount of the solvents' own expenditure: It is immaterial that at the time of the action the value of the benefit enjoyed is considerably higher.

In the *Larame* case (*supra*), the rights of a concubine were considered by the Court of Appeal. In that case, the parties had lived in concubinage for 10 years. At the time they separated, the man had immovable property in the form of a house and land, and movable property in the form of a car and furniture, all valued at R278,000. The woman claimed that the property was purchased as a result of their "common labour" and her contributions. She claimed the value of a half share in the property and other assets that is R139,000, and R50,000 as moral damages. The Supreme Court assessed the value of the assets at R165,000 and held that the land, house and car were acquired, by the parties jointly. Stating that it was extremely hazardous to assess the proportion they contributed, the trial Judge found that the woman had provided money to the man and thereby suffered impoverishment of her patrimony. Accordingly she was awarded 30 of the assets, valued at R49,000. Her claim for loss of her furniture and for moral damages was rejected.

The contributions made by the woman in that case consisted of monetary contributions made at different times to the man. The evidence revealed that the total contribution was R20,269. Mustafa P stated thus-

> I have carefully considered the meaning of Article 1381-1. I think that the operative word in the Article is "correspondingly". I think that the Respondent could only recover what she had given - that was the extent of her detriment; that also would "correspondingly" be the extent of the Appellant's enrichment. I am of the view that the concept of enrichment in the Article bears a connotation of restitution.

Goburdhun JA agreeing with that view stated:

> In such an action, the present value of the property is irrelevant. The Respondent can only recover what she had contributed. It is immaterial that at the time of the action the value of the benefit enjoyed by "L'enrichi" is much more.

Law JA also concurred with those views, and the Court unanimously set aside the award of R49,000 made on the basis of a 30 share and ordered that the man pays a sum of R20,269 on the basis that that was the extent of her detriment and the extent of his own enrichment.

In the present case, the Plaintiff in her testimony stated that at the time of purchase of the land. Parcel C.1059, she was employed as a nurse, and was earning R2,800 per month. She stated that she paid R24,000 for the land, and produced a certificate from Barclays Bank wherein it is stated that she had obtained a housing loan of R18,000 in February 1984 (exhibit P3). However, the purchase price as given in the deed of transfer is R12,000. The duty paid is R240. The Defendant had no regular job at that time, but was a

garagiste. The Plaintiff also produced her bank statements and pass books which showed that he had substantial amounts in her accounts, (exhibit P4). On the other hand the pass book entries in the Defendant's Account (exhibit P5) for the period 1987/88 shows meagre balances below R1,500. The Plaintiff testified that the old house on the land (Parcel C.1059) was renovated by joint contributions, and produced two receipts, one for the purchase of a wheel barrow in February 1994 for R425 (exhibit P6) and a gas cooker in July 1990 for R2052 (exhibit P7) and bathroom fittings purchased through a neighbour in January 1992 for R2550 (exhibit P8). She stated that the other receipts were left behind when she moved out of the house in April 1994.

The Plaintiff also produced documents marked exhibits P8a, P9, P10, and stated that they were receipts for amounts spent on the Defendant by her, when he went to Mauritius. The total sum is R5003. She also produced a bank receipt for R1,610 paid for a telegraphic transfer £166 to the Defendant when he was in the U.K.

The Plaintiff further stated that the Defendant was in prison for two years, and during that time, he maintained herself and the three children. The Defendant however stated that he spent only 1 ½ years out of a sentence of 3 years, and that the Plaintiff and the family were supported by the Social Services Department.

As regards the movables, she claimed that everything listed in the schedule to the amended plaint belonged to her.

As regards Parcel no. S. 329 situated at Anse Aux Pins which the Defendant in his counterclaim has averred was purchased jointly, but registered in the Plaintiffs name, the Plaintiff in her evidence stated that the full purchase price of R33,000 was paid by her. She also stated that the house was constructed from a sum of R50,000 she received as gratuity from the

Government, and that from a loan of R100,000 approved by the S.H.D.C, she obtained only R20,000 to complete the foundation of the house and instructed the SHDC to withhold the release of the balance sum of R80,000 until the present case was disposed of (exhibit PI 4). Exhibit P5, a letter dated 24 July 1996 is to the effect that a sum of R1,525 was being deducted monthly from her salary in respect of the SHDC loan. This was confirmed by witness Greta Simara an Officer of the SHDC. The Plaintiff also produced the application made by her to the Planning Authority on 14 January 1994 to construct a house on Parcel S. 329 at Anse Aux Pins. She also produced a valuation report dated 19 March 1996 from Hughes and Polkinghome (exhibit P20) wherein it is stated that the house was partially built to up to window sill level over the foundation, and that such work did not exceed R22,074 in value.

On being cross-examined, the Plaintiff stated that when she met the Defendant in 1981, he was a motor mechanic. She also stated that she had already purchased a car by then but did not drive it as she could not obtain the licence. As regards the Anse Royale property. Parcel C.1059, the Plaintiff maintained that she obtained only two loan, one to purchase the property and the other to purchase Parcel S. 329 at Anse Aux Pins. She relied on the bank statements and other documents produced by her to substantiate her assertion. The defence produced a letter from the Ministry of Health (exhibit D2) whereby the Plaintiff was suspended from her duties as a nurse, with effect from 23 Sepptember 1985. However, the application for gratuity attached to the payment voucher (exhibit P18) shows that she was reinstated two days later on 25 September 1985. The Plaintiff also admitted that on 26 March 1982 (exhibit D3) she signed as guarantor to a loan of R10,900 obtained by one Alma Dodin from the Development Bank to purchase a boat and that he repaid the loan in installments (exhibit D4). She stated that the boat was purchased by her for the Defendant as he could not obtain a

loan due his criminal record, and hence the application was made in the name of her brother Alwin Dodin. Learned Counsel for the Defendant suggested to the Plaintiff that she had several financial commitments of her own and that hence she could not have been able to contribute to the purchase of the Anse Royale property (C.1059) on 13 February 1984. The Plaintiff maintained that she paid R18000 she had obtained from the bank in February 1984 (exhibit P3). She denied that that sum of money was used or any other purpose. She also maintained that the Anse Aux Pins property (Parcel C.328) was purchased by her own funds and that the foundation of the housing was also constructed from money she received from her gratuity, and R20,000 she obtained from the SHDC. The charge on the property was however entered on 19 December 1994 (exhbit D6). A charge on Parcel S. 329 for a loan of R24,000 obtained earlier from Barclays bank was discharged on 27th December 1994. The Defendant on the other hand testified that at the time he met the Plaintiff in 1981, he was earning between R4000 to R6000 per month as a garagiste. He however stated that he spent R4000 to R5000 per year on purchasing food for the family. He stated that by agreement he asked the Plaintiff to keep her money in the bank and to withdraw only if he needed financial help. However after moving to the property at Anse Royale, he reverted back to his previous occupation as a herbalist. He claimed that he paid half of the costs of schooling and maintenance of the Plaintiffs child in Mauritius until they broke off in 1994. He also stated that he travelled to Mauritius and Rodrigues on several occasions with the Plaintiff and the children. On such occasions the Plaintiff also contributed towards the expenses, but when he went alone he bore all the expenses. He claimed that as a herbalist he still earned between R4000 to R5000 per month, but could sometimes earn about R5000 per week. He maintained that the Anse Royale property was purchased from his own funds.

Testifying regarding the counterclaim, he stated that Parcel

no. S.329 at Anse Aux Pins was purchased for R33,000 out of which about R25,000 was paid by him. However he did not produce any documentary proof of such payment. Questioned as to why that property was registered in the name of the Plaintiff, he stated "that property was placed on her name because I had mine at Anse Royale". He further stated that even the Planning application was made by her. He also stated that he contacted one Gerard Dorothee to construct the house. In his testimony, he first stated that Dorothee was a friend, and he would work every Saturday and whenever he needed money he asked him. Pressed by his Counsel as to any agreement on the contract price, he stated that it was R200,000, but he paid only about R20,000 as construction stopped when he went to England. He produced receipts marked D5 to D7 and D11 in proof of purchasing certain building materials during the period 1985 to 1997. The total amount on these receipts is R1300.53. According to the Plaintiff, the construction stopped after cohabitation ceased in April 1994. She produced a letter dated 24 July 1996 (exhibit P14) sent to the SHDC, wherein she stated that the 1st installment of R20,000 on the loan of R100,000 was received in April 1995, and repaid in June 1996, and requesting that the balance of R80,000 be withheld till the present case was concluded. But the Defendant claims that construction stopped when he left for England. This is contrary to his amended defence wherein he avers that construction stopped when cohabitation ended. According to exhibit P 11, the Defendant was in England in 1991. The land at Anse Aux Pins was purchased in 1984, and Planning permission to build the house was given in January 1994. The parties separated in April 1994. The Plaintiff received her gratuity of R30,000 on 16 February 1994 (exhibit P18) and the Barclays Bank loan of R18,000 also was in February 1984 (exhibit P3). The bank statements show that after depositing the sum of R30,000 in her account on 24th February 1994 she withdrew sums of R6000, 5000 etc totalling R34,520 up to 23 March 1994, a period of one month. The Defendant was

unable to explain why the Plaintiff would have made those withdrawals, but ventured to stated that she purchased a motor car and paid for driving lessons. But the Plaintiffs testimony was that she purchased a car before she met the Defendant in 1980, and that thereafter the Defendant became the driving instructor. When questioned regarding the expenses incurred by the Plaintiff, the Defendant became evasive and stated - "I am not answering any question concerning money of ladies. She spends on whatever she wants, how she wants to."

The Defendant stated that when they met in 1980, they had intended to remain together as a family for the rest of their lives. A child was born to them. The Anse Royale property was purchased in 1981. The Plaintiff who was a nurse drawing a salary of R2800 per month at the time of purchase of the land produced proof that she had obtained a housing loan of R18,000 from the Barclays Bank in February 1984. Apart from that, the bank statements produced by her show that she had a substantial amount of money in her account. She also produced several receipts for purchasing building materials at the relevant time.

As regards the Anse Aux Pins property, Gerard Dorothee, who the Defendant claimed was engaged as the contractor stated that due to the friendship with the Defendant he agreed to do all masonary work up to roof level for only R25,000. However the Defendant in his testimony stated that the agreed contract price was R200,000 but he paid only about R11,200 when construction stopped when he went to England. Dorothee testified that he commenced construction between February and March 1994. But according to evidence, the Defendant went to England in 1991. Dorothee further testified that after the parties had separated, he renovated the house at Anse Royale, added a verandah, fixed tiles on the floor and rebuilt a cabinet.

Dorothee did not impress me as a credible witness. His evidence that he constructed the partly built house on the Anse Aux Pins properly cannot be accepted as the construction work had commenced prior to April 1994 financed by the loan of R20,000 obtained by the Plaintiff from the S.H.D.C. The receipts marked JD5 to D7 and D11 produced by the Defendant in proof of purchasing building materials during the period of 1985 to 1997 could well have been for the renovation of the house on Parcel C.1059 at Anse Royale.

I would therefore accept the evidence of the Plaintiff as regards actual and ascertainable loss suffered by her without cause as follows

In respect of Parcel C 1059 at Anse Royale

1. R12,240 paid for the purchase of the land and
   R. 240 being the duty paid.
2. R 2,550 bathroom fittings.
3. R 425 wheel barrow.
4. R 2,052 gas cooker.
5. R 5,003 cost of foreign currency given to
   the Defendant on his trips to Mauritius
6. R 1,610 telegraphic transfer of £166 to Defendant
   in the U.K.
   R23,880

The Plaintiff did not produce any documentary evidence as proof of purchasing any of the movable items listed in the plaint. Anyway she testified that they were not of any great value. On the other hand, the Defendant has testified that the Plaintiff has already removed the items save for a cooker, a television set, a stove and a fridge, which he stated is still lying in a store for collection by the Plaintiff. In these circumstances, I make no order in respect of the movables.

In the final analysis, the Plaintiff shall receive from the Defendant a sum of R23,880 being the actual and ascertainable loss proved in the case. As no property adjustment is done in cases where the parties had lived in concubinage. Parcel C.1059 which is registered in the name of the Defendant, and the house thereon shall belong to the Defendant.

As regards Parcel S.329, the land is registered in the sole name of the Plaintiff. She has, on the basis of documentary evidence established that the land was purchased from the money she received as gratuity and that the incomplete house was constructed from the loan obtained from the SHDC. The dates of receiving those two sums of monies are proximate to the date of purchase of that Parcel of land, and hence on a balance of probabilities, the Defendant cannot maintain his counter claim, which is hereby dismissed.

Judgment is accordingly entered in favour of the Plaintiff in a sum of R23,880 payable to the Defendant with interest from April 1994, the date the enrichment commenced, and costs of action.

Record: Civil Side No 134 of 1994

Finesse v Atala & Or

Evidence – photographs – admissibility without negatives

The Plaintiff claimed damages from the Defendants for allegedly demolishing part of a wall on the Plaintiff's land. The Plaintiff instructed a photographer to take photos of the wall. He developed five photographs and had the negatives in his possession but said it would take some time to sort them. The Defendants objected to the production of the photographs as exhibits on the ground that the negatives had not been produced and that the photographer was unable to give the measurements of the objects photographed.

HELD:

(i) The requirement that negatives should be produced before a photograph is admitted in evidence is based on procedure and not law;

(ii) The non-production of negatives is not fatal to such admission;

(iii) In criminal cases, the Court cannot permit any evidence based on mechanical processes which have the ability to be tampered with as the case must be proved "beyond reasonable doubt";

(iv) In civil cases, the burden on the Plaintiff is to prove "on the balance of probabilities";

(v) The photographs do not stand alone as evidence; and

(vi) A photograph is a document under the Evidence Act.

Judgment: Objections overruled. Photographs admitted in evidence as exhibits.

Legislation cited
Evidence Act, s 2

Cases referred to
Andre Esparon v Bernard Vidot SCA 11/1993

Foreign cases noted
Hindson v Ashby [1896] 2 Ch 1

Philippe BOULLE for the Plaintiff
Gustave DODIN for the First Defendant
France BONTE for the Second Defendant

Ruling delivered on 14 March 2003 by:

PERERA J: The Plaintiff claims damages from the Defendants for allegedly demolishing a part of a wall on her land, which she claims was not authorized in the Court Order upon which the First Defendant, a Process Officer of this Court executed a warrant of execution.

The Plaintiff testified inter alia that she commissioned a photographer, on the same day the wall was demolished, to take photographs, which have been marked as items 2 to 6, subject to the photographer being called.

The photographer, Allen Fred, testified that he was a professional photographer, and that on the instructions of the Plaintiff, he took the five photographs and developed them.

He stated that he has several negatives in his possession that it would take time to sort them. Objections were raised by Learned Counsel for the Defendants against the production of the photographs as exhibits in the case, mainly on the ground that the negatives have not been produced and also on the ground that the photographer was unable to give the measurements of the objects photographed.

The requirement that negatives should be produced before a photograph is admitted in evidence is based on procedure and not law. Hence the non-production of negatives is not fatal to such admission. In criminal cases however, this practice is relied on strictly, as a case against an accused has to be proved beyond reasonable doubt. Hence the Court, in these cases cannot permit any evidence based on mechanical processes which have the capacity to be tampered with, to be admitted. In civil cases however, the burden on the Plaintiff being based on proof on a balance of probabilities, photographic evidence, although cannot be relied on as proof in itself, yet would be admitted to aid the Court, but only upon the object or objects so photographed being explained and measurements given by testimony of the photographer or the party seeking to produce them. Hence it would be the function of the Court to consider the photographs in the same way as documents, on a consideration of such evidence and on a balance of probabilities. (See the case of *Hindson v Ashby* [1896] 2 Ch 1.)

In the case of *Andre Esparon v Bernard Vidot* (1993) SCA 11 the trial Judge placed reliance on photographs taken by a tourist who was not called as a witness. They were admitted in evidence without objections by Counsel. The photographs were relied on by the Judge to resolve a conflict in two versions of oral evidence as regards the position of a bus on the road in a road accident which caused personal injuries to the Plaintiff.

The Seychelles Court of Appeal held that in the absence of the photographer 's evidence and as photographs were not in themselves capable of telling a determinate story, a proper evaluation of photographic evidence was not possible. It was also held that the fact that they were admitted in evidence without objections did not per se render them-impeccable m so far as the probative value was concerned, and that the photographs needed to be explained in order to aid the Court to evaluate them.

In that case, apart from tendering the photographs, neither the Plaintiffs nor the Defendants said anything about the photographs. Hence a rehearing was ordered solely on the ground that the photographs themselves afforded no evidentiary value and that hence any conclusion arrived at by the judge was not valid. The Court did however not state that a photograph, which for purposes of Section 2 of the Evidence Act (Cap 74) is a "document", is inadmissible merely because the maker was not called as a witness or the negatives not produced.

In the present case, the Plaintiff testified regarding the alleged damage to her wall and also gave evidence as regards the approximate measurements. The photographs are intended to support such evidence. Moreover, a Quantity Surveyor, Miss Cecile Bastille has produced a valuation report on the alleged damage. This report has been marked as Item 7, and awaits her evidence before being exhibited. Hence unlike in the case of *Andre Esparon* (supra), the photographs do not stand alone to be considered as evidence. In these circumstances, the objections are overruled, and the photographs marked Items 2 to 6 are admitted in evidence as exhibits P3 to P7.

As regards an ancillary ruling sought by Mr Boulle, Learned Counsel for the Plaintiff as to whether documents could be put to an adverse party called on personal answers, it is my view

that as the purpose of personal answers is to obtain admissions, any documents can be put to such party for such limited purpose, be they already marked as items or otherwise. However no such document will be marked in evidence as exhibits in the course of examining an adverse party on personal answers.

Ruling made accordingly.

Record: Civil Side No 358 of 1999

Dewea & Or v Roucou Construction (Pty)

Trespass – damages – liability of sub-contractor

The Plaintiffs claimed damages for trespass and consequential loss caused to their property. The Plaintiffs averred that the Defendant Company excavated a road and caused damage to the Plaintiffs' land. It was reported that a large area of the Plaintiffs' land had been cut and the soil had been removed and that this caused the soil to be distributed and lose stability, requiring the need for a retaining wall. The Defendant Company averred that the excavation was done specifically under contract with the Seychelles Housing Development Corporation and that no damage or trespass was caused to any neighbouring land. They further aver that they had sub-contracted the work to a third party that they did not instruct to trespass on any land, and therefore, if the alleged acts had been committed, they were done by persons unconnected to the Defendant company. The Plaintiffs claim R50,000 for damages for trespass to the land; R47,000 for the construction of the retaining wall; R500 for the report done by the quantity surveyor; R750 for the cost of a site visit by a civil engineer who assessed the damage and; R30,000 for moral damages.

HELD:

(i) The loss of soil was not due to any natural phenomena but to an intentional or accidental cutting of soil on the embankment; and

(ii) The Defendant Company is liable for the damage caused by the sub-contractor. The Defendant Company cannot evade liability by treating the sub-contractor as an independent contractor.

Judgment for the Plaintiff. Total damages awarded R60,625 (R10,000 trespass; R47,000 construction of retaining wall; R2,875 report of surveyor; R750 site visit by civil engineer; R5000 moral damages).

Cases referred to
Paton v Uzice (1967) SLR 8

Foreign cases noted
Saisse v Serandat (1863) MR 170

France BONTE for the Plaintiff
Charles LUCAS for the Defendant

Appeal by the Defendant was allowed on 5 December 2003 in CA 9 of 2003.

Judgment delivered on 27 March 2003 by:

PERERA J: This is a delictual action in which the Plaintiffs claim damages for trespass and consequential loss caused to their property. The Plaintiffs are owners of a Parcel of land bearing no. C.3983 at Les Canelles. It is averred that the Defendant company, upon a contract with the Seychelles Housing Development Corporation (SHDC) excavated a road through its servants or agents, and in the course of such work caused damage to the Plaintiffs' land.

Upon a request for further and better particulars sought by the Defendant, the Plaintiff produced a Survey report from one B.J.K. Felix, a Land Surveyor, wherein the area of encroachment was computed at 17 square metres. He also reported that a beacon had been moved from its original position. The Plaintiffs also produced a report from Vladimir Prea, a Civil Engineer, regarding the damage. It was reported that an area of 8.5 metres in length, 2.5 metres in depth and

1.0 metres to 3.2 metres in height along the boundary of the Plaintiffs' land had been "cut and the soil removed." It was also reported that consequent to the excavation, the soil embankment had been disturbed, causing it to lose its effective stability and that hence a retaining wall should be constructed. These two reports were, at the hearing, marked as exhibits P3 and P4.

The Defendant Company avers that the excavation for the purpose of construction of a road was done specifically under the contract with SHDC along a pegged area and that no damage or trespass was caused to any neighbouring land. They further aver that they sub-contracted such work to a third party and that they did not instruct the sub-contractor to trespass on any privately owned land, and states that if the alleged acts were caused, it was done by persons unconnected to it, or its activities.

The case for the Plaintiffs' is that their land. Parcel C.3983 is bound by beacons TD 249, TS 866, TT 2783, TS 712 and TS 432 as shown in exhibit P3(a) attached to the report of Vladimir Prea. The excavation is shown in dotted lines between beacons TD 249 and TS 432 along the Eastern boundary.

The 1st Plaintiff testified that the JCB excavator engaged by the Defendant Company, through its servants or agents was parked on the adjoining Parcel C. 2851 which belonged to one Mrs Larue. One day in March 1997, when she returned home around 4.30 p.m after work, she found that the said portion of her land had been excavated. She however did not see anyone doing the excavation, but she obtained information from the neighbours that it was done by the JCB excavator belonging to one George Vandange. The 1st Plaintiff testified that she had proposed to construct her access road in the area excavated and now she is compelled to build a retaining wall and backfill the earth to stabilise the area.

Cyril Roucou, the Director of the Defendant company testified that consequent to the contract with SHDC to construct the road, he hired the J.C.B. excavator of George Vandange to excavate an area indicated by pegs. He stated that he was not liable for any damages' that may have been caused outside his scope of work. He further stated that before Vandange was engaged as a sub-contractor, written consent was obtained from the SHDC as required by condition no.5 of the contract (exhibit P6).

Georges Vandange, himself a contractor testified that he contracted with the Defendant company to level the road for construction. Instructions regarding the area to be leveled were given by Mr Roucou. He stated that the lady occupying the neighbouring land wanted some soil "to reclaim or Gil up her property, and so to cut down on costs we gave her the soil." She however did not ask him to cut earth from part of any land. The road work was done by the excavator operator on the instructions given to him by the Defendant contractor, through him. Vandange further testified that he only supervised the work done to level the road and in doing so he visited the site about thrice a day. He maintained that what was done apart from excavating the demarcated area, was to dump the excess soil on the land of Mrs Lame.

Hansel Boniface, the J.C.B. excavator operator also testified that the area to be leveled was demarcated by Mr Roucou. He stated that there was no place to put excess soil that was excavated and hence it was heaped up in the middle of the road.

As regards the lady who wanted soil, he stated thus –

> At the beginning of the road there was a lady who had lots of flowers. I pushed some of the soil near the flowers and I parked my JCK. there at night and as for the rest of the excess soil, we put them near

> the main road.

He further stated –

> At first the soil was pushed on to her property, then when I was clearing out the property, she to led me just to push them inside, I did so.

He denied that he was asked to excavate or to terrace the land. Questioned by Court whether in the process of pushing the soil, he took the excavator into the yard and cut the soil on the embankment, he replied that he only dumped the excess soil and leveled it with the "*spade*" of the excavator. He stated that after the day's work was over, Vandange took away the ignition key of the excavator after it was parked on Mrs Lame's land.

On the basis of the evidence of Land Surveyors B.J.K. Felix and Vladimir Prea, it has been established that soil from the area of approximately 17 square metres had been removed from the Plaintiffs' land which is on the same level as the area being excavated for the road, but about 3 metres above the land of Mrs Lame. At the visit to the locus in quo. it was observed that this loss of soil had not been due to any natural phenomena but due to an intentional or accidental cutting of soil on the embankment. Vladimir Prea, also, in his report describes the damage as a “cutting and removal of soil".

Liability

Generally, to establish liability, there must be a "lien de subordination", between the "commettant" and the "propose". However there are exceptions to that rule. In the case of *Paton v Uzice* (1967) SLR 8, the Plaintiff sued the Defendant for damages arising from trespass, alleging that the Defendant's labourers had crossed his land. The Defendant contended that he was working hours, and that even if there was evidence that he had instructed the labourers to cross the

Plaintiffs land, when coming to work on his land, he was still not liable, as for him to be liable, there must have existed between him and the labourers a contractual relationship, and that did not exist after they finished their work on his property.

Soyave ACJ (as he then was) upheld the first contention. As regards the second submission, it was held that there was evidence that the Defendant had instructed the labourers to cross the Plaintiff's land. However what was material was whether the labourers were in such circumstances the proposes of the Defendant. The Learned Judge citing paragraphs 1030 to 1033 in Lalou *Traite Pratique de la Responsabilite Civile*, stated thus:

> From the above, it appears to me that for a person to be the "propose" of another, a contractual relationship between them is not essential and that he would be deemed to be the "propose" of that other person in the course of doing something if he does it on the latter's instructions or request or order. It also does appear that if a person does something on the instructions and in the interest of another person, he is in the course of doing it the propose of that other person.

The Defendant was accordingly held liable in damages. The exception to the general rule of liability was clearly illustrated in the case of *Saisse v Serandat* 1863 MR 170. In that case the Plaintiff and the Defendant were labourers whose lands were separated by a public road. The Defendant hired a Sirdar (a contractor) to clean his land, trim the hedges and prune wild plaints. The Sirdar in turn hired labourers. The labourers burnt the leaves and the trimmings, causing the burning embers to be carried by wind to the roof of the Plaintiffs house, which consequently caught fire. The issue was as to who the "commettant" and who the "propose" were. It was held that the fire was caused by the negligence of the

Sirdar and his labourers, on the basis that the Defendant's contract was directly with the Sirdar and his labourers. Hence the Court held that:

> An employer is not only answerable for the negligence of his immediate "propose", but also of those who are appointed by that propose to act under him or with him, in the discharge of the business or work confided to him.

In the present case, the Defendant company was performing a contract entered with the SHDC to construct a road as per the working plain (exhibit D1). Although the copy produced by the Plaintiffs was only signed by the Managing Director of SHDC as employer, Mr Roucou admitted that he signed it before commencing work. That, obviously would have been so, as the employer was a State Corporation. Incidentally that agreement (exhibit P6) was made on 29 April 1997, and pursuant to clause 6(i) work was to commence on 29 April 1997 and completed by 30 June 1997. The Plaintiffs have averred that the damage to their property was caused "on a date in March 1997."

However, Counsel for the Defendant in the examination in Chief of George Vandange questioned him whether the Defendant hired him to do the work in March 1997. and he replied in the affirmative. Clause 6 of the agreement stipulates that the contractor (Koucou Construction) shall not sub-contract the works or any part without the written consent of the SHDC. Although Mr Roucou in his testimony stated that he obtained such consent, no documentary proof was produced. In any event, the parties are ad idem that the construction of the road was done by the Defendant company as contractor of the SHDC and Georges Vandange as sub-contractor. In clause 8, the contractor was required to indemnity the SHDC and take out an insurance policy against, inter alia”

Any damage to property of persons other than the employer (SHDC) or the contractor (Koucou Construction) arising as a consequence of the negligence or beach of duty of the contractor or of circumstances within the contractor's control. For the purposes of sub-clause (i) (ii) and (Hi), the expression "contractor" shall include any sub-contractor of his".

Hence even if the sub-contractor had breached his duty by exceeding his mandate by causing damage to the property of a third party, the SHDC would be indemnified, and the contractor would have been held directly liable in damages. Learned Counsel for the Defendant contended that the Plaintiffs who are third parties to that contract could not rely on that clause to establish liability. Although that submission is principally correct, yet, the Plaintiffs are not relying on that contract to establish a breach, as against them, but to produce evidence of the nature of the contract which the Defendant Company admitted they entered into with the SHDC, and the performance of which had caused damage to their property. The action is however based on delict and not in contract.

The Defendant sought to evade liability on the ground that Vandange was an independent contractor and that hence he was not liable for anything done by him outside the scope of the duties entrusted to him. But an independent contractor is one who does not take orders or instructions as to how he carries out his work. For example, doctors or surgeons are not the prepose's of their patients. In the present case both Vandange and Boniface testified that they were excavating the road according to instructions given by Mr Roucou. On the basis of the nature of work involved, such instructions would not have been limited to merely showing the pegs demarcating the proposed road, but also giving of instructions regarding the gradient and such other vital matters that need to be given either directly by Mr Roucou or through his project

engineer.

Amos and Walton in *An Introduction to French Law* at 230 state:

> Even if the servant has done something which he was expressly forbidden to do, the master is liable if the servant was acting in the assumed exercise of his duties.

Vandange testified that he dumped the excess soil on Mrs Lame's land to cut down on cost of transporting it out of the site. Hence that was an act which was connected with the main work entrusted to him by the Defendant Company, and was beneficial to both Vandange and the Defendant Company. Further the evidence of Boniface that the ignition keys of the excavator were taken away by Vandange every day after the excavating work was over, establishes that soil was dumped and leveled on Mrs Lame's land during the hours of employment, and rendered necessary due to the need to dispose of excess soil from the site. Whether any other work was done there at the request of Mrs Lame is immaterial, as it is clear that the Plaintiffs land had been excavated, intentionally or by accident.

Although there is no direct evidence as to who cut the soil and how, there is circumstantial evidence that the JCB excavator was engaged in excavating a road near the boundary of the Plaintiffs' land, that excess soil was "pushed" to the land below belonging to Mrs Lame, and that the excavator was parked overnight on Mrs Lame's land. There is no evidence that any other excavating machinery was involved in any work in that area during the time the Plaintiffs' land was damaged. Vandange and Boniface vehemently denied that Mrs Lame requested them to terrace her garden and to excavate the embankment to widen her yard. If so, the damage had been caused accidentally. The admitted activities on Mrs Lame's

land makes it more probable that the damage caused to the Plaintiffs land, was caused by the J.C.B. excavator. Hence on a balance of probabilities it is most likely than not, that the damage was caused by the JCB excavator and by no other. That damage was caused by the sub-contractor in the discharge of bis duties entrusted to him by the Defendant company.

On the basis of delictual principles therefore, the Defendant company, as the "commettant" would be liable for the damage caused by the operation of the J.C.B. excavator by Vandange and his driver, the proposes, as until the road construction work was completed, the Defendant company had the duty to ensure that the work contracted by him did not cause any damage or loss to any third party, either directly or through his preposes. In the present case, the Defendant's obligation to ensure that no harm or damage was caused to anyone was more, as he engaged heavy machinery to assist him in constructing a road from the main road, up a steep hill and that entailed a certain amount of danger to the safety of persons and a risk to neighbouring properties. It would not be open to him to evade liability by treating Vandange as an independent contractor. If that be so, he ought to have moved the Court to add Vandange as a Defendant in the case, or raised a plea in limine that there was no cause of action against the Defendant company. As Amos and Walton further state:

> The liability of the master for his servant's wrongs does not suppress the personal liability of the servant himself. "Both are liable solidarity and the master against whom damages are awarded has a right of recourse against his servant.

Damages

The Plaintiffs claim R50,000 as trespass to land. On the basis of the finding of this Court, the prepose of the Defendant company is responsible for interfering with a portion of the Plaintiffs' land. There has therefore been trespass to land. On a consideration of the limited nature of the trespass, I award a sum of R10,000 under this head.

As regards the claim for the construction of a retaining wall to stablise the area of land where the damage had occurred, Ms. Cecile Bastille, Quantity Surveyor has furnished a report (exhibit P5) wherein she has assessed the construction of a wall and back filling at R47,000. In her testimony, she stated that she based her estimate on the Engineering Report of Vladimir Prea. She further stated that the calculation was based on a "metre square rate" for a wall 8.5 metres in length, 2.5 m in depth and 1.0 metres to 3.2 metres in height. The estimate also included the cost of back filling. She also stated that that estimate was made in 1998, and that it would be costlier now. The report of Vladimir Prea remains unchallenged. Hence Ms. Bastille's report based on the measurements of the wall to be erected and calculated at the prevailing rate of construction cannot be faulted. Hence I award R47,000 under this head. The Plaintiffs also claim R500 paid to Ms Bastille for her report. In her testimony she stated that she could not remember how much was paid. There is also no documentary proof of any payment. Hence I make no order under that head. However in lieu of that payment I allow a sum of R2,875 paid to BJK Felix for the topographic survey, as per receipt dated 30 June 1999 which was produced in evidence as exhibit P4 a. As regards the payment made for the site visit report made, Vladimir Prea in his evidence stated that he received R75Q. Hence I accept his evidence and award a sum of R750 under that head.

The Plaintiffs also claim R30,000 as moral damages. They are presently unable to construct on their land as the portion

of the land over which they proposed to build the access road has been disturbed and rendered unstable.

Undoubtedly, this has caused anxiety and distress to them. Accordingly I award a sum of R5,000 under this head.

Judgment is therefore entered in favour of the Plaintiffs in a sum of R60,625 together with interest and costs.

Record: Civil Side No 17 of 1999