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LIST OF CASES

DIGEST OF CASES

ADMINISTRATIVE LAW

- *Administrative law – judicial review – public service orders*

CONSENT JUDGMENT

- *Civil procedure – consent judgment – variation*

COMMERCIAL CONTRACTS

- *Civil Code - contract – commercial contracts – time for performance – election*

DAMAGES

- *Civil Code - delict – damages – presumption of liability*

DELICT

- *Civil Code - delict – damages – presumption of liability*

EXPERT WITNESS

- *Evidence – expert witness*

INTERLOCUTORY ORDERS

- *Civil procedure – interlocutory orders – final orders*

JUDICIAL REVIEW

- *Administrative law – judicial review – public service orders*

LEAVE TO APPEAL

- *Civil procedure – leave to appeal*

LIABILITY

- *Civil Code - delict – damages – presumption of liability*

NEW TRIAL

- *Civil procedure – new trial*

PERSONAL INJURY

- *Civil Code - personal injury – quantum*

PROOF

- *Matrimonial causes – fraud – matrimonial property – standard of proof*

PUBLIC SERVICE ORDERS

- *Administrative law – judicial review – public service orders*

RES JUDICATA

- *Civil procedure – writ habere facias possessionem – de facto partner and children – res judicata*

STAY OF PROCEEDINGS

- *Civil procedure - stay of proceedings pending appeal*

WRIT HABERE FACIAS POSSESSIONEM

- *Civil procedure – writ habere facias possessionem – de facto partner and children – res judicata*

Republic v Agathine

Evidence – expert witness

In a Misuse of Drugs Act prosecution, the competence of the Government analyst, who tested the substance in question, was challenged.

HELD:

(i) The competency of an expert is not based purely on academic qualifications in the field to which the testimony relates;

(ii) The competency of an expert witness is a preliminary question for the judge. An expert must be "skilled" by special study or experience. However the fact that an expert has not acquired their knowledge by professional means goes merely to the weight of the evidence and not the admissibility;

(iii) Where opinion evidence is receivable, whether from experts or not, the grounds or reasoning upon which such opinion is based may be inquired into. This inquiry is usually reserved for cross-examination, and is, in some cases, inadmissible in chief; and;

(iv) The competency and reliability of a person as an expert witness cannot be challenged merely due to the absence of advanced technology in Seychelles.

Judgment: Objection overruled. Evidence admitted.

Legislation cited
Misuse of Drugs Act, s 12

Cases referred to
Robert Azemia & Ors v The Republic CSCA 4/2004
Davie v Edinburgh Magistrates (1953) SC 34

Foreign cases noted
R v Greensmith (1983) 77 Cr App R 202
R v Robert McCheyne Robb (1991) 93 Cr App R 161

David ESPARON for the Republic
Anthony JULIETTE for the Defendants

Ruling delivered on 17 June 2005 by:

KARUNAKARAN J: The Defendant above-named stands charged before the Court on Count 1, with the offence of "importation of a controlled drug" contrary to Section 3 read with Section 26(1) (a) of the Misuse of Drugs Act and punishable under Section 29 and the Second Schedule to the said Act.

Particulars of offence are as follows:
The particulars of offence under Count 1 allege that the Defendant on 4 June 2005 imported into Seychelles a Controlled Drug namely, 3 grams and 499 milligrams of cannabis resin without lawful authority.

On count 2, the Defendant stands charged with the offence of Possession of a Controlled Drug contrary to section 6(a) of the Misuse of Drugs Act read with 26(1)(a) and punishable under second schedule to the said Act.

The particulars of offence under count 2 reads that the Defendant, on 30 May 2005, at the Seychelles International Airport, Pointe Larue, Mahe had in his possession a controlled

drug namely, 3 grams and 499 milligrams of cannabis resin without lawful authority.

Having produced the Defendant before the Court on the charges hereinbefore mentioned, the state counsel Mr D. Esparon, on behalf of the Republic applied to the Court for an order remanding the Defendant in custody pending trial, in terms of Section 179 of the Criminal Procedure Code read with Article 18 (7) of the Constitution, for reasons set out in an affidavit filed by a police officer involved in the search, arrest and investigation of the crime alleged against the Defendant. It evident from paragraph 5 and 6 of the affidavit that the Republic seeks remand mainly on two grounds, namely:

> (i) the "offence of importation" with which the Defendant has been charged is a serious one, carrying a minimum sentence of 3 years imprisonment in the case of conviction: and
>
> (ii) Furthermore, the offence is one which is on the increase in Seychelles.

Be that as it may. Section 179 of the Criminal Procedure Code reads thus:

> Before or during the hearing of any case, it shall be lawful for the Court in its discretion to adjourn the hearing to a certain time … And in the mean time the Court may suffer the accused person to go at large or may commit him to prison, or may release him upon his entering into a recognizance with or without sureties, at the discretion of the Court ...

Article 18 (7) of the Constitution reads thus:

> A person who is produced before a Court shall be released, either unconditionally or upon reasonable conditions, for appearance at a later date for trial or proceedings preliminary to a trial except where the Court, having regard to the following circumstances, determines otherwise –
>
> (a) Where the Court is a magistrates' Court, the offence is one of treason or murder;
>
> (b) The seriousness of the offence;
>
> (c) [t]here are substantial grounds for believing that the suspect will fail to appear for the trial or will interfere with the witnesses or will otherwise obstruct the course of justice or commit an offence while on release.
>
> (d) There is a necessity to keep the suspect in custody for suspect's protection.
>
> (e) The suspect is serving a custodial sentence;
>
> (f) The suspect has been arrested pursuant to a previous breach of the condition ...

It is the submission of the state counsel Mr D Esparon that (i) the offence alleged carries a minimum mandatory sentence of 3 years imprisonment in law and (ii) the offences of this nature are prevalent and of late, on the increase in the country. These two factors, according to the State counsel constitute the seriousness of the offence, in terms of Article 18(7) (b) of the Constitution quoted supra. Therefore, he invited the Court to exercise the discretion conferred on this Court by Section 179 of the Criminal Procedure Code and remand the

Defendant in custody pending trial. Further, he contended that mere seriousness of the offence, as a single factor constitutes a valid ground under Article 18(7) of the Constitution to remand an accused person in custody pending trial. In support of his contention, Mr Esparon cited the Ruling delivered by the Court in the recent case of *Republic v Jean-Claude Matombe and another* Criminal Side 23 of 2005, and read out a number of excerpts there from relevant to the point. For these reasons, learned State Counsel urged the Court to order remand of the Defendant in custody pending trial in this matter.

On the other side, learned defence counsel Mr A Juliette vehemently resisted the application for remand sought by the prosecution and moved the Court for an order admitting the Defendant on bail pending trial, even on stringent conditions. The main contention of Mr Juliette is that the quantity of the controlled drug allegedly found in Defendant's possession was only 3 grams and 499 milligrams, a very trivial quantity, which according to him, cannot constitute the seriousness of the offence. Thus, he submitted in effect, that the offence alleged is not of such a serious nature so as to warrant the remand of the Defendant in custody pending trial. Mr Juliette further argued that when people charged with the offence of stealing large sum of money from the Government of Seychelles are enlarged on bail pending trial, there is no justification in refusing bail to an accused person for being in possession of a few grams of cannabis resin. Hence, counsel submitted that the degree of seriousness is less in the instant case, although the text books define "importation of drugs" as a serious one. Therefore, counsel submitted that the instant case does not fall under the exception of seriousness defined in article 18(7) of the Constitution. For these reasons, Mr Juliette urged the Court to admit his client on bail pending trial, even on stringent bail conditions

I gave meticulous thought to the submissions of learned

counsel on both sides.

First of all, the comparison, made by the learned defence counsel, between persons accused of drug offences and those accused of stealing money, is logically a bad comparison, if I may say so. With due respect to the learned defence counsel, "a table" cannot be compared to "a cow" just because each stands on "four legs" that are equal in number and similar in terminology. Likewise, the "drug offences" can no way be compared to "economic offences" just because each category stands on the same terminology of "offences" in their respective appellation. Indeed, the former relates to a crime against humanity; if this cancerous crime spreads unchecked, it will completely destroy every fibre of the social structure and human values on which our civilization has thriven. However, the latter is an economic crime against the State resulting mere monetary loss to others, which can be compensated by suitable sanctions. Hence, the argument of counsel comparing these two different categories of offences, does not appeal to me in the least.

Having said that I would like to repeat what the Court had to state in its ruling delivered in a similar case CR 23 of 2005 on 6th May 2005.

> Under Article 18(7) of the Constitution any person produced before a Court in respect of any criminal proceeding has a Constitutional right to be released on bail conditionally or unconditionally. Undoubtedly, this is the Rule. However, the Court may refuse bail, and remand him in custody pending trial having regard to the six circumstances or grounds, which are enumerated in paragraphs (a) to (f) there under. They are the constitutional exceptions to the said Rule. One among those exceptions is the "seriousness of the offence".

As rightly submitted by the learned defence counsel "seriousness of an offence" is a question of degree. Indeed, as this Court held in *Matombe* supra, in determining seriousness, it is in my opinion perfectly clear that the duty of the judge is to take into account all relevant facts and circumstances peculiar to the offence, as they exist at the date of hearing the bail application, that he must do, in what I venture to call a broad commonsense way as a man of the world and come to his conclusion, giving such weight as he thinks right to various factors in the situation that constitute the seriousness of the offence. Some factors may have little or no weight others may be decisive but it is quite wrong for him to exclude from his consideration matters which he ought to take into account.

To my mind, the quantity of the drug allegedly involved in a case is no doubt, one among those various factors in the situation and constitutes and contributes to the degree of seriousness of the offence. The greater the quantity involved, the higher the degree of seriousness of the offence. Needless to say, the Court therefore ought to take that factor into account in determining the seriousness of the offence. At the same time, it is important to bear in mind that it is not the only factor, which primarily and solely constitutes the seriousness or otherwise of an offence under the Misuse of Drugs Act. The Court therefore, cannot exclude it; ought to consider this factor but along with other factors in combination, in the matrix of the relevant facts and circumstances that are peculiar to the offence alleged in the case on hand. Therefore, I find that the smaller or even trivial quantity of the drug involved in a case cannot as a single factor, reduce the degree of seriousness of the offence to zero or negate its effect to nothingness so as to treat the case of malignancy as a benign one.

Having taken all relevant facts, circumstances and factors into account in this particular case, I find that (i) the offence

alleged herein carries a minimum mandatory sentence of 3 years imprisonment in law and (ii) the offences of this nature are prevalent and alarmingly on the increase in the country causing public concern. These two factors in combination, in my view, constitute the seriousness of the offence in this case, in terms of Article 18(7) (b) of the Constitution. Hence, in exercise of the discretion conferred on this Court by Section 179 of the Cr. P. Code, I hereby remand the Defendant in prison custody pending trial. I decline to grant bail as no convincing reason has been shown by the defence necessitating the Court to do otherwise.

Record: Criminal Side No 38 of 2005

Morel v Registrar of the Supreme Court

Civil procedure – leave to appeal

The Petitioner challenged the exemption of the SMB from the Price Control Regulations. The challenge was dismissed as frivolous and vexatious. The Petitioner sought leave to appeal the dismissal.

HELD:

(i) The object of obtaining leave is primarily to prevent cases which do not disclose any reasonable action, or which are scandalous, frivolous, vexatious or an abuse of process from going before the Court of Appeal; and

(ii) In considering an application for leave to appeal to the Court of Appeal against a ruling of the Supreme Court refusing such leave in the first instance, the Applicant should show that –

(a) the intended appeal raises issues of public interest; and

(b) there is arguable ground of appeal, and such ground has a reasonable chance of success.

Judgment: Leave to appeal granted.

Legislation cited
Criminal Procedure Code, ss 68, 69
Interpretation and General Provisions Act, ss 63, 66
Trades Tax Act, s 7

Supreme Court (Supervisory Jurisdiction over Subordinate Courts, Tribunals and Adjudicating Authorities) Rules 1995, rr 5, 8

Pesi PARDIWALLA for the Petitioner
Ronny GOVINDEN for the Respondent

Ruling on application for leave to appeal to the Seychelles Court of appeal delivered on 10 June 2005:

RENAUD J: The Applicant (who was the Petitioner) is moving this Court for leave to appeal to the Seychelles Court of Appeal against a Ruling given by this Court on 3rd July 2003 refusing leave to the Applicant to proceed. The Application is made under Rule 8 of the Supreme Court (Supervisory Jurisdiction of Subordinate Courts, Tribunal and Adjudicatory Authorities) Rules 1995, hereinafter referred to as the Rules.

In summary, the facts of this case are that the Petitioner filed a petition against the action of the Registrar of the Supreme Court contesting the latter's exercise of his discretion under Section 68(4) of the Criminal Procedure Code. The Petitioner sought leave of this Court as per Rule 5 of the Rules to proceed with the hearing of a Judicial Review on its merits. At that hearing, this Court dismissed the case on the ground that the charge sought to be filed by the private prosecutor was frivolous and vexatious as the SMB had been granted exemption by the Minister of Finance from the provisions of the Trades Tax Act regarding Price Control Regulations. It is against that Ruling that the Petitioner is now seeking leave of this Court to appeal to the Seychelles Court of Appeal as per Rule 8 of the Rules.

Learned Counsel for the Applicant appended an Affidavit in support of his Application, deposing, inter alia, that the grounds of the intended appeal disclose issues of public interest and that he verily believes that the grounds of the

intended appeal are valid grounds and would have a reasonable chance of success. In the circumstances, he moved that it is necessary, in the interest of justice that, leave be granted to the Applicant to appeal against the Ruling.

In his reply, Learned Counsel for the Respondent objected to the Application on the basis that the grounds, set out by the Applicant in its Intended Notice of Appeal, do not disclose an arguable case.

Learned Counsel for the Applicant submits that the intended appeal raises issues of public interest at two levels. Firstly, it is concerned with the enforcement of price control, which according to him, is indisputably a matter of public interest. Learned Counsel argues that the ultimate object of the intended appeal is to obtain an order of the Supreme Court compelling the Respondent to issue summons on the SMB to answer to the price control charges against it. Secondly, the individual grounds of appeal disclose fundamental issues of law, the resolution of which on appeal, in one sense or the other, would greatly serve the public interest. These, he states, are patent in grounds 1 to 4 of the Notice of Appeal.

As regards the chance of success, Learned Counsel for the Applicant submits that the judge's decision refusing leave to the then Petitioner to proceed with his Petition is grounded on the finding that SMB was exempted of price control by a “Certificate of Exemption” and, therefore, the Petition was "wholly unarguable". Learned Counsel submits further that this finding is unsafe for the following reasons:

(i) It is not clear from the decision of the Registrar how the purported Certificate of Exemption became available to him.

(ii) It is not known whether the purported Certificate is an authentic document, especially

as the Respondent, himself, in his letter of 5 September 2002 expresses a certain measure of doubt with regards to the purport of the document: "It will appear

(iii) The purported Certificate is not in the form of a Statutory Instrument and, therefore, cannot attract judicial notice. Such a document would have to be adduced in course of the trial, in accordance with the applicable rules of admissibility applicable to the production of documentary evidence.

(iv) In view of the doubtful probative value and purport of the document, it was improper for the Respondent to use it to exculpate the Accused and discontinue proceedings against it.

Learned Counsel for the Respondent on the other hand, submits that it is in the public interest that laws and regulations are abided by. In this present case, he argues, exemption made by the Minister of Finance was done by a statutory instrument which is a law, and that law is in the public interest.

As regard the intended grounds of appeal and its chance of success, Learned Counsel for the Respondent submits that this is not so. He concedes, however, that it may be true that the Registrar, before he took the decision not to admit the complaint, had issued summons to compel the attendance of the Respondent in the Supreme Court under Section 69 of the Criminal Procedure Code, but this does not affect his judicial discretion to thereafter refuse to admit the complaint. Counsel submits that this is so as the law that regulates the exercise of statutory powers and discretion allows powers to be exercised from time to time in order to correct any error. He further

submits that the Petition did not have any arguable case, or, the case is frivolous and vexatious.

As regards the chance of success, Learned Counsel for the Respondent submits that it was proper for the Learned Judge to have taken Judicial Notice of the purported Certificate of Exemption. He supports this submission by the authority to be found in *Phipson on Evidence* (1990 ed) at 38, paragraph 2-17, where the learned author states that Official Seals and Signatures can be the subject of judicial notice — this includes "Judicial Notice of such documents as the certificate of the Secretary of State for India, authentically the signature of an Indian Official". Accordingly, Learned Counsel further submits that the objection taken against the admissibility and weight given by the Learned Judge to the Certificate of the Minister of Finance is entirely frivolous and vexatious. Learned Counsel for the Applicant replied to the Respondent's submissions with particular regard to the Certificate of Exemption *(*Document*)* which purports to exempt the SMB from Section 7 of the Trades Tax Act. He argues that such Document must be in the form of a Statutory Instrument. He further argues that the Document on which the Respondent appeared to have relied upon in order to discontinue the proceeding against SMB, and on which the Supreme Court also relied to refuse the Application for leave to proceed, lacks the attributes of a statutory instruments (S.I.) in the light of the provisions of Sections 63 and 66 of the Interpretation and General Provisions Act *(*IGPA*)* which set out the requirements of form, that a S.I. must satisfy before coming into operation. Learned Counsel adds that in particular it is provided that an S.I. must be published in the Gazette and can only come into operation on the date of publication or such other date as it may provide. He further argues that there is no indication on the Document that satisfies the publication requirements. Moreover, he adds, the Document does not satisfy the Citation requirement set out in Section 66(1)(a) and (b) of the IGPA.

The further argument of Learned Counsel for the Applicant is that there is not the least indication on the face of the Document that it is or was at all meant to be a S.I., and as such, judicial notice thereof could not be taken in view of the clear provision of Section 63(1) of IGPA. Hence, he argues that the Document cannot be used as authority for exemption as contemplated by the Trades Tax Act.

Learned Counsel for the Applicant concludes that the authorities regarding judicial notice cited by learned counsel for the Respondent has no relevance and cannot be relied upon to give any probative value to the Document, therefore, his submissions on the probative value of that Document discloses a very arguable case, which alone, according to him, ought to be the subject matter of an appeal.

Rule 8 of Supreme Court (Supervisory Jurisdiction of Subordinate Courts, Tribunal and Adjudicatory Authorities) Rules 1995, is worded as follows:

> Where the Supreme Court refuses to grant leave to proceed, the Petitioner may appeal to the Court of Appeal within 14 days of the Order of the refusal with leave of the Supreme Court first had and received.

I believe that the objects of obtaining leave at this stage is primarily to prevent cases which do not disclose any reasonable cause of action, or which are scandalous; frivolous; vexatious or an abuse of process, from landing before the Court of Appeal. Therefore, in considering an Application for Leave to Appeal to the Seychelles Court of Appeal against the Ruling of this Court refusing such leave in the first instances, the Applicant ought to show that:

(i) the intended appeal raises issues of public

interest, and

(ii) there is arguable ground of appeal, and such ground has a reasonable chance of success.

The issues raised by learned counsel in their respective submissions are not matters to be resolved by this Court if indeed there is any adjudication that is called for. The submissions are there only to highlight and possibly impress on this Court that the Applicant has a very arguable appeal with a reasonable chance of success, on the one hand, and on the other hand, as argued by the Respondent, that that is not the case.

Both counsel are in agreement that the subject matter in issue, that is, the application or non-application of Price Control Regulations, is a matter of public interest. I hold a similar view that the subject matter in issue meets the first criteria required to satisfy this Court that leave may be granted for the case to proceed to the Seychelles Court of Appeal.

Does the matter in issue meet the second criterion, that is, whether there is arguable ground of appeal with a reasonable chance of success?

I have meticulously analysed the submissions made by learned counsel. It is evident to me that the whole matter boils down to the issue as to whether the purported Certificate of Exemption satisfies all the necessary attributes, legal or otherwise, to be deemed a document that would properly attract the judicial notice of the Court. In the light of the submissions of both parties, and having given careful consideration to the various points raised by both sides, I conclude and hold the view that this issue has certain merit and is indeed not frivolous or vexatious, and as such it ought to be adjudicated upon by the appropriate forum. Hence it

meets the second criterion.

In the circumstances, I find that it is necessary and in the interest of justice that leave be granted to the Applicant to appeal to the Seychelles Court of Appeal against the ruling made by this Court on 3 July.

Record: Civil Side No 339 of 2002

Javotte & Or v Minister Of Social Affairs and Employment

Administrative law – judicial review

The Applicant was declared a prohibited immigrant. She sought to have the decision on her status quashed.

HELD:

(i) A right of appeal can be created only by an express statutory provision. However, stipulations such as "final" or "final and conclusive" have been interpreted to mean that parliament intends nothing more than to save intra vires orders of the executive from being challenged in a Court of law, and that accordingly, the Courts have jurisdiction to quash unlawful orders or decisions made under a statute, by an appropriate writ under the supervisory powers of a Court;

(ii) "Sufficient interest" or "standing" concerns the Applicant's interest in the subject-matter of the case rather than the remedy sought. Hence the leave stage is a procedural bar to prevent cases without any merit from being presented under public law. The Petitioner who is faced with an order to leave the country, has sufficient interest in the subject-matter of the petition;

(iii) The concept of "good faith" involves the notion of uberrima fides to the extent that the Petitioner when filing the petition should have had an arguable case;

(iv) The Minister has exceeded power and acted unlawfully if a reasonable Minister, properly directing him or herself would not have reached that decision. The Court will then exercise its supervisory powers and quash the decision; and

(v) The Petitioner claims that the Director of Immigration failed to take into account subjective matters concerning herself and her family, and seeks intervention by the Court to quash the decision to enable consideration of those matters.

Judgment: Application dismissed.

Legislation cited
Constitution of Seychelles, art 125
Employment Act, ss 47, 48, 51
Immigration Act, ss 16, 19, 20, 21
Supreme Court (Supervisory Jurisdiction over Subordinate Courts, Tribunals and Adjudicating Authorities) Rules 1995, rr 6, 7

Cases referred to
Amalgamated Tobacco Co (Sey) Ltd v MESA (1996) SLR 1
Gordana Benker v Government of Seychelles SCA 46/1999
Cable & Wireless (Sey) Ltd v Minister of Finance (1998) SLR

Foreign cases noted
Council of the Civil Service Unions v Minister of the Civil Service [1985] AC 374
Gul v Swizterland (1996) 22 ECHR 93
R v Flexistone Justices ex parte Leigh [1987] QB 582
R v Home Secretary ex parte Brind [1991] 2 WLR 588
R v Secretary of State for the Home Office ex parte Doorga

(1990) COD 109
R v Paddington South Rent Tribunal, ex parte Millard [1958] 1 WLR 348
R v London County Council, ex parte *Corrie* [1918] 1 KB 68
Padfield v Minister of Agriculture, Fisheries and Food [1968] AC 997
R v Huntington District Council, ex parte Cowan [1984] 1 WLR 501
R v Electricity Commissioners, ex p London Electricity Joint Committee Co [1920] 1 KB 171
Page v Hull University Visitor [1993] 1 All ER 97
Ridge v Baldwin [1964] AC 40
O'Reilly v Mackman [1983] 2 AC 309

Alexia ANTAO for the Plaintiff
Fiona LAPORTE for the Defendant

Judgment delivered on 25 November 2005 by:

RENAUD J: This is an application for Judicial Review of the decision of the Minister of the then Ministry of Employment and Social Affairs, herein referred to as "MESA".

The Petitioners are seeking the following relief:

(a) For a writ of certiorari to quash the decision of the Respondent for being ultra vires null and void as it was based on a non-existent provision of the Employment Act 1995.

(b) For a writ of mandamus to compel the Respondent to order the reinstatement of the Petitioners in their jobs as the termination of their employment was not grounded on any evidence adduced either before the competent officer or before EAB.

(c) For a compensation order for the prejudice the Petitioners have suffered as a result of the unjustified termination of their employment.

(d) The grounds advanced by the Petitioners for seeking such relief are as follows:

(i) There is sufficient evidence to establish that the Petitioners' termination of employment was ultra vires the Act.

(ii) In effecting a termination based on "redundancy" the employer failed to comply with its statutory obligations.

This Court is empowered to hear application by virtue of Article 125(1)(c) of the Constitution and it does so in accordance with the Supreme Court (Supervisory Jurisdiction over Subordinate Courts, Tribunals and Adjudicating Authorities) Rules 1995 herein referred to as "the Rules".

On 4 April 2003, the Petitioners filed their "Application for the Exercise of Supervisory Jurisdiction under Article 125(c) of the Constitution" and sought leave to proceed. On 24 June 2003 this Court having found that there was a bona fide claim by the Petitioners, granted leave to proceed and directed MESA to forward the record of proceedings to this Court. On 19July 2003, MESA complied with the order of this Court and forwarded the proceedings as requested.

The case was then fixed for 14 October, 2003 and all parties duly notified. The Attorney-General, acting on behalf of the Respondent, was also served with the Petition upon its request, on 24 September 2003. The Court allowed time to the Respondent to file its response by 13 January 2004. Unfortunately, the Attorney-General representing the

Respondent failed to do so. Further time was allowed for filing a response and that was to be 17 February 2004. By that date, the Attorney-General had again not filed its response and sought for further time. The matter was set for 18 May 2004, and again, by that date the Attorney-General had not filed its answer. Further time was allowed up to 21 September, 2004 for that purpose. On 21 September 2004 the Attorney-General duly filed its objection supported by affidavit.

The Petitioners were then allowed time to respond to the objections raised by the Respondent and that was to be by 23 November 2004 but could not do so for technical reasons. Further time was granted up to 29 March 2005, when the response of the Petitioners to the objections raised by the Respondent was duly filed and the matter was fixed for hearing on 15 June 2005.

The Petitioners deponed to an affidavit as follows:

> 1. We are ex-employees of the Public Utilities Corporation (PUC) and the Respondent is the Minister of the Government of Seychelles responsible for the administration of employment matters and was at all material times acting in his appellate capacity under the Employment Act 1995 (the Act)
>
> 2. We have been employed with PUC for a period of two years and a half and twenty-one years respectively and were terminated by letter dated 31 May 2002. Copies of the letter of termination is produced and marked Exhibit P1.
>
> 3. On 6 June 2003 we lodged a grievance with the competent officer under the Act for

unjustified termination of employment.

4. After reviewing the evidence of the parties at the hearing of the grievances on 31 May 2002, the competent officer determined that although the representative of the Employer provided no reasons for the termination and under normal circumstances the terminations would not be allowed and the employees re-instated but in "this case termination of contracts of employment should be allowed. With payment of all employment benefits". The record of proceedings before the competent officer is produced and marked as Exhibit P2.

5. We appealed against the decision of the competent officer on the 12 June 2002, and the appeal was heard on 1 August 2002 by the Employment Advisory Board (EAB).

6. The EAB found that there was an absence of fact and reasons for the termination of our employment and further on the evidence adduced that the Employer had not complied with its statutory obligations.

7. It was also a finding of the EAB that the competent officer erred in his finding as there was no evidence to suggest that the working relationship between ourselves and the employer had broken down irreparably, and consequently reversed the decision of the competent officer. The record of proceedings before EAB is produced and marked Exhibit P3.

8. In a letter dated 7th of January 2003 we were informed that the Minister in his appellate capacity decided to uphold the determination of the competent officer. The said letter is produced and marked Exhibit P4.

9. In the circumstances, we respectfully move this Honourable Court to exercise its supervisory jurisdiction and grant the relief sought in our Petition.

In an affidavit in support of the "Notice of Objection to the Petition", the Minister of Employment and Social Affairs inter alia states as follows:

1. That the facts and matters stated in the Petition and deponed are true where the same are within my knowledge and otherwise true to the best of my information and belief being based on information and documents in the possession of the Petitioner.

2. That I admit paragraphs 1, 2, 3, 4, and 5 of the Petition.

3. That in answer to paragraph 6 of the Petition I aver that neither the determination before the competent officer and nor that of the Employment Advisory Board (hereinafter referred to as the Board) were based on "the interest of the organization". The evidence before the competent officer and arguments presented before the Board refer to termination on the

ground of redundancy. I further aver that both the former and the latter found that the Petitioners have been unfairly terminated. However, I refused to reinstate the Petitioners for the following reasons:

> in view of the fact that termination was made in a redundancy situation the Board finds it is not practicable to recommend reinstatement.

5. That in further answer to the Petition / aver that in the circumstances referred to in paragraph 2 above there could not be evidence to establish that the Petitioners termination of employment was ultra vires the Employment Act, 1995 as amended.

The Petitioner replied to the Respondent's affidavit as follows:

1. That further information has come to light in regard to the allegation that our employment was terminated because a redundancy situation existed. It is hereby produced and exhibited herewith marked as Exhibit P5 copy of the Nation Newspaper dated Saturday 19 July 2003 advertising our jobs.

2. That this explains why the Employer was not in a position to place before the competent officer and the EAB facts in support of their claim that there was a redundancy situation as none existed.

3. That in the premise the Minister based his

decision on non-existent facts and is for that reasons, unreasonable and ultra vires the Employment Act as amended.

4. That Leopold Javotte one of the Deponents herein re-applied for his old job post the said advertisement and is currently working in the same post for which he was made "redundant".

A Writ of Certiorari has the effect of quashing a decision which may be done by an excess or abuse of power. The criteria for deciding which acts or decisions are subject to Certiorari was expressed by Lord Atkin in the case of *R v Electricity Commissioners, ex p London Electricity Joint Committee Co* [1920] 1 KB 171 as:

> ... whenever anybody of persons having legal authority to determine questions affecting the posts of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the following jurisdiction of the King's Bench Division.

Certiorari is also available to quash or nullify actions or decisions that are *ultra vires* or in breach of natural justice or where traditionally there has been an error of law on the face of the record. As Lord Slynn suggested in the case of *Page v Hull University Visitor* [1993] 1 All ER 97 at 114b, the scope of certiorari may be interpreted widely, when he said:

> If it is accepted, as I believe it should be accepted, that Certiorari goes not only for such an excess or abuse of power but also for a breach of the rules of natural justice.

The interpretation of the duty to act judicially has been

widened considerably since the case was decided. Since the case of *Ridge v Baldwin* [1964] AC 40, the Courts have interpreted the phrase to include those bodies that have the power to decide and determine matters which affect the citizens. This means that certiorari generally may be available to review all administrative acts.

The formulation of acting judicially commonly used today is that favoured by Lord Diplock in *O'Reilly v Mackman* [1983] 2 AC 309*,* that it is enough to show that the body or person has legal authority to determine questions affecting the common law or statutory rights of other persons.

The Order of Mandamus requires the carrying out of a public duty which has been imposed by law. It developed as a means for returning to public office those people who had been wrongfully deprived of such a position. Mandamus, however, will only be issued where the duty is owed and a request to perform it has been refused, for example — requiring a tribunal to determine a case which it had wrongfully claimed was outside its jurisdiction — *(R v Paddington South Rent Tribunal, ex parte Millard* [1958] 1 WLR 348*);* requiring a body to consider matters according to law where a discretionary power had been fettered by overly rigid adherence to a policy — *(R v London County Council, ex parte Corrie* [1918] 1 KB 68), and requiring a body to exercise a power according to law where the power had been abused — (*Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997*).* Judicial review deals primarily with the question of law. Lord Widgery CJ in the case of *R v Huntington District Council, ex parte Cowan* [1984] 1 WLR 501*,* identified a proper case for judicial review:

> as being a case where the decision in question is liable to be upset as a matter of law because on its face it is clearly made without jurisdiction

or made in consequence of an error of law.

I have reviewed the proceedings provided by MESA. It is obvious that the process of terminating the employment of the Petitioners started by a letter emanating from their employer namely, Public Utilities Corporation (PUC) dated 20 May 2002 addressed to MESA, The text of the letter as well as the title of subject matter is reproduced hereunder:

> RE. TERMINATION OF APPOINTMENT IN THE INTEREST OF THE ORGANISATION — MESSRS BARRY MATHIOT, MARC JEAN AND LEOPOLD JAVOTTE"
> Your urgent approval is sought for the Termination of Appointment, in the interest of the Organisation for the following above mentioned employees.

The letter went on and set out the National Identity Number; Address; Occupation; Salary; Date of Employment and the legal benefits that were due to each one of them. On 24 May 2002 the Principal Secretary, Ministry of Administration & Manpower Development wrote to The Executive Chairman, Public Utilities Corporation as follows:

> I refer to your letter of 16 May 2002 seeking approval for the termination of appointment of the following employees, in the interests of the organization:
>
> Mr Marc, Daniel Jean NIN 964-0484-1-1-40
> Mr Barry, Michel Mathiot NIN 955-0694-1-1-39
> Mr Leopold Javotte NIN 961-0171-1-1-12
>
> Approval is hereby conveyed.

By letter dated 28 May 2002 the Principal Secretary of MESA wrote to PUC as follows:

RE, TERMINATION IN THE INTEREST OF THE ORGANISATION – BARRY MATHIOT, MARC JEAN AND LEOPOLD JAVOTTE.

Your letter dated 20th May 2002 refers.
You are invited to attend a meeting on Friday 31st May at 10.00 a.m Unity House room 305 without fail.
The three above named workers must also attend the meeting. Please bring them along.

By letter dated 31 May 2002, MESA wrote to PUC and copied to each of the employees on their respective home address, as follows:

RE: TERMINATION IN THE INTEREST OF THE ORGANISATION – BARRY MATHIOT, MARC JEAN AND LEOPOLD JAVOTTE

Further to Negotiation Procedure activated by Public Utilities Corporation, pursuant to the Employment Act, 1995, please be notified that approval is conveyed for the contracts of employment of the above-mentioned persons to be terminated with immediate effect with payments of all legal benefits.

I note from the record of proceedings that a meeting was held and the record of that meeting is reproduced hereunder:

BEFORE THE COMPETENT OFFICER LESLIE BONIFACE NEGOTIATION PROCEDURE
PUBLIC UTILITIES CORPORATION
REF: TER: 17 APPEARANCES
Marc Jean: Employee
Barry Mathiot. Employee

Leopold Javotte: Employee
Robert Moustache: representative of Employer

INTRODUCTION
The Negotiation Procedure and its purpose under the law was explained to the meeting. It was explained that the organization would have to give reason for wanting to terminate the contract of employment of the workers.

ROBERT MOUSTACHE
The above stated as follows:

- that he himself had received instruction to make the necessary formalities to g5o through the procedures to make the three workers redundant but was given no reason as to why and hence could not give any.

- That the only thing that he could say 5was that the organization felt that it cannot continue to employ the workers.

MARK JEAN

The above stated as follows:

That he could not say if he is against the termination or not as no reason has been provided for the same.

That he would like PUC to justify the termination only then would he be in a position to say whether he is in favour or not.

That if he had committed offences he would like to know or if he was being terminated for political

reason/she would like to know too.

CONCLUSION

The two other employees advance the same argument as Mr Jean. The representative of PUC on his part maintained that he could provide no reason as he himself was in the dark regarding the reason for the termination.

DETERMINATION

It is not clear as to why the employees concerned were being terminated. The purpose of the consultation under the Negotiation Procedure is to establish the reason/s the organization have for any prospective termination and also to examine ways to avoid, if possible, the termination. The representative of PUC could not however provide any. Under normal circumstances the termination should not be allotted and the employees should be reinstated. However the competent officer is of the opinion M the working relationship between (sic) has broken down and is irreparable. As such it would not be prudent to determine that the contracts of employment of the employees continue to subsist. The competent officer is of the opinion that the contracts of employment of the employees should be allowed to be terminated with payment of all employment benefits.

Competent officer means a person authorized by the Minister to act in respect of that matter and means also the Minister wherever he thinks it fit to act in person in respect of any matter. In this case the competent officer was a person other than the Minister.

Chief Executive means the person acting or discharging the functions of such office in the Ministry or, as the case may be, the Department responsible for the administration of this Act.

There is a Negotiation Procedure laid down in Part 1 of Schedule 1 of the Employment Act cap 69. This procedure is applicable in 3 specific instances where the competent officer is empowered to make determination, and these are:

(a) restrictions of termination of contract under Section 47 of the Act;
(b) lay-offs under Section 48 of the Act; and
redundancy of workers under section 51 of the Act.

In this matter the issue of "lay-offs" under Section 48 of the Act did not arise.

Relevant parts of the negotiation procedure applicable in cases of "restrictions of termination of contract under Section 47 of the Act" and "redundancy of workers under Section 51 of the Act" is reproduced hereunder:

> Section 1.(1) Where an Employer wishes to terminate a contract of employment otherwise than under section 57, he shall, not less than 42 days before he intends to give notice of termination to any worker, notify the, Union and the Chief Executive. The period of 42 days referred to in sub-paragraph (1) may, in exceptional circumstances and at the discretion of the Chief Executive, be reduced.
>
> Section 1.(3) The notification under sub-paragraph (1) shall specify:

(a) the reason for the proposed termination;

(b) the number of workers concerned,-

(c) the names, ages, occupation, date of engagement and wages of the workers concerned,-

(d) whether the proposed termination relates to an activity in a particular sector of the business or to the business as a whole;

(e) the criteria used for selecting the workers whose contracts are to be terminated.

Section 1.(4) The employer shall also furnish any further information which the competent officer may request.

Section 2. Upon receipt of the notification and of any additional information requested under paragraph 1(4), the competent officer registers the notification and issues to the employer a certificate of registration.

Section 3. (1) As soon as possible after the date of registration of the notification and in any case not later than 7 days therefrom, the competent officer shall invite the Union, the employer or the employer's organization to which he may belong, for consultation with a view to exploring and agreeing on how the proposed terminations may be avoided or their effects minimized.

Section 3 (2) Notwithstanding sub-paragraph (1), where the reason for the proposed termination of a contract is a personal one in the sense that it

relates to the character, competence, loyalty or other attribute of the worker, the competent officer shall invite the worker's participation to consultations in pursuance of sub-paragraph (1).

Section 4. (1) The competent officer shall keep a record of the statements made during the consultations held pursuant to paragraph 3, and shall file all documents and evidence produced by the parties and any written submission they may make.

Section 4.(2) Following the conclusion of consultations the competent officer considers the case and makes his determination of the officer.

Section 4.(3) A determination by the competent officer under sub-paragraph (2) shall be made within 14 days after the date of registration of the notification.

Section 5. The worker, the Union or, the employer may, not later than 14 days after service of a determination made under paragraph 4(3), appeal to the Minister against that determination.

Section6 No action shall be taken by the employer in connection with the proposed termination (including giving notice to a worker of termination) until 21 days has elapsed following a determination under 4(2) or until the result of an appeal or review, as the case may be, or unless the competent officer fails to make a determination within the time allotted under paragraph 4(3).

Section 7. This procedure is also subject to Part III of this Schedule.

In this case, the whole matter was activated by the employer, namely PUC, by letter dated 20 May 2002, as reproduced above. The employer sought the approval of MESA to terminate the employment of Messrs. Barry Mathiot, Marc Jean and Leopold Javotte, in the interest or the organization. That letter, was supposed to be the notification required by Section 1(1) of Part 1 Schedule 1. It was addressed to the Principal Secretary, Ministry of Social Affairs and Employment, who is the Chief Executive of the Ministry responsible for the administration of the Employment Act. However, the reason for such termination was given as "in the interest of the organization".

The employer, in seeming compliance with the law, provided certain information called for under Section 1(3) of Schedule 1, in cases where and when redundancy is proposed, but it failed to provide the information required by Section 1(3)(d) and Section 1(3)(e). It is noted that the law requires that the employer "shall" specify this information, thus making it mandatory to do so.

There is no evidence of compliance by MESA with the provision of Section 2 of Schedule 1 as the record does not show that a certificate of registration was issued.

I am satisfied however, that the case was registered as there is a case reference number: TER/17. I believe that it is reasonable to assume that the registration took place on the day following the date of the letter from PUC, that is, 21 May 2002.

The competent officer, by letter dated 28 May 2002, invited the employer to attend a meeting on Friday 31 May 2002 at

10.00am. In that same letter the employer was informed that the three workers must also attend the meeting and the employer was called upon to bring them along. Such notice was issued within 7 days after registration of the notification in accordance with Section 3(1) of the Schedule. There is no evidence that the competent officer invited the Union for consultation as the law requires.

The competent officer, following the consultation, by letter dated the same day conveyed his decision to the employer copied to the 3 workers, "that approval is conveyed for the contracts of employment of the above-named persons to be terminated with immediate effect with payments of all legal benefits".

The above stated decision apparently emanated from the determination of the competent officer. The proceeding of the negotiation meeting is reproduced above, A question that now arises is whether the competent officer, having come to the conclusion that "Under normal circumstances the termination should not be allowed and the employees should be reinstated", has to power to go further and state "However, the competent officer is of the opinion that the working relationship between (sic) has broken down and is irreparable" in the absence of any evidence. I believe that this is an area of serious concern that needs to be determined in this review.

In the light of the foregoing, I believe that the competent officer in the first instance is not empowered by law to receive a notification when the ground of termination is "in the interest of the organization". There is no such provision in the law and by analogy there is no cause of action so to speak. If it was found necessary for such a ground to be included in the law, that would fall within the province of legislators and indeed is not open to the competent officer to add any other ground for termination of an employee other than those contained in the law. For that reason only, a writ of certiorari may be issued as

the action of the competent officer is ultra vires the law.

Secondly, assuming that the competent officer had in mind that it was a notification of redundancy, then the mandatory requirement for the employer to provide all the information required by the law is lacking. The competent officer should have not proceeded with the hearing unless and until all the mandatory information required under Sections 1(3)(e) and 1(3)(d) of Schedule had been supplied by the employer.

Thirdly, the Union was not invited to participate as called for under Section 3(1) of Part 1 of Schedule 1. I note that neither were the workers informed of their right to be represented by their Union.

Fourthly, the rule of natural justice requires that the workers should have been informed of the case against them. This came out clearly at the hearing and the employer could not provide them with any proper ground and as such the workers were not aware as to what defence if any they had to advance and they indeed could not advance any because of that serious anomaly. They were called in apparently to negotiate termination of their employment in the interest of the organization but midstream the hearing seemed to have been approached as if it was a redundancy situation, yet the procedures for redundancy were not followed by the employer, as I have stated above. Judicial review is applicable in cases where the rule of natural justice has not been followed and for that reason a writ of Certiorari may be issued.

Fifthly, after hearing the case the competent officer made the finding that:

> It is not clear as to why the employees concerned were being terminated. The purpose of the consultation under the Negotiation Procedure is to establish the reason/s the organization have for any prospective termination and also to examine ways to avoid, if possible, the termination. The representative of PUC could not however provide any. Under normal circumstances the termination should not be allowed and the employees should be reinstated.

This finding in my view would have been correct if "redundancy" was the reason for termination.

But unfortunately the whole process went awry, in my view, when the competent officer went further and imported his own opinion as the concluding determination:

> However the competent officer is of the opinion that the working relationship between (sic) has broken down and is irreparable. As such it would not be prudent to determine that the contracts of employment of the employees continue to subsist. The competent officer is of the opinion that the contracts of employment of the employees should be allowed to be terminated with payment of all employment benefits.

I find that there is no basis or evidence on which the competent officer formed that opinion. Worst still, in was not an issue that came up or was considered at all at the hearing. The workers were not called upon at all to address that point, that is the working relationship between (sic) has broken down and is irreparable". I find that the competent officer exceeded his judicial powers in the circumstances and his final determination is ultra vires the law. Again, for that reason a writ of certiorari may be issued.

The matter did not end there; it went on appeal to the Minister and the Employment Advisory Board (EAB) heard the appeal and conveyed its advice to the Minister. The EAB concluded that:

> We are of the view that the competent officer erred in his finding as there is no evidence to suggest that the working relationship between Appellants and Respondent had broken down irreparably. The competent officer had not addressed the issues before him correctly. He took a very simplistic approach and his decision to allow the termination on those grounds that he did was unfair in the circumstances.

I totally agree with the conclusion reached by the EAB on that score.

The whole matter was concluded by the decision of the Minister after the Appeal was heard. His decision simply upheld the determination of the competent officer. He did not make any other determination of his own. In that case if the determination of the competent officer fails then it would follow the Minister's final determination would also fail.

For reasons stated earlier, I issue a writ of Certiorari on the grounds that the competent officer received and heard a matter that did not fall within the ambit of the applicable law; his determination was ultra vires the law applicable in that the competent officer exceeded his judicial powers and came to a conclusion which is not supported by evidence and further that he failed to uphold the rule of natural justice when hearing the matter.

The 3 workers were public employees and as such they are

entitled to a writ of mandamus. I hereby issue an order of mandamus ordering the return of these 3 public officers who had been wrongfully deprived of such a position back to their original position with PUC.

The Petitioners may have suffered prejudice but the writ and order made herein would in the ultimate place the Petitioners in the position as if their respective employment was never terminated. Their employer has to pay them their salaries and benefits from the time they were made to cease working to date, of course deducting whatever the employer has hitherto paid them as compensation etc based on the decision of the competent officer. In respect of the one who was re-employed he would have to be similarly considered and be reimbursed for any period that he did not receive his salary. In the circumstances and for these reasons, I do not make any other compensation order.

Record: Civil Side No 91 of 2003

Galt International v Krishna Mart & Co (Pty) LTD

Civil procedure – new trial

Following a number of procedural delays the Plaintiff received judgment at an ex parte hearing. The Defendant applied for a new trial.

HELD:

(i) A fundamental requirement of natural justice is that a person should have an adequate opportunity to appear and answer a claim brought against them. This requirement may be breached if the Court refuses to permit a Defendant to file a statement of defence, albeit late, where the case will proceed ex parte; and

(ii) The Court may refuse to permit late filing of a statement where the Defendant's behaviour justifies the refusal such as where the Defendant is merely delaying proceedings and has no intention of putting forward a genuine defence.

Judgment: Application for new trial granted.

Legislation cited
Seychelles Code of Civil Procedure, ss 63, 69, 193, 194, 195, 197, 198, 225, 247

Cases referred to
Biancardi v Electronic Alarm SA (1975) SLR 193
Naiken v Pillay (1968) SLR 101

France BONTE with Serge ROUILLON for the Plaintiff

Charles LUCAS for the Defendant

The Appeal resulted in the Court ordering the Appellant to pay security and for records to be prepared within 30 days

Ruling on an application for a new trial delivered on 21 November 2005 by:

PERERA J: This is an application filed by the Defendant Company under Section 194 of the Code of Civil Procedure for a new trial on the ground that it is necessary "for the ends of justice." The Plaintiff Company filed this action on 22 November 2004, claiming a sum of SA Rand, 1,098,430.49 together with interest at 10% as at 1 September 2004 and continuing. On 15 February 2005, the first date fixed for the Defendant to appear and answer the claim, the Defendant was represented by Mr C Lucas Attorney at law who obtained time till 24 May 2005 to file a defence. On that day, Counsel for the Defendant filed a request for further and better particulars, and thereupon time was granted till 12 July 2005 to file a defence. In the meantime the Plaintiff filed a reply to that request on 31 May 2005. On 12 July 2005, Miss L Pool Attorney at Law stood in for Mr C Lucas and obtained further time to file the defence on 29 September 2005. On that day, once again Miss Pool stood in for Mr Lucas and sought further time. No reasons were given for Mr Lucas' absence or the cause for not filing the defence. Counsel for the Plaintiff vehemently objected to granting of further time as extensions had been given on three previous occasions since 15 July 2005. Thereupon Miss Pool stated that she had no further instructions. Karunakaran J then made order that as the Defendant had defaulted appearance as well as failed to file the defence, the case be fixed for ex parte hearing on 5 October 2005 at 9.00 a.m. with notice to the Defendant. On that day, Mr Lucas appeared for the Defendant and filed a defence dated 5 October 2005 and a medical certificate dated 28 September 2005 wherein he had been granted medical

leave from that day till 1 October 2005. Although he submitted to Court that Miss Pool has on the previous day informed the Court that he was sick, the proceedings do not indicate that. Mr Lucas then informed Court that the delay in filing the defence was because the parties were negotiating a settlement.

Karunakaran J thereupon explained to Mr Brent Bonnes, the representative of the Defendant Company of the possibility of further delay if an ex parte judgment is entered and subsequently an application to set it aside is filed. However, he and his Counsel Mr Rouillon insisted on an ex parte hearing. Mr Lucas then told Court:

> My lord, I will leave it in your hands, procedurally it is in the Court's hand. If they insist my lord, I did not file a motion, I thought it would have been too formal given the nature of the relation between the two parties. As it is now, it is soured up so much and if they move for ex parte, I have no valid motion per se before the Court today. I will just allow it to go through and then I will make the application, which is necessary.

The Court thereupon stated "if they insist, I will proceed and give judgment." Mr Lucas then left the Court, and the case was heard ex parte upon hearing the evidence of Mr Bonnes. The Plaintiff company was awarded SA Rand 1,098,430.49 with interest and costs as prayed for.

On the same day the Plaintiff applied for attachment under Section 247 of the Code of Civil Procedure, of monies of the Defendant Company in named accounts at the Bank of Baroda, the Mauritius Commercial bank and Barclays bank, three immovable properties and six motor vehicles. The Court issued an order of attachment on 6 October 2005 only in respect of the bank accounts and the motor vehicles, as

Section 247 did not apply to attachment of immovable properties. The order was made expeditiously on the application of the Plaintiff who in a supporting affidavit had averred that he, as a non resident was leaving the country on 8 October 2005, and as there was an application for winding up of the Defendant company filed by Opportunity International General Trading LLC in case no. 117/06 pending before this Court. If the application for attachment is considered as the commencement of the execution process; although Section 225 provides that such application should be made 48 hours after the default of payment, yet the proviso empowers this Court on grounds of urgent necessity to direct that a judgment or order be enforced by execution "immediately after judgment has been given and before the costs incurred in the suit can be ascertained by taxation."

On the application made by the Plaintiff to validate the attachment, it was disclosed that the Defendant Company had the follow bank balances:

> Mauritius Commercial Bank –
> credit balance - R9,714-71
> Barclays Bank
> Bank of Baroda A/C. 01-536406-01
> AIC. 01-386406-01
> (AIC number not stated)

Mr F Bonte and Mr Rouillon who represented the Defendant company perused the certificates issued by the respective banks, but did not observe that the certificate from the Baroda bank, without indicating the account number had disclosed a debit balance of R995,334.89 rather than a credit balance.

The attention of the Court was not drawn to the actual status of that account, and hence when the order of attachment was validated, the Court acted per incuriam in respect of the account with bank of Baroda.

Be that as it may, the present application for a new trial was filed on 11 October 2005.

The Plaintiff Company has filed objections to the granting of a new trial, on the following grounds

1. That the application fora new trial under Section 194 was an incorrect procedure, and that in the circumstances of the case, an application ought to have been made under Section 69. It is further averred that the application fails to satisfy any of the 194, 195 and 197 of the Code of Civil PmWure.

2. That the Defendant is using delaying an deceptive tactics to frustrate the Plaintiffs claim and is acting in bad faith and in disrespect of the Court by diverting his money in the bank to other undisclosed accounts and in settling other creditors.

3. That the Defendant is moving stocks and other movable assets into a new company called "Parameshwari Traders (Pty) Ltd."

4. That there is a winding up application filed against the company, and several other local creditors, and hence the Defendant is seeking to frustrate the Plaintiff's claim as a foreign trader.

Firstly, on 5 October 2005, when the case was called for ex parte hearing there was appearance on behalf of the Defendant company. In fact a statement of defence was also filed the same day, albeit without the leave of Court.

In the case of *Biancardi v Electronic Alarm SA* (1975) SLR 193, the circumstances were somewhat similar. In an

application under Section 69 of the Code of Civil Procedure to set aside an ex parte judgment, the Court held that:

> Section 69 can only apply to cases where the party invoking it has not appeared on the day fixed in the summons for appearance before Court under Section 63. As the Defendant had duly appeared before the Court through the Curator of Vacate Estates on that day, Section 69 had no application and could not be relied upon by the Defendant, and the only procedure – apart from appeal – upon to it was an application for a new trial under Section 193.

The Defendant thereupon made an application for a new trial under Section 193, but the Court on a consideration of the circumstances in which the default occurred, refused the application.

In the present case, the proceedings had passed the stage envisaged in Section 63. The Defendant had appeared in Court through Counsel and obtained adjournments to file a statement of defence. They never failed to appear on any of those adjourned dates. After the case was fixed for ex-parte hearing on 5 October 2005, the Defendant was represented by Counsel who filed a statement of defence the same day. As the case had been fixed for ex parte hearing, the Defendant ought to have first sought to have that order set aside and thereafter sought leave to file the defence. The proceedings of that day show that Mr Lucas came ready to file the defence as he had not been properly briefed about the order for ex parte hearing made by the Court on 29 September 2005. Although the Court had directed that notice of that order be served on the Defendant, the Registry had failed to do so. There were therefore ample reasons for the Court to either order the Defendant to file a proper motion to set aside the order fixing the case for ex parte hearing as a

Defendant should not be deprived of his right to defend, merely because the Plaintiff was insisting on judgment being entered ex parte.

In *Naiken v Pillay* (1968) SLR 101**,** the Court allowed an application for a new trial order Section 194(c) as the defence was filed, albeit late, and the nature of the claim was altered during the ex parte hearing. An application to file the defence out of time was refused and the case was heard ex parte. Sir Campbell Wylie CJ however stated:

> Refusal to permit a Defendant to file a statement of defence, albeit late, combined with a decision to try the proceedings ex parte, may have the effect of depriving the Defendant of one of the fundamental requirements of natural justice — the requirement that a person should have an adequate opportunity to appear in his own defence and answer the claim brought against him. Cases might exist where such a drastic consequence could be justified because of the Defendant's behaviour — for instance, if it was made clear that that the Defendant was merely delaying proceedings and had no intention of putting forward a genuine defence.

Did the Defendant in the present case default filing the defence with the intention of delaying proceedings or without having any intention of putting forward a genuine defence? It has been submitted that:

> no defence had been filed for obvious reasons and for other good reasons already known to the Plaintiff's Counsel inter alia that the parties were in the process of negotiating a settlement for the container in the bonded warehouse.

The plaint in this case was filed on 22 November 2004. Correspondence between the parties dated 4th November 2004, 16 February 2005 and 30 September 2005 sent to the Ministry of Finance seeking approval to verify the stocks in the bonded warehouse have also been filed. The Plaintiff has alleged that some of the goods consigned to him by the Defendant had been embezzled by a director of the company or rerouted to third parties. Although none of these matters were disclosed to Court when seeking adjournments to file the defence, the Plaintiff undoubtedly was aware of those matters.

Those letters were attached to the defence filed on 5 October 2005 and subsequently in an amended defence dated 19 October 2005. The Defendant's Attorney Mr Lucas was indisposed during the material time, and hence that was another reason for the delay in filing the defence. Hence, the Defendant was not purposely delaying the proceedings without any intention of putting forward a genuine defence. The Defendant company has in their amended defence admitted part of the claim, namely goods worth R306,746.97 (C.1,F) in the bonded warehouse, and USD 4768.30 for goods received.

On a consideration of all the circumstances, the Court is satisfied that an order for a new trial should be granted, in the interest of justice, pursuant to Section 194 (c) of the Code of Civil Procedure. Section 198 provides that:

> The Court may grant an order fora new trial on such terms, if any, as to costs and finding of security for the amount for which judgment was given at the first trial, or such other terms as to the Court may seem fit.

In the first trial, judgment was entered in favour of the Plaintiff in a sum of SA Rand 1,098,430.49 together with interest at

10% per annum and costs of action.

Hence, the order for a new trial will be subject to the following terms:

(1) The monies in the following bank Accounts of the Defendant company, which have been attached and validated shall continue to be withheld by those banks until a further order is made by Court.

(a) Barclays Bank (Seychelles) Ltd
A/C. No. 0071266079 R66,971.22

(b) Mauritius Commercial Bank
A/C. No. 00712164700 R9,714.71

(c) Bank of Baroda
A/C. No. 01-536406-01 R119.59
A/C. No. 01-386406-01 R 1, 756.09
R78.561.59

(2) Motor vehicle bearing no. S. 11663 shall remain under attachment until a further order is made to the Seychelles Licensing Authority.

(3) In addition, the Defendant company shall deposit a sum of R500,000 at the Registry of the Supreme Court to the credit of this case as security, or alternatively, furnish a bank guarantee for that amount within 30 days from today.

The case will be mentioned on 22 December 2005 at 9.00a.m. to ascertain whether the security sum of R500,000 has been deposited. If so, the Court will fix a date for hearing on that day. If the Defendant company fails to fulfil that condition, the Plaintiff company will be entitled to execute the ex parte

judgment dated 5 October 2005.

The Plaintiff Company will also be entitled to taxed costs of the mention and hearing dates from 5 October 2005.

Record: Civil Side No 318 of 2004

International Investment Trading SRL (IIT) v Piazolla & Ors

Civil Procedure - stay of proceedings pending appeal

The Plaintiff received judgment in its favour in the Supreme Court. The Defendants sought a stay of execution pending the outcome of the appeal in the case.

HELD:

(i) Whether to grant or deny a stay is entirely within the Court's discretion in the exercise of its equitable jurisdiction under section 6 of the Courts Act;

(ii) In considering whether to grant or refuse a stay, the Court must balance the interests of the parties by minimising the risk of possible abuse by an appellant to delay the Respondent in realising the fruits of their judgment; and

(iii) Where an unsuccessful Defendant seeks a stay pending an appeal, it is legitimate ground for granting the application that the Defendant is able to satisfy the Court that without a stay they will be ruined and that they have an appeal which has some prospect of success.

Judgment: stay of execution granted

Legislation cited
Courts Act, s 6
Seychelles Code of Civil Procedure, s 230
Seychelles Court of Appeal Rules 1978, r 53

Cases referred to
Falcon Enterprise & Ors v Eagle Autoparts Ltd CS 139/2000 (Unreported)
MacDonald Pool v Despilly William CS 244/1993 (1996) SLR 192

Foreign cases noted
Linotype-Hell Finance Ltd v Baker [1992] 4 All ER 887

France BONTE for the Plaintiff
Pesi PARDIWALLA for the Defendant
Phillippe BOULLE for the Intervener

Application for stay of execution delivered 28 March 2005 by:

RENAUD J: This is an application for stay of execution of judgment pending the outcome of an appeal before the Seychelles Court of Appeal.

On 3 March 2004 this Court delivered its judgment in favour of the Plaintiff declaring that 67% of the shares held and registered by Delonix Ltd in Takamaka Development Company Ltd is the property of International Investment Trading SA In pursuance thereof, Delonix Ltd is to transfer back to International Investment Trading Srl, as represented by its liquidator Alfonso Zaccari, 67 % of the shares that Delonix Ltd holds in Takamaka Development Company Ltd.

On 26 April 2004 Mrs Francesca Piazolla entered a notice of motion moving this Court for an order to grant a stay of execution of the judgment for the reasons set out in an affidavit attached thereto. The affidavit, deponed to by Learned Counsel Ms Dora Zatte of 307 Victoria House, is reproduced hereunder:

1. That I am the Attorney for the Appellant

2. That I am duly authorized to swear the Affidavit on her behalf

3. That Judgment in Civil Side No: 178/1998 was delivered on the 3rd day of March 2004.

4. That the Appellant filed her notice of appeal in the Registry of the Supreme Court on 15th March 2004.

5. That to the best of my knowledge and belief the Appellant has good grounds of appeal.

6. That the Plaintiff's Company is in liquidation.

7. That as a result of the Judgment in Civil Side No. 178/98, the Court made an order that all the shares owned by the Second Defendant in Takamaka Development Company Ltd. be transferred in the name of International Investment Trading, the Plaintiff.

8. That in the event that the Respondents execute the Judgment they may sell the property and this would be prejudicial to the Appellant in that she will never be able to recover the property should the appeal be successful.

9. That in order to meet the ends of Justice it is urgent and necessary that the Court orders a stay of execution of the Judgment in Civil Side No. 178/98 pending the determination of the appeal.

10. I pray accordingly.

On 14 June 2004, Mr France Bonte Learned Counsel for the First Respondent, in answer to Ms Zatte's Affidavit deponed as follows:

1. In answer to Miss Zatte's affidavit dated 22nd April 2004.

2. That Paragraph 5 of the affidavit is denied. The Appellant is merely an Intervenor who did not even attend Court inspite(sic) of the fact that the Court had ordered her to appear on her personal answers.

3. Of paragraph 7 of the Affidavit. That the judgement(sic) be executed is just and necessary so as not to prejudice the Respondent.

4. Paragraph 8 of the Affidavit is denied. There is no way **that the Appellant** is to obtain any benefit from this appeal. The Appellant should act against the trustee in bankruptcy of her late husband. A stay of execution will only delay the payment of creditors of her bankrupt late husband.

5. Paragraph 9 of the Affidavit and the prayer should be denied." Learned Counsel for the Second Respondent did not file an Affidavit in reply.

Mr Pardiwalla, Learned Counsel for the Second Respondent, did not file any affidavit in reply as he said that he would only be raising a point of law.

There is filed before the Seychelles Court of Appeal a Notice of Appeal dated 15 March 2004 by Learned Counsel Ms Dora Zatte on behalf of the Appellant/Intervener Mrs Francesca Piazolla of Studio Co. GE.BA Via A. Casardi No. 12, 70051 Barletta (BA), Italy, stating three Respondents, namely: (1) International Investment Trading Sd (IIT) represented by lawyer Alfonso Zaccari as liquidator; (2) Vito Francavilla, Receiver & Trusty in Bankruptcy of Michelle Piazola; and (3) Delonix Ltd., represented by Suketu Patel & Bernard Pool of La Rosiere House, Victoria, Mahe.

The grounds of appeal advanced by the Appellant/Intervenor are as follows:

> (i) The judgment is ultra petita as the Learned Trial Judge awarded a remedy to the Plaintiff which was not prayed for in the pleadings.
>
> (ii) The remedy granted in favour of the Plaintiff was not available in law on the pleadings.

The Appellant/Intervener seeks the following relief:

> An order setting aside the judgment of the Supreme Court and substituting therefore a judgment dismissing the Plaintiff's claim, with costs, in the Supreme Court.

Mr Boulle, Learned Counsel for the Applicant emphasized that he is seeking a stay of the execution of the judgment particularly where the judgment states:

> in the end result I enter judgment in favour of the Plaintiff declaring that 67% of the shares held and registered by Delonix Ltd in Takamaka Development Company Ltd is the property of

> International Investment Trading Sri. In pursuance thereof, Delonix Ltd is to transfer back to Internation Investment Trading Srl, as represeneted by its liquiditor Alfonso Zaccari, 67 % of the shares that Delonix Ltd hods in Takamaka Development Company Ltd."

He however agreed that time has passed and it is evident that things may have been done in the interim. Therefore, Mr Boulle conceded, that in granting a stay of execution, the Court cannot undo what has been done, for example, if the shares have already been transferred, the Court cannot grant a stay that will affect such past transactions. However, Mr Boulle argued on the basis that the transfer has not been effected, and therefore he is not pursuing this matter in vain. He said that the matter is on appeal and the other parties ought to be restrained from taking any further action until the appeal is heard, otherwise, as stated in the Affidavit, the Applicant:

> in the event that the Respondents execute the judgment they may sell the property and this would be prejudicial to the Applicant in that she will never be able to recover the property should the appeal be successful.

According to Mr Boulle, that is the crux of the matter. Mr Boulle further argued that there is nothing in the affidavit of the Respondent which avers that the judgment has been executed. The Applicant, as the widow and heir, intervened in this matter upon the passing way of her husband, Mr Michelle Piazolla, who was an original party to the case and the matter between the parties is still alive in Courtin, Italy.

Mr Bonte, Learned Counsel on behalf of the First Respondent reaffirmed his position as stated in his Affidavit in reply and added that the execution of the judgment has already been

completed. He argued that the Court does not act in vain and therefore moved that the application be denied.

Mr Pardiwalla, Learned Counsel for the Second Respondent submitted that the fundamental principle of stay of execution is that the Plaintiff is not deprived of the fruits of his judgment. He agreed that the matter is on appeal and that this Court has a discretion to grant a stay of execution, but, added that as judgment has already been executed the Court does not act in vain. Mr Pardiwalla said that, in the circumstances, he fails to see why the Court should be asked to make an order for stay of execution of a judgment that has been executed. Mr Pardiwalla conceded that the Third Respondent, Delonix Ltd, on instructions, did not transfer the shares to the First Respondent as stated in the judgment, but has transferred these onto other parties. This, Mr Pardiwalla argued, Delonix Ltd has a choice to do. However, he agreed that the fact that the shares have already been transferred is not averred and deponed to in an affidavit. Mr Pardiwalla, further submitted that the Applicant was only an Intervenor in the case and she did not have the property in the first place and this matter cannot affect her in any way and likewise will not change the outcome of the appeal.

There does not seem to be any specific and explicit provision of any statute which directly and expressly grant this Court power to stay execution of judgment pending appeal. It is only by inference from Section 230 of the Seychelles Code of Civil Procedure, that this Court may draw such power. With regard to the question of stay of execution pending an appeal, this is what that Section says:

> 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 as the appellate Court may direct.

I note that Rule 53 of the Seychelles Court of Appeal Rules 1978 also has an identical provision.

In a similar case, that of *Falcon Enterprise & or v Eagle Autoparts Ltd* CS 139/00, his Lordship Justice Perera also observed that neither of those provisions stipulate any ground or provide guidelines as to the circumstances in which a stay of execution should be granted or refused.

In another similar case of *MacDonald Pool v Despilly William* CS 244193 this Court identified five grounds, the existence of any one or more of which, singly or in combination, would entitle an appellant a stay of execution of judgment pending appeal. These 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.

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

Going beyond our jurisdiction, I note from the dictum in the case of *Linotype-Hell Finance Ltd v Baker* [1992] 4 All ER

887, Lord Justice Staughton states:

> Where an unsuccessful Defendant seeks a stay of execution pending an appeal to the Court of Appeal, it is 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.

By this, it appears that the principle applicable in the United Kingdom is that, the English Courts would grant a stay only when two basic ingredients co-exist in combination to constitute a single legitimate ground – these are:

(i) Without a stay the appellant will be ruined and

(ii) The appeal has some prospect of success.

The above two principles could be combined and considered as a sixth principle, as follows:

6. Without a stay the appellant will be ruined and the appeal has some prospect of success.

I therefore believe that the granting or denying a stay of execution is entirely a matter to be considered within the discretion of the Court, upon facts and circumstances of each case. The Court, however, ought to exercise this discretion judicially and not capriciously or arbitrarily, in its exercise of its equitable jurisdiction in terms of Section 6 of the Courts Act.

In considering whether to grant or refuse a stay of execution, the Court must also balance the interests of the parties by

minimizing the risk of possible abuse by an Appellant to delay the Respondent from realizing the fruits of his judgment by obtaining a stay of execution. Careful consideration ought to be given to avoid circumstances wherein such a stay may cause more loss and hardship to the Respondent that the one caused to the Appellant by refusing to grant it. The Court ought to balance the interests of both parties and minimize the risk of possible abuse by the Appellant.

In the present case, in the Affidavit filed on behalf of the Appellant, it is stated that:

> in the event that the Respondents execute the judgment they may sell the property and this would be prejudicial to the Applicant in that she will never be able to recover the property should the appeal be successful.

Agreeably, there is an appeal pending before the Seychelles Court of Appeal which is going to be determined very soon.

On the other hand, in the Affidavit filed on behalf of the First Respondent, it is averred, inter alia, thus: “That the judgment be executed is just and necessary so as not to prejudice the Respondent", and also "A stay of execution will only delay the payment of creditors of her bankrupt late husband”.

I carefully and meticulously consider the submissions of Learned Counsel for the parties, as well as the Affidavits filed by them. I allow myself to be guided by the principles enunciated above and apply those principles to the present case. I also endeavour to balance the interests of both parties in the matter.

I therefore believe that the granting or denying a stay of execution is entirely a matter to be considered within the discretion of the Court, upon facts and circumstances of each

case. The Court, however, ought to exercise this discretion judicially and not capriciously or arbitrarily, in its exercise of its equitable jurisdiction in terms of Section 6 of the Courts Act.

In considering whether to grant or refuse a stay of execution, the Court must also balance the interests of the parties by minimizing the risk of possible abuse by an Appellant to delay the Respondent from realizing the fruits of his judgment by obtaining a stay of execution. Careful consideration ought to be given to avoid circumstances wherein such a stay may cause more loss and hardship to the Respondent that the one caused to the Appellant by refusing to grant it. The Court ought to balance the interests of both parties and minimize the risk of possible abuse by the Appellant.

In the present case, in the Affidavit filed on behalf of the Appellant, it is stated that:

> in the event that the Respondents execute the judgment they may sell the property and this would be prejudicial to the Applicant in that she will never be able to recover the property should the appeal be successful.

Agreeably, there is an appeal pending before the Seychelles Court of Appeal which is going to be determined very soon.

On the other hand, in the Affidavit filed on behalf of the First Respondent, it is averred, inter alia, thus: "That the judgment be executed is just and necessary so as not to prejudice the Respondent", and also: "A stay of execution will only delay the payment of creditors of her bankrupt late husband".

I carefully and meticulously consider the submissions of Learned Counsel for the parties, as well as the Affidavits filed by them. I allow myself to be guided by the principles enunciated above and apply those principles to the present

case. I also endeavour to balance the interests of both parties in the matter.

I find that, in the circumstances, the Applicant has satisfied this Court that, without a stay of execution, it would suffer more prejudice than the Respondents if the stay pending the determination of the appeal, which has some prospect of success, is denied. Further, I believe that if the stay is not granted, it would render the result of the appeal nugatory if the appeal if successful.

For these reasons, the application for stay of execution is granted effective from 23 February 2005.

For the purpose of clarity, any transaction regarding the shares in issue, that may have taken place prior to the effective date of this ruling, is not subject to this present order.

Record: Civil Side No 178 of 1998

Government of Seychelles v
Public Service Appeal Board

Administrative law – judicial review – public service orders

Two public officers were suspended from Prison Service duties without pay pending investigation of their conduct. The Public Service Appeal Board ordered that the officers be dismissed with full pay for the period of the suspension. The Government sought an order to quash the decision of the Board.

HELD:

(i) The contracts of public officers are governed by the Public Service Orders;

(ii) Article 145 of the Constitution applies to instances where a service commission acts ultra vires, or disregards the Constitution, a law, or Rules, regulations and orders that bind contracts of employment for public officers. It is not a case of judicial review where every kind of error of law on the face of the record can be investigated; and

(iii) Public Service Orders have no legal force as they are not laws, yet when a complaint is made by a public officer, provisions of the Public Service Orders cannot be disregarded as that complaint should be considered in relation to the Orders on which the employment contract is based.

Judgment for the Petitioner.

Legislation cited
Constitution of Seychelles, Arts 145, 146, 147

Foreign legislation noted
Constitution of Mauritius, Art 118

Foreign cases noted
Unuth v Police Service Commission (1982) MR 232

Elvis CHETTY for the Petitioner
John RENAUD for the Respondent

Judgment delivered on 17 October 2005 by:

PERERA J: This is an application for a writ of certiorari filed by the Government of Seychelles, seeking to quash an order made by the Public Service Appeal Board (PSAB) on 18 August 2003. It is averred that two Prison Officers, namely Ansel Lame and Christopher Cadeau where formally suspended from duties without pay on 31 October 2002 by the Superintendent of Prisons on suspicion that they were involved in releasing convicted Prisoners occasionally. They were informed that such acts amounted to criminal offences.

The Complainants filed complaints before the PSAB on 15 May 2003, which were stated as follows:

> Complaining about the suspension which has been going on for 6 months without pay. I understand that the case is with the Police but I do not have any salary to maintain myself. I would like at least half of mv salary until the investigation is over.

The Complainants therefore were prepared to await the outcome of the Police investigation, but sought an order for the payment of at least half their salary.

On the same day, the PSAB called for the comments on these complaints from the Principal Secretary, Ministry of Social Affairs an Employment, together with the Personal Records Forms and other particulars relating to the suspension. That Ministry, by letter dated 26 May 2003 stated that both Complainants were appointed to the post of Prison Sergeant on 2 May 2002 on a probationary period for 6 months and that they were suspended without pay with effect from 24 October 2002 pending Police investigation. It was further stated that as no case against them had been filed so far, the Ministry would conduct disciplinary proceedings.

The PSAB however proceeded to hear the complaints on 3 and 31 July 2003. According to the proceedings furnished to this Court, when the Board enquired as to what the complaint was, both Complainants deviated from their written complaint seeking half pay, and sought to canvas the validity of the suspension. While Ansel Larue wanted an order of reinstatement, Christopher Cadeau did not want such an order. The Board indicated to them that it was in the interest of the Complainants that they did not seek reinstatement and that they could obtain the full salary withheld during the suspension. The Complainants, the Superintendent of Prisons and a Ministry Official agreed to that settlement. However the Superintendent informed the Board that both Complainants were serving their probationary period at the time of the suspension and hence he had to seek approval of the Ministry.

In a formal order made on 18 August 2003, the Board stated inter alia thus:

> We have examined the evidence placed before the Board. The Police have been investigating serious crimes alleged to have been committed by the Complainant(s). There is much more to be done. In the meantime we have assessed the

> situation on the evidence before us. The Complainant(s) (have) agreed that (they) should leave the services of the Ministry. We agree and we are of the view that that should be effective 31st July 2003.
>
> We order that the services of the Complainant(s) be terminated in the interest of the organization with effect from 31st July 2003 and arrears of salary and all benefits associated with the termination be paid to the Complainant(s) by the 30th September 2003.

The order was conveyed to the Ministry on 20 August 2003 for compliance. The Ministry, by letter dated 4 September 2003, informed the PSAB that the Police had almost completed the investigation against the two Complainants, and as the complaints against them were serious, they should be dismissed without any benefits. The Board replied that it was functus officio and hence advised the Ministry to seek any other legal remedy. Consequently, the instant application for a writ of certiorari has been filed. The main grounds relied in paragraphs 8, 9, 10 and 11 of the petition are as follows:

> (8) It is averred that the PSAB acted ultra vires, unreasonably and with impropriety by making an order under Public Service Order 133(a) on the ground of "termination in the interest of the organization", as the case before it was of a disciplinary nature which should have been construed under other provisions of the Public Service Order including PSO 110 as read with Public Service Order 116 (III).
>
> (9) It is averred that the Public Service Board

erred in failing to invite submissions of the representation of the Ministry at the hearing on the issue of the propriety of allowing the termination under Public Service Order 133(a).

(10) It is further averred that the Public Service Board acted ultra petita in that Public Service Order 133 (a) was not a ground of the complaint.

(11) It is averred that the Public Service Board wrongly construed the matter as one where it had a discretion to make any order which it wished, in that the Public Service Orders contain mandatory provisions as to procedure to be followed in the event where Public employees are involved in alleged serious offences which have been reported to the Police.

The Respondent, the PSAB, in answer to the petition maintains that the representatives of the Ministry accepted the procedure adopted, and agreed to the order proposed by the Board. It is further averred that the PSAB is not bound by the Public service orders and that the Board is not restricted it its consideration of a Complaint by the grounds stated in the complaint.

The jurisdiction of the PSAB to hear complaints by Public Officers covers a variety of grievances that arise in the service as set out in Article 146(1) (a) to (e). Under Sub Article 6, an aggrieved Public Officer has the right to take legal or any other proceedings under any other law, notwithstanding that a complaint has been made to the PSAB. Sub Article (3) provides inter alia that the Board may refuse to consider a complaint where it is of opinion that the complaint has been

delayed without reasonable cause for more than six months or the complaint is subject to the Complainants were suspended without pay on 24 October 2002, pending police investigation.

The complaints were filed on 15 May 2003, about 7 months later, and that too only to seek a variation of the Ministry order by authorizing the payment of at least half pay "until the investigation is over".

In paragraph 9 of the answer, it is averred that the PSAB "makes its own procedure which is flexible, and the Board is not subject to the control of any body or person in the discharge of its functions". Article 147(3) permits the PSAB to regulate its own proceedings, while Article 145(2) provides that the PSAB "shall not, in the performance of its functions, be subject to the direction or control of any person or Attorney". In the case of *Unuth v Police Service Commission* (1982) MR 232, the Supreme Court of Mauritius, considering Article 118 of the Constitution, which has a similar provision as our Article 145(2), held that:

> It is not as in the case of judicial review in other spheres, every kind of error of law on the face of the record that can be investigated, but only instances where a service commission acts ultra vires, or disregards the Constitution or a law.

To this, I would add, disregard of Rules, regulations and orders that bind the Complainant's contract of employment. In that context, did the PSAB Act ultra vires its powers in making the order dated 18 August 2003? A citizen or a resident of Seychelles is bound by the general laws of the country. Where he joins a profession, he would in addition be governed by the regulations, orders or other rules that govern the procedure of that profession. Accordingly, the contracts of the Complainants were governed by the Public Service Orders (PSO). Admittedly, the Complainants were suspended

on the basis of alleged criminal offences committed by them, pursuant to PSO 116 (iii). Termination "in the interest of the organization", which was ordered by the PSAB, is permitted under PSO 133 (vi) where there are no disciplinary grounds. Although the PSO's have no legal force as they are not laws, yet when a complaint is made by a Public Officer, provisions of the PSOs cannot be disregarded, as such Public Officer's complaint should be considered in relation to these orders on which his contract of employment is based. Article 146(i) limits the powers of the PSAB to hear complaints of persons aggrieved by an appointment made to an office, a promotion to an office, any disciplinary proceedings taken in respect of an Officer, termination of an appointment or a decision relating to the qualification of a person who has applied for an Office or is serving in an Office. All these are governed by the PSOs. The PSAB has averred in paragraph 7 of the answer that the Board is “not bound by the provisions of the PSO. It is not a government body. Its powers are contained in the Constitution and not the PSO". What is relevant is not the powers of the PSAB, but the rules, regulations and orders the Complainant and his Department or Ministry has bound themselves in the contract. The Board in exercising its functions under Article 146 (i) should consider the complaints within the provisions of the PSOs which apply to the Complainant.

The Complainants had allegedly, committed criminal offences. There was a Police investigation pending. The Ministry had suspended their employment without pay, until that investigation was complete. The Complainants acknowledged these facts in their complaint, but merely sought an order for half pay pending the Police investigation. Parties bound by the PSO's cannot agree to act contrary to its provisions. The order of the PSAB was contrary to the provisions of PSO 133(a) as disciplinary proceedings were pending. The order is therefore ultra vires its powers as it disregarded the PSO orders under which the complaint ought to have been

considered. Hence the order dated 18 August 2003 being both ultra petita and also ultra vires, a writ of certiorari is hereby issued quashing that order.

There will however be no order for costs.

Record: Civil Side No 306 of 2003

Friminot & Or v Gill

Civil procedure – consent judgment – variation

In a disputed succession matter, the Court reviewed the nature of consent judgments and the power of the Court to vary judgments.

HELD:

(i) Judgments can be set aside in accordance with the Civil Procedure Code and a new trial ordered only:

(a) when the aggrieved party in an ex parte judgment has a statutory right under section 69 to seek remedy from the Court and shows sufficient cause; or

(b) when an inter partes judgment is vitiated by fraud, violence, or discovery of new evidence, the aggrieved party has a statutory right under section 194.

(ii) When the Civil Procedure Code does not expressly grant a legal remedy based on a substantive right to a party in a civil litigation, the Court cannot and should not fill the gaps using English legislation to grant that remedy and right.

Judgment: Action dismissed.

Legislation cited
Courts Act, s 17

Seychelles Code of Civil Procedure, ss 69, 194

Foreign legislation noted
Supreme Court Rules (UK)

Foreign cases noted
Kinch v Walcotte [1923] AC 483

Serge ROUILLON for the Plaintiff
Philippe BOULLE for the Defendant

The Appeal was dismissed on 29 November 2006 in CA 4 of 2006

Judgment delivered on 10 October 2005 by:

KARUNAKARAN J: The Plaintiffs in this action seek a judgment declaring that the consent-judgment entered by the Court on 23 January 1997, in Civil Side No. 174 of 1995, hereinafter called the "Judgment by consent" is not a proper judgment of the Court and so seek a number of consequential relieves, inter alia, for an order setting aside the terms and conditions contained in the said judgment. On the other side, the Defendant vehemently contests this matter. In his statement of defence, the Defendant has raised a number of defences based on points of law as well as on the merits and thus, seeks a dismissal of the action.

The facts of the case are these.

Both Plaintiffs herein, are the joint executors of the estates of the deceased couple namely Mr Odrade GrandCourt and Mr Charlemagne GrandCourt, who died on 10 November 1978 and on 8 March 1997 respectively. The Plaintiffs' appointment as joint-executors was made by the Supreme Court on 1 June 2000 vide exhibit Pl. The Plaintiffs, in their capacity as such,

have now instituted the present action on behalf of the estates of the said deceased couple.

It is not in dispute that Mrs GrandCourt predeceased Mr GrandCourt on 10 November 1978. Following the death of Mrs Odrade GrandCourt, the Supreme Court, on 27 of November 1979 - in Civil Side Case No. 109 of 1979 - first, appointed her husband Mr Charlemagne GrandCourt as the executor of her estate vide exhibit P2. Pursuant to that appointment, Mr GrandCourt was vested with the said estate, which included a parcel of land Title T696, hereinafter called the "suit-property" situated at South Mahe. On 4 of February 1993, Mr GrandCourt, during his life time, in his capacity as the executor of the estate of his late wife, sold the said parcel of land to the Defendant herein, for a sum of R500,000 (hereinafter called the purchase price), under a notarial sale-deed. On the same day, the purchaser namely, the Defendant also executed a Charge deed, charging his interest in the said property Title T696 to secure the payment of the whole purchase price R500,000 to the seller Mr GrandCourt. Subsequently, the Defendant started making payments to Mr GrandCourt on instalment basis. The final payment of the purchase price was to be made by December 1993. However, the Defendant did not complete the said payments within the period agreed upon. In fact, by the end of 1993, he had left a balance of R130, 000 due and payable to Mr GrandCourt pending the final registration of the said deed of sale and the charge.

In the meantime, on 2 March 1994 Mr GrandCourt without the knowledge of the Defendant, subdivided the suit-property T696 into two plots namely, T1393 and T1394 and caused registration of the said two parcels at the Land Registry. As a result, the Defendant could not effect registration of the sale deed executed by the parties in respect of the parent parcel T696, at the Land Registry, though the Defendant was ready and willing to complete the final payment and

settle the balance outstanding on the purchase-price.

Having been aggrieved by the discreet subdivision and the resultant difficulty encountered in registering the sale deed at the land registry, the Defendant requested the seller Mr GrandCourt to accept the balance outstanding on the purchase-price and transfer the two parcels, the subdivisions of the parent parcel T639 to the former. However, Mr GrandCourt refused to do so. This necessitated the Defendant, Mr Christopher Gill to file a civil suit in Civil Side 109 of 1979 for specific performance of the contract of sale, ordering Mr GrandCourt to effect the transfer of the subdivided parcels to the Defendant as per the contract.

In the said suit, both parties were represented by counsel. The suit wa settled as the parties agreed through their counsel, to a consent-judgment being entered on 23 January 1997, which in essence contained the following terms:

(1) The Plaintiff (Mr Christopher Gill) shall pay the Defendant (Mr GrandCourt) the sum of R375, 000 without interest within two years... etc.

(2) The Land Registrar is hereby ordered to transfer Parcels T1393 and T1394 immediately, in the name of Christopher Gill, the Plaintiff.

(3) Each party to bear its own costs.

About two months after the said consent judgment was entered Mr GrandCourt died leaving a will whereby he bequeathed his entire estate to one Marie Claire Legaie of Baie Lazare, Mahe. The Plaintiffs, who are the executors of the estate of the deceased GrandCourts have now come before this Court seeking a declaratory judgment to nullify the

said consent judgment on grounds alleging the following facts:

(1) The heirs of Mrs Odrade GrandCourt at the time of her death were her husband Mr Charlemagne GrandCourt and their three children namely, (i) Percival GrandCourt (ii) Lora Therese Berry and (iii) Phyllis Hobbs.

(2) The said three children did not consent to the purported sale of the property Title T696 by their deceased father Mr GrandCourt to the Defendant.

(3) The said judgment by consent in Civil Side No. 174 of 1995 entered into, by counsel was invalid in that, it did not have the authority of the heirs and it was not signed and endorsed by the said three children, the other heirs to the estate of their deceased mother Mrs GrandCourt.

(4) The Defendant did not pay the sum of R375,000 to Mr GrandCourt within the period stipulated in the said consent-judgment.

One of the Plaintiffs Mr Wilfred Friminot (PW1) gave evidence in support of the case for the Plaintiffs. He testified that he knew the deceased Mr GrandCourt as a close friend and a neighbour for the past 15 years. In 1994, the Defendant Mr Christopher Gill had filed a suit in Civil Side No. 74 of 1995 against Mr GrandCourt for specific performance of the contract of sale. In the said case, learned counsel Mr Bonte was representing Mr Christopher Gill and learned counsel Mr S Rouillon was representing Mr GrandCourt.

As a friend Mr Friminot was helping Mr GrandCourt in the said case by participating in the negotiations with counsel and gave him instructions on behalf of Mr GrandCourt, though Mr Friminot stated that he had no mandate or authority to do so.

In early 1997, when the case was pending before the Court, Mr GrandCourt was 87. He was sick, feeble and bedridden. On 23 January 1997, when the judgment by consent was entered, Mr GrandCourt was not present in Court. According to Mr Friminot, his counsel Mr Rouillon advised him to reach a settlement in the case and enter judgment by consent in the best interest of his client Mr GrandCourt. Thus, according to Mr Friminot the impugned judgment was entered. A couple of months after the said judgment, Mr GrandCourt died testate bequeathing his entire estate to one Mrs Marie Claire Legaie. Subsequently, Mr Friminot heard from the said three children of GrandCourts that they did not consent to the sale of the suit-property by their father to the Defendant. However, in cross-examination Mr Friminot admitted that he did not know whether they really gave consent directly to their father Mr GrandCourt for entering the said consent-judgment. Further, Mr Friminot testified that all three children subsequent to the demise of their father thus, instructed him, to file the instant action to set aside the said judgement in question. As a result of this litigation in Court, the Plaintiff also caused an inhibition being registered against the suit-property. In the circumstances, the Plaintiffs pray this Court for a declaratory judgment granting the relief mentioned above.

On the other side, Mr Boulle, learned counsel for the Defendant submitted essentially on a point of law contending that this Court has no jurisdiction to declare its judgment improper. He argued that all judgments are judgments of the Court and should be treated as such for all legal intents and purposes, unless and until set aside by the competent Court namely, the appellate Court. Our law does not make any distinction between a consent-judgment entered by the Court based on the terms agreed upon by the parties, and the one given by the Court after hearing the parties on the merits.

According to him, there is no provision in the Seychelles Code of Civil Procedure, hereinafter called "Civil Procedure

Code" granting jurisdiction to the Supreme Court to set aside, cancel or declare its own judgment improper, bad or null and void, irrespective of the fact, whether the judgment was obtained by consent of parties or given after adjudication by the Court on the merits. This is the rule. There are only two exceptions to it. They are:

(1) The "Judgment of the Court obtained ex parte" due to nonappearance of a party, so to say “default judgments", which can be set aside by the same Court in terms of Section 69 of the Civil Procedure Code; and

(2) The "Judgments given inter parte", which are vitiated by fraud, violence or discovery of new evidence etc. can be set aside by the same Court by ordering a new trial in terms of Sections 194-204 of the Civil Procedure Code.

Hence, Mr Boulle submitted that first of all, in the absence of any specific statutory provision in the Seychelles Code of Civil Procedure this Court has no and cannot assume jurisdiction to cancel or set aside its own judgment by declaring it improper or null and void. Secondly, it is the submission of Mr Boulle that the plaint in this matter does not disclose any cause of action against the Defendant. He therefore, urged the Court to dismiss the action on both grounds.

In his reply Mr Rouillon, learned counsel for the Plaintiff contended that whenever the Seychelles Code of Civil Procedural is silent on any matter, the Court should adopt the English procedure. According to him, the Rules of the Supreme Court 1975 of the UK (the White Book) and the English practice provide for setting aside the judgments by consent. In support of this proposition, Mr Rouillon cited a number of excerpts from the White Book: *The Supreme*

Court Practice 1995 vol 2 page 1452, part 2-18, the *Halsbury's Laws of England* (4 ed) vol 37 and from the *English and Empire Digest* vol 51 page 732. In the circumstances, he submitted that this Court does have jurisdiction to declare any Judgment by Consent null and void and accordingly set aside the same. Having thus argued Mr Rouillon also submitted as follows:

> We are basically saying that the agreement was fraud for the judgment by consent to be entered and by that fact there is no judgment as such.

Obviously, the fundamental issue that arises here, for determination is whether this Court may assume jurisdiction by adopting the English procedure and practice if any, for setting aside a judgment by consent, in the absence of any specific provision in the Seychelles Code of Civil Procedure in this respect.

Firstly, as I see it, the remedy claimed by the Plaintiff in this matter namely, to have a lawful Judgment of the Court being set aside by the same Court, is not a matter, which simply involves rules of practice. Obviously, it involves a substantive right, which is required to be conferred on the claimant by a statute or procedural law. Needless to say, a legal remedy cannot exist without a legal right and vice versa: *ubi jus ibi idem remedium*. As rightly submitted by Mr Boulle, our Civil Procedure Code grants jurisdiction and provides for setting aside judgments, only under two specific circumstances.

They are, namely:

(i) When an ex parte judgment is given by the Court, the aggrieved party has a statutory right in terms of Section 69 of the Civil Procedure Code to seek a remedy from the same Court, and if sufficient cause is shown, the Court may set

aside its judgment and order trial inter parte; and

(ii) When an inter parte judgment is vitiated by fraud, violence or discovery of new evidence etc. the aggrieved party has a statuary right in terms of Sections 194 of the Civil Procedure Code to seek a remedy from the same Court, which may set aside the said judgment and order a new trial.

Admittedly, the impugned "judgment by consent" in the instant case does not fall under any of the said two exceptional circumstances. Therefore, it goes without saying that this Court has no jurisdiction to set aside the said judgment and so I find, upholding the submission of Mr Boulle in this respect.

It is pertinent here to note, Section 17 of the Courts Act, which reads thus:

> In civil matters whenever the laws and rules of procedure applicable to the Supreme Court are silent, the procedure, rules and practice of the High Court of Justice in England shall be followed as far as practicable.

However, a new right and remedy of setting aside a consent-judgment in my view, cannot be granted by this Court to the Plaintiff in the absence of the necessary statutory provisions or amendments to the Seychelles Code of Civil Procedure. Indeed, no Court is empowered to assume jurisdiction and make new laws in the guise of interpreting Section 17 supra in order to grant a new right and remedy to any party. Indeed, when the Civil Procedure Code does not expressly grant a legal remedy based on a substantive right to a party whether Plaintiff or Defendant in a civil litigation, the Court cannot and should not on its own fill in the gaps with English legislation

and grant that remedy and right to that party.

The Court cannot thus, bring in amendment to the Procedure Code usurping the function of the legislature by interpreting the silence. For these reasons, I find that the present action before this Court for a declaration to negate its judgment is not maintainable in law.

In any event, on a plain reading of the plaint, it is so evident that the pleading does not disclose any cause of action against the Defendant on any ground whatsoever. Hence, on the face of it, the plaint is liable to be dismissed. On the question of "fraud", although Mr Rouillon submitted that the agreement, which gave rise the "Judgment by consent" was vitiated by fraud, there is not even a scintilla of pleading in the plaint, let alone the evidence, to support his contention in this respect. Hence, for this reason too, I hold that the instant suit for a declaration to negate the judgment of the Court on the alleged ground of fraud is also not tenable in law. Indeed, a judgment by consent is binding until set aside and acts as an estoppel see *Kinch v Walcotte* [1923] AC 483.

In view of all the above, I hold that the Consent-judgment entered by the Court on 23 January 1997, in Civil Side No. 174 of 1995 is still valid and binding. The Land Registrar is therefore, hereby ordered to transfer Parcels T1393 and T1394 in the name of Christopher Gill, upon payment of the sum R375, 000 to the Plaintiffs, in compliance with the terms of the said judgment. The present action is accordingly, dismissed with costs.

Record: Civil Side No 154 of 2000

Delcy v Camille

Civil procedure – interlocutory orders – final orders

The judgment creditor sought to enforce a Court order against the judgment debtor after she failed to pay the debt.

HELD:

(i) An interlocutory matter relevant to an appeal includes matters regarding the furnishing of security for costs, delays in filing heads of arguments, and other incidental matters;

(ii) If a judgment or order finally determines the rights of the parties, it should be treated as final; if on the other hand further proceedings are necessary in order to determine those rights, it should be treated as interlocutory; and

(iii) An order for enforcement of judgment is an interlocutory order.

Judgment for the judgment creditor.

Legislation cited
Courts Act, s 12
Imprisonment for Debt Act, ss 10, 11, 12, 13, 14, 15
Seychelles Code of Civil Procedure, ss 251, 252, 253, 254
Seychelles Court of Appeal Rules 2005, rr 17, 18, 20, 25, 35

Foreign legislation noted
Rules of the Supreme Court (UK), ord 59

Foreign cases noted
Bozson v Altrincham [1903] 1 KB 547
Collins v Paddington Vestry (1880) 5 QB 368
Salaman v Warner [1891] 1 QB 734
Salter Rex & Co v Ghosh [1971] 2 QB 597
White v Brunton [1984] QB 570

Francis CHANG SAM for the Judgment Creditor
Philippe BOULLE for the Judgment Debtor

Ruling delivered on 26 October 2005 by:

PERERA J: By a judgment dated 27 October 2003, the Defendant was ordered to pay FF 469,667, R20,000 and costs of action in a sum of R8975, the equivalent in Seychelles rupees being approximately R511,536. No appeal was filed against that final judgment. On 13 January 2004, upon an application for summons to show cause being filed by the Plaintiff (Judgment Creditor) under Section 251 of the Code of Civil Procedure as the judgment debt had not been paid, this Court by order dated 7 February 2005 ordered that the judgment debtor be civilly imprisoned for a period of six months unless the judgment was satisfied within three months. However exercising its discretion under Section 253, this Court made a further order granting the judgment debtor a last opportunity to avoid imprisonment by paying R200,000 of the judgment debt within three months, and the balance in installments of R5000.

The Judgment Creditor filed a motion dated 12 May 2005, averring that the Judgment debt had not been paid in terms of the order of 7 February 2005, and moving that the order for Civil Imprisonment be "reviewed". The judgment debtor filed a motion dated 12th July 2005 in this Court seeking a stay of execution of the order dated 7 February 2005. It was averred that a Notice of Appeal had been filed on 22 February 2005. A further answer to the motion of 12 May 2005 was filed by the

judgment debtor before the Court of Appeal averring that a similar motion was filed before the Supreme Court. In paragraph 3 of the affidavit to that answer, the judgment debtor averred that:

> I believe it is just and reasonable that the notice of motion before the Supreme Court to review the order dated 7th February 2005 be stayed pending the decision of the Court of Appeal on the motion to stay the order pending the hearing of the Appeal.

Hence the judgment debtor had sought an order of this Court to stay execution of the order dated 7 February 2005 pending the hearing of the Appeal before the Court of Appeal, and at the same time sought an order from the Court of Appeal to stay the motion filed by judgment creditor to "review" the order of 7 February 2005. However, before the present matter was considered, Counsel for the Judgment debtor amended the caption of the latter "answer to motion dated 12 May 2005" to read as "Supreme Court" instead of "Court of Appeal". Accordingly there is now no motion before the Court of Appeal. There is only the notice of Appeal filed on 22 February 2005. The judgment creditor has, in an affidavit dated 4 August 2005, inter alia objected to a stay until the hearing of the Appeal, as the judgment debtor had not filed an Appeal against the original judgment dated 27 October 2003.

Before the merits of the motions before this Court were considered, I called upon Learned Counsel for the Judgment debtor, Mr Boulle to satisfy Court whether there was a proper Appeal before the Court of Appeal, as it appeared that the order dated 7 February 2005 was an "Interlocutory order" and hence needed leave to appeal. Pending a ruling on that issue, the hearing on the merits of the motion to review the order of 7 February 2005 was stayed.

The present Ruling is therefore limited to a consideration of whether the order dated 7 February 2005 is "interlocutory or final'. If "final", there is a valid "appeal" before the Court of Appeal, but if "interlocutory", there is no such 'Appeal' at all as leave to Appeal has not been obtained, and further the time limit for doing so has also lapsed. In the latter situation, a stay order will not arise. The distinction is relevant for all purposes connected with Appeals to the Court of Appeal.

Section 12 (2) (a) (i) of the Courts Act provides that in Civil matters, no Appeal shall lie as of right to the Court of Appeal. Sub Section (b) provides that:

> in any such cases as aforesaid, the Supreme Court may, in its discretion, grant leave to appeal if, in its opinion, the question involved in the Appeal is one which ought to be the subject matter of an Appeal.

The Seychelles Court of Appeal Rules 2005 came into operation under SI 13 of 2005 on 14 February 2005. Rule 35 thereof provides that the former Rules of 1978 have been repealed and superceded by the present Rules, subject to the proviso that:

> any proceedings already commenced under the repealed Rules may continue thereunder, save in so far as the Rules herein contained maybe applicable thereto without injustice or increased costs to the parties.

In the present matter, proceedings to appeal commenced with the Notice of Appeal filed on 22 February 2005. Hence the Rules of 2005 would apply. Rule 18 thereof sets out the procedure to be followed in Court. Rule 25(i) states that, "In this Rule, an Interlocutory matter means, any matter relevant to a pending Appeal, the decision of which will not involve the

decision of the Appeal". Subsection (2) provides that "an Interlocutory matter, other than an application for special leave to Appeal, may be brought before the President or a single Judge designated by the President".

Clearly therefore, for Rule 25 to apply there should already be filed an appeal from a final judgment of the Supreme Court. “Interlocutory matters" would then be matters relevant to that Appeal, such as matters concerning the furnishing of security for costs, delays in filing heads of arguments, and such other incidental matters. Rule 20 (i) provides that the Supreme Court or the Court of Appeal may on application stay execution on any judgment or order pending appeal. This Court has therefore the jurisdiction to consider an application for stay of execution of its own judgment pending the determination of an Appeal to the Court of Appeal. But where leave to Appeal is required before an Appeal is filed in the Court of Appeal, the consideration of an application to stay execution would arise only upon such leave being granted, subject to the provision in Rule 20(i) that "an Appeal shall not operate as a stay of execution or of proceedings under the decision appealed from". It is in this context that it becomes necessary to consider whether the Order of this Court dated 7 February 2005 was "interlocutory" or "final".

The following tests illustrate the differences in terminology.

In *Collins v Paddington* 5 QBD 370 it was stated:

> Where any step is necessary to perfect an order or judgment, it is not final but interlocutory.

In Bozson v Altrincham [1903] 1 KB 547, Alverstone CJ giving a more clear definition stated:

> If a judgment or order finally determines the rights of the parties, it ought to be treated as

> final: if, on the other hand, further proceedings are necessary in order to determine those rights, it ought to be treated as Interlocutory.

In that case Alverstone CJ further said that "the test was whether the Judgment or Order as made finally disposed of the rights of parties". However in a previous case *Salaman v Warner* [1891] 1 QB 734*,* Lord Esther MR had said that the test was the nature of the application to the Court, and not the nature of the order which the Court eventually made. Lord Denning MR in the case of *Salter Rex & Co* v *Ghosh* [1971] 2 QB 597, preferred the test adopted by Lord Esther MR and stated "Lord Alverstone was right in logic, but Lord Esther was right in experience." He then proceeded to state:

> This question of "final" or "Interlocutory" is so uncertain that the only thing for Practitioners to do is to look up the practice books and see what has been decided on the point. Most orders have now been the subject of decision. If a new case should arise, we must do the best we can do with it. There is no other way.

In this respect, the test laid down in the case of *White v Brunton* [1984] QB 570 is of special significance to the instant matter which involves enforcement of a judgment. That test was that *"*an order was not final unless it would have finally determined the whole case whichever way the application in the Court below had been decided".

In the present matter, the judgment dated 27 October 2003 finally disposed of the rights of the parties. But to the successful party, finality is reached only when he obtains the fruits of that judgment. To that end he would pursue the avenues provided in the Code of Civil Procedure for execution of judgment. Any application made in the process of execution of Judgment, would, on the basis of *Salaman v*

Warner (supra), and approved by *Salter Rex & Co v Ghosh* (supra), be interlocutory. In *Re Page* [1910] Ch D 489 Buckley LJ stated thus:

> It is plain that many orders which prima facie are final, are not final but are Interlocutory for the purposes of Appeal, such for instance as orders made in favour of Creditors or Claimants in an administration action finally determining their rights. The reason, as I understand it, is that although their rights are finally determined, it remains to work out the administration of the fund in order to give effect to those rights.

This Court, by order dated 7 February 2005 suspended an order of civil imprisonment for six months imposed on the Judgment debtor. Section 254 of the Code of Civil Procedure provides inter alia that Section 10 to 15 of the Imprisonment for Debt Act shall apply to and be read with Sections 251, 252 and 253 of the said Code. Section 15 of the said Act, provides that:

> The imprisonment of a debtor under the provisions of this Act shall in no way interfere with or prejudicially affect the right of his creditors to obtain the payment of their claims by the seizure or sale of the property of such debtor or by all other legal means whatsoever.

Civil imprisonment therefore does not extinguish the judgment debt. Hence there was no finality to the order of 7 February 2005.

In this context, it is of interest that Order 59 of the Rules of the Supreme Court of UK, was amended by inserting a new Rule 1A with effect from 1 October 1988 under the heading "Final and Interlocutory orders". Rule (3) embodied the test

propounded in the case of *White v Brunton* (supra) and states:

> A judgment or order shall be treated as final if the entire cause or matter would (subject only to any possible Appeal) have been finally determined whichever way the Court below had decided the issues before it.

That Rule also followed Lord Denning's advice in the case of *Salter Rex & Co* (supra), to the Practitioners "to look up the Practice Books" for guidance, by setting out lists of specific types of orders which are to be treated as "final" and specific types of orders to be treated as interlocutory. Ord 59/1A/4 lists "enforcement of judgment" under Ord 59/1A/21, as an "Interlocutory order" under Ord 59/1A/ (6) (cc).

On a consideration of the jurisprudence, and Order 59/1A of the R.S.C. Rules (U.K.), the order dated 7th February 2005 of this Court was, for purposes of an Appeal to the Court of Appeal, Interlocutory in nature. Hence leave to appeal was necessary. Rule 17(8) of the Seychelles Court of Appeal Rules 2005 provides that "where an application for special leave to appeal in a civil matter is required by law, provisions of Sub Rules (1) to (7) inclusively shall mutatis mutandis apply". The "law" referred to therein is undoubtedly Section 12 of the Courts Act, which provides that leave to appeal should be obtained from the Supreme Court, and if such leave is refused, "the Court of Appeal may grant special leave to appeal".

There is no application for leave to appeal against the order of 7 February 2005 before this Court. Consequently the motion dated 12 July 2005 to stay execution of that order does not arise for consideration. Hence in view of these circumstances, Learned Counsel for the judgment creditor may now support the motion dated 12 May 2005 to review the order of 7 February 2005. Learned Counsel for the judgment debtor will

have the right to reply on the merits of that motion.

There will be no order for costs.

Record: Civil Side No 55 of 2001

Clarisse v Sophola

Civil procedure – writ habere facias possessionem – de facto partner and children – res judicata

The Applicant sought to evict his father's de facto partner (the Defendant) and children from the family house after his father's death. The Defendant averred that she and the children had a life interest in the property.

HELD:

(i) The principle of res judicata operates when there should have been a final determination of the parties' dispute;

(ii) A writ habere facias possessionem is a quick executory remedy available to an owner of a property to evict an unlawful occupant; and

(iii) A de facto partner may not have any right of succession to the property of the deceased partner. However children of the de facto relationship will have legal rights and may have a claim for any property improvements made.

Judgment for the Defendant.

Legislation cited
Civil Code of Seychelles, art 1351

Cases referred to
Delphinius Turistica Maritima SA v Villebrod (1978) SLR 121

Foreign cases noted
Reid v London & N Staffs Insurance Co (1883) 49 LT 468

France BONTE for the Plaintiff
Somasundaram RAJASUNDARAM for the Defendant

Judgment delivered on 1 December 2005 by:

PERERA J: This is an application for a writ habere facias possessionem. The Applicant avers that he is the owner of a property bearing Parcel V. 10522 at Foret Noire, Mahe on which stands a dwelling house. He further avers that the said property is required for occupation by him and his family, but the Respondent has failed to vacate despite repeated requests to do so. It is also averred that the Respondent is now a trespasser, whatever leave, licence, permission or authority which may have been given.

The Respondent in her defence has averred by an affidavit that she was the common law wife of one Donald Clarisse by whom she had two children. Donald Clarisse died leaving the house on the property, the subject matter of this petition, for her and the two children to live until their deaths. She avers that Parcel V. 10522 is a sub division of the parent land bearing Title No. V. 3538 originally belonging to one Mrs Nelly Mayrenda Pool née Berlouis, and that Mrs Jeanne Cecile Poussou, the mother of Donald Clarrise acting for and on behalf by virtue of a Power of Attorney, transferred the whole property jointly in her name and that of Donald Clarisse. Deed of transfer dated 19 November 1996 duly registered at the land Registry has been produced. It is further averred that she invested funds in improving the standard of the house and that she has an interest in the property, as she is presently living in the premises with the two children of Donald Clarisse.

The Respondent has also produced a copy of a plaint filed by the present Applicant before this Court in case no. C.S. 107/02 wherein he has averred that he is the son of Donald Clarisse, and that the present Respondent who was his father's concubine is in occupation of the premises without

permission or lawful authority since his death. He therefore prayed for an order of this Court ordering her to quit, leave and vacate the said house". That case was withdrawn, as the Applicant had decided to seek his remedy before the Rent Board,

The Rent Board decided that as there was no lesser – lessee relationship between the parties, the application for eviction on the ground of requirement for own use should be set aside.

The Respondent has submitted that the present application is barred by the principle of res judicata as the same matter, between the same parties was canvassed before this Court in case No C.S 107/02, which was withdrawn. In Seychelles, this principle is contained in Article 1351 of the Civil Code. For the principle of res judicata to operate, there should have been a final determination of the dispute between the parties. Hence where a plaint filed before a competent Court has been withdrawn, that principle does not operate. Hence a Plaintiff may commence a new action for the same cause, to which such withdrawal will be no defence: *Reid v London & N Staffs Insurance Co* (1883) 49 LJ 468.)

The present Application before Court turns on a different consideration. It is settled law that a writ of this nature may be issued on the Application of an owner of property, when the Court is satisfied that the Respondent to the Application has no serious defence to make thereto: *Delphinius Turistica Maridtima SA v Villebrod* (1978) SLR 121. The defence in the present case discloses, prima facie, that

1. Donald Clarisse, the concubine of the Respondent held a 1/2 share of Parcel V. 3538, while the other 1/2 was held by his mother Jeanne Cecile Poussou.

2. The Applicant is a son of Donald Clarisse,

and a grandson of Jeanne Cecile Poussou.

3. Donald Clarisse left two children. Pursuant to Article 757 of the Civil Code natural children have the same rights as legitimate children.

4. The two children are 6 years and 7 years old respectively According to the birth certificates produced, only one child has been acknowledged by Donald Clarisse.

5. The Respondent was the concubine of Donald Clarisse, and the mother of his children. She is in occupation with the leave and licence of the late Donald Clarisse who owned a share of the parent property.

In the present case, another issue would be the ownership of at least the percentage share of the property, as Donald Clarisse has left natural children.

A writ habere facias possessionem is a quick executory remedy available to an owner of a property to evict a squatter, trespasser or any person in occupation thereof without any permission, leave or licence or any right. Although the Respondent as a concubine may not have any right of succession to the property of Donald Clarisse, yet the minor child with whom she is living would have legal rights, and she herself may have a claim for improvements to the property.

In that respect, the Respondent on her own behalf and as guardian of the children has a serious defence to the Application. The Applicant has therefore to seek his remedy in a civil action. Consequently, the Application is dismissed with costs.

Record: Civil Side No 159 of 2005

Bossy (heirs) v Chow

Civil Code – contract – commercial contracts – time for performance – election

The Plaintiffs own land. They leased the land to the Defendant for a term of 90 years for the express purpose of developing the land. The contract did not state when the development should take place.

The Plaintiffs claimed that the Defendant failed to pay rent and failed to use the property for development. They sought a declaration that the lease has been rescinded and cancelled, and an order for the Defendant to vacate the land. The Defendant claimed that the Plaintiffs never surrendered possession of the land to the Defendant. He counterclaimed for the amount he paid in rent, and return of the control of the land.

HELD:

(i) For a contract to be a commercial contract:

a. The principal transaction should be of a commercial nature;

b. The parties to the contract should be merchants or traders.

(ii) Merchants are persons who, in the course of their business, habitually perform acts with the main object being acquisition or gain. They generally engage in business or trade relating to the production and supply of services, or are recognised as merchants by the usages of trade;

(iii) If a contract does not specify when a term should be performed, the person whose obligation it is to perform the term must take reasonably tangible steps to perform the term within a reasonable period, taking into account all the circumstances;

(iv) External factors are not a valid justification for breaking the terms of a contract, unless the contract states otherwise;

(v) If one party breaks a contract, the other party can elect to demand performance of the obligation, or apply for rescission and damages;

(vi) If the contract is partially performed, the Court may decide whether the contract should be rescinded or confirmed, as long as damages are paid for the partial failure to perform;

(vii) If one party refuses to perform a contract or makes it impossible to perform a contract, the other party can treat the contract as discharged;

(viii) Rescissions are only effected by operation of law if the parties have a term in the contract providing for rescission. The Court may take into account all the circumstances, including fraud or negligence of the parties; and

(ix) The person seeking to prove that a contractual obligation was not fulfilled must

prove that a contractual obligation existed. The burden then shifts to the other party to prove that the obligation was fulfilled.

Judgment for the Plaintiff.

Legislation cited
Civil Code of Seychelles, arts 1351, 1135, 1184, 1184(2), 1315,
Commercial Code of Seychelles, art 1

Foreign cases noted
Cumming v Jansen [1942] 1 All ER 653

Philippe BOULLE for the Plaintiff
Serge ROUILLON for the Defendant

Judgment delivered on 4 March 2005 by:

KARUNAKARAN J: The Plaintiffs - heirs Josselin Bossy - are presently the owners of an immovable property registered as Title Nos. H1839, H1845, and H1854 situated at Mare Anglaise, Mahe - hereinafter collectively referred to as the "suit-property". In a plaint dated 30 April 2001, the Plaintiffs seek in this Court a judgment:

(i) declaring that the lease agreement dated 29 August 1996, in favour of the Defendant in respect of the suit-property, registered in the Land Registry on 19 September 1996 is rescinded and cancelled;

(ii) ordering the Defendant to vacate the suit-property and that the Plaintiffs' fiduciary be placed in possession thereof, and

(iii) ordering the Defendant to pay to the Plaintiffs

the sum of R434,000 with interest and costs.

It is not in dispute that the Plaintiffs are the owners of the suit-property for having inherited the same from the estate of one late Josselin Bossy - hereinafter called "the deceased" - who died intestate in Seychelles on 7 December 1999. Following the death of the deceased, one Mr Hooper Hoareau - PW1- was appointed as the executor of the estate, by virtue of an order of the Supreme Court dated 4 September 2000, vide exhibit P1. In the present action, the Plaintiffs are duly represented by the said executor. Be that as it may. Admittedly, the Defendant is the lessee of the suit-property by virtue of a lease agreement dated 29 August 1996 - exhibit P2 - which the deceased, during his life, had entered into, with the Defendant. The lease agreement is for a term of 90 years, at a rental of R 9,000 per month. The lease was granted for the express purpose of development of the suit-property by the lessee.

As per the plaint, the case of the Plaintiffs is that the Defendant failed to pay rent in accordance with the terms of the lease agreement, and moreover, has failed to use the suit-property for the purpose it was leased out. And the Defendant is now indebted to the Plaintiff for arrears of rent, in the sum of R434,000. As a result of the breach of contract - the lease terms - by the Defendant, the Plaintiffs claim that the lease agreement has been rescinded by operation of law or in the alternative the Plaintiff has a right to rescind the contract by an order of the Court. The Plaintiff is therefore, entitled to repossess the property. It is further averred in the plaint that despite a letter of demand dated 26 April 2001, the Defendant has also failed to pay the arrears of rent. In the circumstances, the Plaintiffs have now come before this Court seeking a judgment for a declaration and orders first-above mentioned.

On the other hand, the Defendant, in his statement of defence,

has denied the entire claim of the Plaintiffs. According to the Defendant, since the lease was drawn up, signed and registered, the Plaintiffs namely, the lessor never surrendered the possession of the two houses, situated on the suit-property to the Defendant. From the inception of the lease until now, the Plaintiffs' agents or assigns have been collecting and enjoying the rents. Moreover, they controlled the properties to the exclusion of the Defendant, in breach of the express terms of the lease. It is further, averred in the statement of defence that the arrears of rent payable by the Defendant were almost covered by the rents paid to the Plaintiff by the tenants of the said two houses, whose rental income amounted to R8,000 per month. In the event of any shortfall of rent, the Defendant had always been ready and willing to pay that difference to the Plaintiff. The Defendant therefore, claims that he was not in breach of the lease agreement as to payment of rent. Moreover, since the Defendant was prevented by the Plaintiff from developing the property for greater gain, the Defendant alleged that he could not pay any shortfall of rent due to the Plaintiff. Hence, according to the Defendant, the Plaintiffs are not entitled to rescind the lease or repossess the suit-property.

Having thus denied the claim of the Plaintiffs, the Defendant has also made a counterclaim in his statement of defence against the Plaintiffs. In view of the facts stated in the statement of defence, the Defendant claims for the return of control of the two houses situated on the suit-property so that he could collect the rents therefrom and develop the property as per the terms of the lease. Furthermore, the Defendant claims from the Plaintiffs all rents, which the Plaintiffs had collected and/or collectable from the said tenants, which sums remain due from the inception of the lease at the rate of R8,000 per month, until November 2002. This amounts to a total due at R576, 000. Hence, the Defendant prays this Court for a judgment:

(i) dismissing the plaint;

(ii) ordering the Plaintiffs' executor, heirs, or agents to vacate the said house on the suit-property and the Defendant should be allowed to take full control of the same;

(iii) ordering the Plaintiffs to pay the Defendant R 576,000 with interest at the legal rate as from September 1996, and;

(iv) ordering the Plaintiff to pay the costs of this suit.

The facts adduced by the Plaintiffs are these.

One Mr Hooper Hoareau - PW1 - the executor of the estate of the deceased testified for the Plaintiffs. According to his testimony, the suit-property was originally leased out to the Defendant by the deceased under the lease agreement-exhibit P2 - dated 29 August 1996, hereinafter called the "contract of lease", for a term of 90 years at a rental of R9,000 per month. The terms of the lease, inter alia, read as follows:

1. The Lessor hereby lets and the lessee takes the "Premises" for a period of 90 years, with effect from the date of signature of this lease, yielding rent at the rate of R9000 per month, for the development of the property. In the event that there is a new building development on the property the Lessee shall pay to the Lessor 10% of the total cost of the new buildings development, subject to a maximum of R200,000 on any single new development.

2. The parties hereby agree as follows:

(a) The Lessee shall be free to develop the land for Residential purposes and shall be free to assign, sub-let or charge any one or all the above mentioned titles for any purpose.

(b) On the expiry of the lease and subject to the Lessor not exercising the right to extent this lease for an additional period of 90 years under the same terms of this lease, the Lessor shall regain the rights to full title over the land abovementioned in this agreement.

(c) The Lessee shall be responsible to pay all charges and or taxes that are payable to the Government and or local authorities under any law in force in Seychelles arising out of the use or possession of the land.

(d) It is expressly agreed that if the rent or any part thereof, whether formally demanded or not shall be unpaid for 30 days after the day on which it is payable and such remaining eight days after a notice in writing from the Lessor may at any time thereafter, sequester any income derivable from the land and existing building for the settlement of the arrears.

Mr Hoareau further testified that there are three houses on the suit-property, one is occupied by the Defendant himself, whereas the other two houses, hereinafter referred to as "house No.1 and house No. 2" respectively, are occupied by other tenants. According to Mr Hoareau, since his appointment

as executor of the estate, in June 2000, he has never received any rent from the Defendant in respect of the suit-property, although he received monthly rentals from the tenants, who were occupying the other two houses situated on the suit-property. During the period between June 2000 and July 2003, he received rentals totalling R75, 000 from the tenant one Mr Karl Pool- vide exhibit P3 - in respect of house No. 1, and a further sum of R87,000 vide exhibit P4 - as rental income in respect of house No. 2. He also testified that after adjusting the rentals received from the other tenants, as at October 2003the Defendant was still in arrears of rent at R190,000 in respect of the suit-property, vide exhibit P5. In the year 2000, the house No. 1 was in a bad state of repair. One Mr Guy Bossy, a brother of the deceased who was then in charge of the estate, repaired the house and put Mr Karl Pool as a tenant thereof. Since Mr Hoareau was appointed as executor, he has been collecting rents from the tenants who were occupying the houses on the suit-property. Even though the Defendant was occupying one of the houses, he never paid any rent to the executor Mr Hoareau, either for the house he occupied or for the suit-property in terms of the said lease agreement. Hence, on 26 April 2001, Mr Hoareau through his counsel Mr Boulle issued a letter of demand - exhibit P6- to the Defendant, which inter alia, reads as follows:

> ... You are indebted, to my client for arrears of rent in the sum of R9,000 per month, which amounts to R434,000 to date.
>
> Within one month hereof, please, vacate the properties, pay to my client the arrears of rent abovementioned and call at my chambers to execute a cancellation of lease in default of which my client will have no option but to take legal proceedings to recover the properties and rental.

However, there was no response from the Defendant to this letter. Besides, Mr Hoareau testified that the Defendant did not make any improvement to the suit-property. He also stated that he never prevented the Defendant from developing the suit-property at any point of time. The Defendant never approached or communicated to Mr Hoareau about his intention to develop the property or on the allegation of him being prevented by the Plaintiffs from doing so. In the circumstances, the Plaintiffs allege that the Defendant has been in breach of the contract, in that the Defendant has neither made any development of the property nor has paid any rent in accordance with the terms of the lease agreement. Therefore, the Plaintiffs seek this Court for an order rescinding the lease and directing the Defendant to pay the arrears of rent as per the contract.

The Defendant, who was examined on personal answers, stated that at the beginning of the lease of the suit-property, the deceased did not deliver the vacant possession of the houses No. 1 & 2 thereon to the Defendant as they had then been rented to the Government and to a third party, respectively. There was a gentleman's agreement between the deceased and the Defendant that the deceased would continue to collect the rents from those tenants and would hand over the houses to the Defendant, as soon as they fall vacant. Further, it was a term of the said agreement that the deceased would collect the rents from the tenants and the Defendant would instead pay only the balance every month, after partly offsetting those monthly rentals received by the deceased against the sum R9,000 payable by the Defendant. However, the Defendant subsequently admitted on his personal answer that it was his mistake to accept such a gentleman's agreement, whose terms differed from that of the written lease. Further, the Defendant stated that when the

Government vacated the house in 1997, the deceased rented it to another tenant and collected the rents through "Rent Board", which was acceptable to the Defendant that time. According to the Defendant, in January 2000 a tenant by name Suleman, while vacating one of the houses refused to hand over the key to the former on instruction by the owners of the house. Hence, the Defendant broke into the house, in order to get possession and made arrangements to repair the house. However, the owners prevented him from effecting the repairs. Hence, according to the Defendant, he decided to leave the matter as it was.

Mr Guy Bossy - PW2 - brother of the deceased testified that even when the deceased was alive, the Defendant had defaulted payments and was in arrears of rent. Hence, the deceased during the evening of his life had filed a case against the Defendant in the Rent Board for its recovery. The Attorneys M/s Shaw and Valabhji were dealing with that case. Following the death of the deceased, the Defendant continued to be in arrears of rent. In January 2000, PW2 took over the control of the two houses on the suit-property. As they were in a bad state of repairs that time, he carried out the repairs at his own expense. He also put the tenants therein and appointed PW1, Mr Hooper as executor of the estate with instructions to collect the rents from the tenants. In view of all the above, Mr Guy Bossy testified that the Defendant had been in breach of the terms and hence sought cancellation of the lease agreement in this matter.

On the other side, the Defendant testified in essence, that there was a gentleman agreement that the deceased would continue to collect the rents from the tenants who were occupying the two houses and the Defendant would pay the difference in terms of the

agreement. According to the Defendant the deceased was collecting a monthly rent of R4000 from each tenant. Besides, the Defendant also made some payments to one Mr Yves Bossy of the deceased's family and towards a loan repayment for a boat-engine that Bossy family had purchased. The Defendant made all these payments in consideration of rent payable to the deceased. The Defendant also produced in evidence a letter, exhibit D1, he received from the Attorney Mr Valabhji, which inter alia, reads as follows:

> Thank you for the cheque for R 58,373- which my client, Mr Josselin Bossy, accepts as part payment of the rents due from you... The lease was discharged as per my letter of the 28th February 1998, leaving a balance of R11, 627 still due which please, let me have at the earliest...
>
> The lease was discharged as per my letter of the 28th February 1998...

In an undated letter, exhibit D2 the Defendant admitted that he was in arrears of rent at R 43,627 and indicated his intention to retake control of the two houses. According to the Defendant, he did not come to Court for seeking possession of the houses because of the case that was pending against him in the Rent Board. As regards the intended development of the property, it is pertinent to quote the following excerpts from his testimony:

> Q: One of the aims was to develop the property. Why didn't you develop the property?
>
> A: First agreement to do so was in April 1999, soon after the Government put measures on foreign exchange that held me back. We had no

> money to start with. We needed to build condominiums for rent and subsequently to build chalets. This was put on hold because of the changing economic system...
> If we had gone ahead with it we would have moved to have a Court order to repossess the two properties

The Defendant further testified that he was in arrears of rent at R78,000 and is prepared to pay this amount provided the issue of the lease is resolved and he is given possession of the entire suit-property.

I meticulously perused the entire evidence including a number of documents adduced by the parties. I gave diligent thought to the submissions made by counsel on both sides. Before going into the merits of the case I note, although a counterclaim has been pleaded in the statement of defence, there is no evidence on record to establish the claim of the Defendant in this respect. In any event, our law is not gentle enough to admit or accept the so called "gentleman's agreements" to contradict or vary the terms agreed upon in a written contract. Hence, I dismiss the Defendant's counterclaim in its entirety in this matter. Coming back to the case of the Plaintiff, the issues to be decided in this matter may be formulated thus:

1. Is the contract of lease - exhibit P2 - between the parties a commercial or a civil contract?

2. Was the Defendant in breach of the terms of the said contract of lease?

3. If so, are the Plaintiffs entitled to seek rescission of the said contract?

4. Has the contract of lease in this case, been

rescinded by operation of law because of an alleged breach thereof by one party?

5. Are the Plaintiffs entitled to have a declaration in their favour that the contract of lease is rescinded or cancelled?

6. Is the Plaintiffs' fiduciary entitled to repossession of the suit-property?

7. On whom does the burden lie to prove the payment of rent?

8. Has the Defendant defaulted in the payment of rent or is he liable to pay any rent after the discharge of the lease and contractual obligation? If so, since when, and what is the quantum of arrears that now remains due and payable to the Plaintiffs? And

9. In case of rescission, is the Defendant liable to vacate the suit-property? If so when?

I shall now deal with the above questions in the order in which they have been formulated.

Question No. 1

It is the submission of Mr Boulle, learned counsel for the Plaintiff that the contract of lease involved in the instant case is a commercial contract, whereas Mr Rouillon, learned counsel for the Defendant contents otherwise. I gave diligent thought to their submissions in this respect. I scrutinised the authorities relevant to the issue on this point. As I see it, to constitute a commercial contract there are two conditions required to be satisfied:

1. The principal transaction involved in the contract

should be of commercial nature; and

2. The parties to the contract should be merchants or traders.

As regards the condition No. 1, obviously, the principal transaction, covered and governed by the contract in question, is nothing but an act of leasing out an immovable property for 90 years, by its owner to a tenant, on a monthly rental basis. Is this an act of commerce or of commercial nature? Indeed, the commercial act is defined in Larousse *Dictionnaire Usuel de Droit*, p. 232 thus:

> "Acte de Commerce" Est acte de commerce tout acte de spéculation, lorsque la pensée de spéculation (c'est a dire de réalisation d'un bénéfice) forme le but principal de la personne qui accomplit l'acte. Le Code de Commerce énumère, dans ses articles 632 (modifie par la loi du 7 juin 1894) et 635, les différents actes qui doivent titre réputes actes de commerce, savoir : achats de denrées et marchandise soft pour en louer l'usage ;entreprises manufacturées, de commission, de transport parterre ou par eau, de fournitures, de spectacles, de ventes a l' encan d'agences et bureaux d'affaires; opération de change, banque, Courtage; conventions entre commerçants, et, entre toute personnel, lettres de change; entreprises de constructions; achats ventes et reventes de navires et tout opérations concernant le commerce maritime (affrètement, contrat 6 la grosse, assurances maritimes, engagements de gens de mer, etc.

Therefore, I find that the principal transaction covered and governed by the contract of lease in this matter, is not a commercial act or of commercial nature and thus, condition

No. 1 above, is not satisfied.

As regards condition No. 2 above, it is pertinent to note that Article 1 of the Commercial Code of Seychelles defines the term "Merchants" as follows:

> 1. Merchants are persons who, in the course of their business, habitually perform acts with the main object being acquisition of gain.
>
> 2. Generally merchants are those who engage in business or trade relating to the production, the distribution and the supply of services and those who, by the usages of trade, are recognised as merchants.
>
> 3. A body corporate is deemed to be engaged in commerce even if its object is non-commercial.

In the present case, obviously both parties to the contract of lease are not persons who in the course of their business habitually performing the act of leasing out or taking on lease of immovable properties with the main object being acquisition of gain nor engaged in business or trade relating to the production, the distribution and the supply of services nor are recognised as merchants by the usages of trade nor are they body corporate. At any rate, there is no evidence on record to show that the parties fall under any of the categories defined in Article 1 above. Therefore, I find that the parties to the contract in question are not merchants or traders in the eye of the law and thus, condition No. 2 above, is also not satisfied. Therefore, in answering Question No. 1 above, I hold that the contract of lease - exhibit P2 - between the parties is not a commercial contract. It is not subject to or governed by the provisions of the Commercial Code and so I conclude endorsing the submission of Mr Rouillon on this point.

Question No. 2

I will now move on to the alleged breach of contract by the Defendant. It is evident from clause 1 of the contract that the suit-property was leased out to the Defendant for primary purpose of its development. In fact, the Defendant himself has admitted in his testimony - quoted in verbatim supra - that he needed to build condominiums for rent and subsequently to build chalets on the suit-property. However, admittedly, he could not perform his part of his contractual obligation, because of the changing economic system and the measures the Government took against foreign exchange movements in the country. Here, it should be noted that although the Defendant entered into the contract about 8 years back, precisely in August 1996, he has not developed or taken any reasonably tangible steps so far, for the development of the property in accordance with the terms of the contract. It is truism that the contract does not stipulate any time limit on the Defendant to carry out the development as argued by Mr Rouillon. It is also correct to say that it contains no term and is silent as to time limit. However, as I see it, this silence should never be construed unfairly to mean that the Defendant had no time-limit at all for the performance of his obligation, implying that he has the right to choose his time limit even up to 90 years, that is, until the expiry of the contract. The consequence of such misconstruction would obviously, lead to injustice and defeat the very purpose of the contract itself. In such circumstances, what does fairness imply into the obligation of the Defendant? As I understand the law under Article 1135 of the Civil Code, fairness imply that the Defendant should have developed or at least should have taken reasonably tangible steps for developing the suit-property within a reasonable period. Article 1135 of the Civil Code reads thus:

> Agreements 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.

To my mind, the Defendant as a prudent man should have started development or at least should have taken reasonable steps for the development of the suit-property within a period of 1 year from the effective date of the contract. Having regard to all the circumstances of the case including the nature of the contract and the presumed intention of the parties in entering into such a contract, this implied period of 1 year seems to be reasonable. Indeed, in considering reasonableness, as Lord Green said - in *Cumming v Jansen* [1942] 2 All ER 653 at 656 - the duty of the judge is to take into account all relevant circumstances as they exist at the date of the hearing; that he must do so in a broad commonsense way as a man of the world, and come to his conclusion giving such weight as he thinks right to the various factors in the situation. Some factors may have little or no weight; others may be decisive but it is quiet wrong for him to exclude from his consideration matters which he ought to take into account. Having considered all, in the present case, I conclude that the Defendant in this matter has failed to develop the suit-property, within the said reasonable period. The change in the country's economic system and foreign exchange climate alleged by the Defendant, even if assumed to be factually correct, to my mind, such external factors cannot in law constitute a valid justification for breaking the terms of a contract between two individuals, unless the contract itself expressly provides for such contingency. In the absence of such terms in the contract, I find that the Defendant has been in breach of his obligation under clause 1 of the contract as to development of the suit-property. In fact, such a breach has defeated the very purpose of the lease namely, the development of the suit-property.

As regards the alleged default in the payment and arrears of rent, the Defendant himself has admitted clearly in his

testimony that he was and is still in arrears of rent, which remains due and payable to the Plaintiff. Undisputedly, even prior to the death of the deceased, the Defendant had been in arrears of rent as evident from the proceedings before the Rent Board. The Defendant has admittedly, made a part payment towards the arrears of rent outstanding then. This is evident from exhibit D1 in which counsel for the Plaintiff has accepted part payment towards the arrears of rent outstanding then. Moreover, the Defendant though held the leasehold rights of the entire property, by his conduct allowed the Plaintiff to sequester the rental income derived from the existing building for the settlement of the arrears in terms of clause 2 (d) of the contract supra.

In fact, the Defendant had been given a freehand to do the necessary for the proposed development of the property under clause 2(a) of the Contract supra. This obviously implies that the Defendant should have taken necessary steps - through a Court of law or otherwise - in order to obtain the vacant possession of the entire property so as to implement his development project if any he had then. Since the Defendant failed to take any steps in that direction, he is now estopped from attributing breach on the part of the Plaintiff. Hence, it goes without saying that the Defendant has been in breach of the terms under clause 1 and 2 (a) of the contract.

Question Nos. 3 & 4

Before answering question No. 3 & 4 supra, one should examine the relevant law under Article 1184 of the Civil Code of Seychelles, which inter alia, reads thus:

> (1) The party towards whom the undertaking is not fulfilled may elect either to demand execution of the contract, if that is possible or to apply for rescission and damages. If the contract is only partially performed the Court may decide whether the contract shall be rescinded or whether it may

> be confirmed, subject to the payment of damages to the extent of the partial failure of performance. The Court shall be entitled to take into account any fraud or negligence of a contracting party. Rescissions must be obtained through proceedings but the Defendant may be granted time according to the circumstances. Rescissions shall only be effected by operation of law if the parties have inserted a term in the contract providing for rescission. It shall operate only in favour of the party willing to perform....
>
> (2) The Court may in relation to an action for rescission make such orders as it thinks fit, both in relation to the rights and duties of the contracting parties and in relation to the rights of their heir.
>
> (3) If, before the performance is due, a party to a contract by an act or omission absolutely refuses to perform such contract or renders the fulfilment thereof impossible, the other party shall be entitled to treat the contract as discharged.

In this particular case, obviously, the Defendant has not fulfilled the undertaking towards the Plaintiff as to payment of rent and development of the suit-property in breach of the terms of the Contract as found supra. Therefore, the Plaintiffs have a choice either to demand execution of the contract or to apply for rescission in terms of Article 1184 quoted supra. Hence, I find the answer to question No.3 above in the affirmative thus:

> "Yes, the Plaintiffs are legally entitled to seek rescission of the said contract".

As regards question No.4, the law is very clear on the issue. Article 1184 supra states in no uncertain terms that

"rescissions shall only be effected by operation of law if the parties have inserted a term in the contract providing for rescission". Obviously, the parties in this matter have not inserted any term in the contract providing for such rescission. Therefore, I hold that the contract of lease in this case cannot be and has not been rescinded by operation of law because of a breach thereof by one party. At the same time, I bear in mind that since the contract is partially performed, the Court may decide either to rescind or confirm and make such orders as it thinks fit in the given circumstances of the case.

Question Nos.5 & 6

In considering the question whether the Plaintiffs are entitled to have a declaration in their favour for rescission, the Court is evidently entitled in terms of Article 1184, to take into account the negligence of the Defendant and part performance of the obligations by the parties. Herein, the Defendant has been negligent not only in obtaining the possession of the two houses situated on the suit-property but also in procrastinating the development of the suit-property over an unreasonable period hereinbefore discussed supra. As a result of the said breach and negligence on the part of the Defendant, I find that the Plaintiffs are entitled to have a declaration in their favour that the said contract of lease is rescinded under Article 1184 of the Civil Code. In the circumstances, the Court finds that the Plaintiffs' fiduciary obviously is entitled to repossession of the suit-property.

Question Nos. 7 & 8

On the question as to burden of proof in respect of payment of rent, it is evident from Article 1315 of the Civil Code that the Defendant, who claims to have been released from the obligation of payment, shall be bound to prove the payment or performance which has extinguished his obligation. Hence, the evidential burden obviously, lies on the Defendant to prove the payments for the period he had been under the contractual obligation to pay the rent for the suit-property.

However, it should be noted that under Article 1315, before shifting the burden onto the Defendant the Plaintiff is bound to prove the Defendant's contractual obligation to pay for the period over which the claim is made. Having said that, I note, it is obvious from exhibit D1 that the Plaintiffs have admittedly, decisively and unequivocally discharged the contract of lease as from 28 February 1998, which they are entitled to do by virtue of Article 1184 (3) above, notwithstanding the fact whether the contract contains any term or not, providing for rescission.

In passing, to my understanding of law, there appears to be a subtle difference between the two instances namely,

(i) the act of treating a contract discharged before the performance is due by a party and

(ii) the fact of rescission of the contract by operation of law.

In the former instance, a party is entitled to treat a contract discharged unilaterally, for reasons stated in paragraph (3) of Article 1184 supra. This discharge germinates from the determinative choice of a party to the contract. He may justify non-performance of his part of the contractual obligation and use such deemed discharge as a shield in the proceedings before a Court of law. The discharge of that kind would obviously arise only in cases, where there is no express term in the contract providing for rescission. However, in the latter instance, the contract is rescinded by operation of law. This rescission germinates from the contractual terms agreed upon by the parties. This happens only in cases where there is an express term in the contract providing for such rescission. Having said that, I find that the Plaintiffs in the present case are not entitled to claim any rent from the Defendant as from 28 February 1998 since the Plaintiffs themselves had

decisively discharged the contract of lease as from that date and duly put the Defendant under notice of such discharge. Hence, the Plaintiffs are now estopped from denying the discharge and from eschewing the legal consequences thereof. Therefore, the question of default in the payment of rent by the Defendant does not arise at all for any period after the discharge of the contract. At any rate, the Plaintiffs have not proved that the Defendant is liable to pay rent under the contract, for any period after the discharge. Further, it is evident from exhibit D1 that the Defendant owed only a balance of R11, 6271 as at 28 February 1998 toward arrears of rent. In the circumstances, I find the Plaintiffs are not entitled to make any legal claim under a discharged contract of lease. Consequently, the Defendant also under no contractual obligation to pay any rent for the period subsequent to the discharge except the balance of the arrears that had accrued prior to the said discharge. Hence, the claims, counterclaims and admissions made by a party against the other based on the contractual rights and liabilities, which allegedly arose subsequent to the said date of discharge are of no effect to legally bind the parties and so I find. In the circumstances, I conclude that in the eye of law, the Defendant is liable to pay rent and the arrears accrued thereof only for the period, when the contract was in subsistence. Hence, I find that he is liable to pay only R11,627 to the Plaintiffs, as he has not discharged the burden of proof as to payment in this respect.

Question No. 9

Since the Court has already found supra that the contract of lease in question is rescinded for breach of the terms by the Defendant, I find that he is liable to vacate the suit-premises. However, having regard to all the circumstances of the case including the balance of hardship, I believe the Defendant should be given a reasonable time to look for an alternative accommodation, as he is residing in one of the dwelling houses on the suit-property. In my judgment, a period of six

months would be just and reasonable that should be granted for the Defendant to vacate the premises.

At this juncture, I remind myself of the wide discretion conferred on this Court in terms of Article 1184 (2) of the Civil Code to grant remedies as the Court thinks fit, which in my view, includes equitable ones. The Court may in relation to an action for rescission make such orders as it thinks fit, both in relation to the rights and duties of the contracting parties and in relation to the rights of their heir. At the same time I warn myself that the said discretion should be used judicially for the ends of justice. For the reasons above, in the end result I enter judgment as follows:

(i) I hereby declare that the lease agreement dated 29 August 1996 in favour of the Defendant in respect of the suit-property Title Nos. H1839, H1845 and H1854 registered in the Land Registry on 19 September 1996 remains rescinded retrospectively as from 28 February 1998.

(ii) I order the Defendant to vacate the suit-property including the dwelling house he is occupying thereon, on or before 4 September 2005 and hand over the vacant possession of the same to the Plaintiffs' fiduciary Mr Hooper Hoareau thenceforth.

(iii) I further order the Defendant to pay to the said Fiduciary the sum of R11,627 with interest at 4% per annum, the legal rate as from 1 March 1998.

(iv) I make no order as to costs.

Record: Civil Side No 289 of 2001

Bristol v Sodepak Industries Limited

Civil Code - personal injury – quantum

The Plaintiff worked for the Defendant Company. His hand was crushed in a machine. The Defendants admitted liability.

HELD:

(i) Tort damages are compensatory, not punitive. They should be assessed so that the Plaintiff suffers no loss and makes no profit; and

(ii) Changes in the value of money, times and lifestyle, should be taken into account when considering precedent cases.

Judgment: R160, 000 awarded.

Legislation cited
Civil Code of Seychelles, arts 1351, 1135, 1184, 1184(2), 1315,
Commercial Code of Seychelles, art 1

Cases cited
Fanchette v Attorney-General (1968) SLR 111
*Sedgwick v Government of Seychelles (*1990) SLR 220
Hoareau v Joseph Mein CS 16/1988 (Unreported)
Francois Savy v Willy Sangouin CS 229/1983 (Unreported)
Antoine Esparon v UPSC CS 118/1983 (Unreported)
Robinson v Leyland Motors CA 357A of 1974

Foreign cases noted
Cumming v Jansen [1942] All ER 653

Anthony JULIETTE for the Plaintiff
Serge ROUILLON Defendant

Judgment delivered on 19 October 2005 by:

KARUNAKARAN J: The Plaintiff is a young man and a resident of Takamaka, Mahe. At all material times, he was employed as a general helper by the Defendant, which is a company engaged inter alia, in the industrial production of toilet papers. In the instant action, Plaintiff claims the sum of R350,000 from the Defendant towards loss and damage, which the former allegedly suffered due to personal injuries sustained as a result of an accident whilst at work on 9 November, 2000.

Herein, the case of the Plaintiff is that the said accident was caused by the fault and negligence of the Defendant, in that the Defendant as an employer failed to provide a safe system of work for the Plaintiff to perform his duties in the course of his employment. Hence, the Plaintiff claims that the Defendant is liable to compensate him for the consequential loss and damages.

Although the Defendant, in the written statement of defence, has denied liability, subsequently on 16 March 2005, it changed the stand and admitted liability. Consequently, counsel on both sides narrowed down the issues and invited the Court only to make assessment on the quantum of damages payable to the Plaintiff and hence is this determination.

In the year 2000, the Plaintiff was employed by the Defendant as a general helper and was at all material times assigned by the Defendant to work on a toilet paper machine. On 9 November 2000, the Plaintiff was working on the said machine. He was fixing the paper rolls. As the rolls suddenly got jammed, the machine started to swallow up the right

forearm of the Plaintiff. His hand got stuck into the clutches between the two rollers of the machine. The Plaintiff tried to pull out his hand but in vain. The hand was completely crushed and flattened by the machine. The Plaintiff suffered terrible shock and pain. He screamed and cried for help. Some of his co-workers rushed to the scene, turned off the machine and tried to pullout the crushed hand of the Plaintiff. However, they couldn't succeed. It was a prolonged struggle that lasted for 30 minutes. Eventually, with much difficulty they could reverse the rotation of the rollers and managed to pull out his hand. The Plaintiff fainted. He was immediately taken to hospital.

As per the medical report, the right hand and distal part of the right forearm of the Plaintiff had been completely crushed. There was a massive tissue loss on the palmer aspect of the right arm. There was moderate bleeding from artery radius and artery ulna. There was bone loss from distal end of radius to metacarpal bones. The remaining part of the right hand was cold and blue due to lack of blood circulation. As a case of emergency, the Plaintiff was swiftly taken to the operating theatre. Under general anesthesia, amputation of distal part of the right forearm was performed. He was in hospital for 8 days. As a result of the said trauma the Plaintiff has now lost his right forearm. This loss, according to the prognosis of the Senior Consultant Orthopedic Surgeon Dr A. Koritnikov, has resulted in permanent disability of 50% of the Plaintiff's upper limbs.

As a result of the said injury and the consequential disability, the Plaintiff suffered immense pain and suffering. He also suffered inconvenience, anxiety, and distress as well as loss of amenities and enjoyment of life. On the shock of amputation and phantom limb, it is pertinent to quote the testimony of the Plaintiff, which reads:

> Then they (doctors) took me upstairs to the

> theatre and when I woke up, they had already amputated my hand. When I woke up I thought I was in a nightmare, in a dream but when I reached for my hand, it was not there.

In view of all the above, the Plaintiff now claims compensation for the resultant loss and damage from the Defendant. The particulars of loss and damage are pleaded in the plaint, as follows:

(i)	Moral damage for pain and suffering	R200,000
(ii)	Moral damage for inconvenience, anxiety, and distress	R 50,000
(iii)	Moral damage for loss of amenities and loss of enjoyment of life	R100, 000
	Total	**R350,000**

Needless to say, the Plaintiff is relatively young. He is only 25; presently, unemployed and is getting a monthly subsistence allowance of R1100 from the Means Testing Board. However, whilst in employment with the Defendant company, he was earning a salary of R1700 per month. He has studied electrical engineering and refrigeration at the Seychelles Polytechnic. Apart from loss of employment at present, the Plaintiff's employability and prospects of getting a normal job in the world of work, is not as bright as that of any other young and able man with two good arms, because of the disability.

> Regarding the principles applicable to assessment of damages, it should first be noted that in a case of tort, damages are compensatory and not punitive. As a general rule, when there has been a fluctuation in the cost of living, any prejudice the Plaintiff may suffer therefrom, must be evaluated as at the date of judgment. But

damages must be assessed in such a manner that the Plaintiff suffers no loss and at the same time makes no profit. Moral damage must be assessed by the Judge even though such assessment is bound to be arbitrary. See, *Fanchette v Attorney-General* (1968) SLR. On the question of stare decisis, it is pertinent to note that the fall if any, in the value of money leads to a continuing reassessment of the awards set by previous decision of our Courts in order to meet the changing needs of time and economic life style (*Sedgwick v. Government of Seychelles* (1990) SLR).

In the instant case, for the right assessment of damages, I take into account the guidelines and the quantum of damages awarded in the following cases of previous decisions:

(1) *Harry Hoareau v Joseph Mein* CS No 16 of 1988, where the Plaintiff was awarded a global sum of R30,000 for a simple leg injury caused by a very large stone. That was awarded about 16 years ago.

(2) *Francois Savy v Willy Sangouin* CS No 229 of 1983, where a 60 year old Plaintiff was awarded R50,000 for loss of a leg. That was awarded about 20 years ago.

(3) *Antoine Esparon v UPSC* CS No 118 of 1983, where R50,000 was awarded for hand injury resulting in 50% disability and the Plaintiff was restricted to light work only. This sum was awarded about 22 years ago.

(4) In an English case, *Robinson v Leyland*

Motors Ltd CA 357A of 1974 - see *Kemp & Kemp on Quantum of Damages* vol 2 - the Plaintiff was aged 21 years and was employed by the Defendant as a fitter. As a result of the accident at work the Plaintiff's left arm was amputated above the elbow. The Court awarded a total sum of £13,000 as damages in respect of pain and suffering and loss of amenity and earning capacity.

The injuries in the present case are obviously, of sever in degree and nature. The crushed hand has remained clutched for about 30 minutes in the machine. Obviously, the Plaintiff should have struggled with pain and shock for the longest 30 minutes in his life. Indeed, a terrible torturous experience in anyone's life for that matter! For pain and suffering I would therefore, award R60,000 In respect of moral damage for inconvenience, anxiety, and distress the sum of R30,000 would in my view, be reasonable and just. For loss of amenities and loss of enjoyment of life, I would award the sum of R70,000, which figure in my considered opinion, is reasonable, in view of the fact that the Defendant has been a right-handed person and has sustained 50% disability of his upper limbs.

For these reasons, I enter judgment for the Plaintiff and against the Defendant in the sum of R160, 000 with interest on the said sum at 4% per annum - the legal rate - as from the date of the plaint, and with costs.

Record: Civil Side No 126 of 2002

Bason v Bason & Ors

Matrimonial causes - fraud – matrimonial property – standard of proof

The parties were married. The Plaintiff is British, the Defendant Seychellois. They bought a house. It was registered in the Defendant's name, because the Plaintiff was a British citizen and so could not own land. The parties had mutually agreed that the Defendant would transfer the ownership of the house to the Plaintiff once he was a Seychelles citizen. The parties separated. The Plaintiff became a citizen. The Defendant then transferred the property to her brother, the third Defendant, for a sum below market price. She moved to England. The Plaintiff claimed that the transfer was fraudulent.

HELD:

(i) For fraud to exist, it must be shown that fraudulent contrivances preceded the agreement or were used at the time the contract was entered into and had a direct effect on it;

(ii) The person seeking to cancel a fraudulent contract must prove that the other person intended to deceive, and there was a material factor present consisting of contrivances, false allegations, or the withholding of information which induced consent to the agreement;

(iii) Contrivances may include tricks, illusions, delusions, fraudulent set up, and exploitation of the other party's weaknesses;

(iv) Fraud usually vitiates consent;

(v) Lies can be fraudulent, but not every lie is fraud. In deciding if a lie is fraud, consideration must be given to the position of the liar, the mental capacity and status of the other person;

(vi) A person cannot receive damages for fraud if they entered into the contract through their own negligence; and

(vii) To prove fraud, the standard of proof is higher than "balance of probabilities" but lower than "beyond reasonable doubt".

Judgment for the Plaintiff.

Legislation cited
Civil Code, art 1116, 1121, 1134
Summary Jurisdiction (Wives and Children) Act, s 3

Cases cited
Savy v Savy (1978-1982) SCAR 325
General Insurance Company of Seychelles Ltd v SeyBake Seychelles Ltd (1983–1987) SCAR 252
Govinden v Govinden (1979) SLR 28

Antony DERJACQUES for the Plaintiff
First Defendant (Absent and unrepresented)
John RENAUD for the Second and Third Defendants

Judgment delivered on 27 May 2005 by:

KARUNAKARAN J: The Plaintiff, Robert Bason, aged 57, an accountant by profession was at all material times, a British

national. In the mid-1970s, he came to Seychelles as a tourist. He came, saw and fell in love not only with the flora and fauna of Seychelles but also with one of its inhabitants namely, the First Defendant, Miss Rose Labonte, a young Seychellois national, who was at the material time, living with her mother at Anse Aux Pins, Mahe. The Third Defendant is the brother of the First Defendant, whereas the Second Defendant is the wife of the Third Defendant and sister in law of the First Defendant. Be that as it may.

On 31 August 1976, the Plaintiff married the First Defendant at the Civil Status Office in Victoria, Mahe, Seychelles. Soon after the marriage, the Plaintiff and the First Defendant, hereinafter called the "couple" went to live in England. For the first few months, they were living with the mother of the Plaintiff sharing her accommodation. As soon as both got employment, they moved into a rented accommodation of their own. The First Defendant was in employment but only for a couple of months. And thereafter, she resigned as she became pregnant and gave birth to her first child. Since then, she has always remained a housewife. The Plaintiff continued his employment and was the sole bread-winner of the family.

A few years later, the Plaintiff took a housing loan from a building society in England. He purchased a house in Northampton at the price of £31,500.on mortgaging the property - vide exhibit P8. The ownership of the property was registered in the joint names of the couple. The couple also had their second child. The family soon moved into the matrimonial home of their own. Having lived in England for about 10 years, in 1987 they decided to return to Seychelles for permanent settlement. Hence, they gradually started disposing of their assets in England with a view to effect a complete transfer of their assets and residence to Seychelles. In early 1988, they sold their matrimonial home for a net price of £19,654.63 vide exhibit P9, being the balance they received

after deducting the loan outstanding on the mortgage. They also disposed of some of their movables in England and shipped others to Seychelles. They also transferred the sale proceeds and other funds they had at their disposal, to a bank account in Seychelles held in the sole name of the Plaintiff with the Standard Chartered Bank PLC vide exhibit P3. In early 1989, after transferring all their assets and funds the family eventually arrived in Seychelles.

Upon their arrival here, the couple decided to own a matrimonial home in Mahe. Hence, on 1 June 1998 they purchased a parcel of land - Title S1640 - at Anse Aux Pins, Mahe with a dwelling house thereon hereinafter called the "suit-property" for the sum of R100,000 vide exhibit Pl. This property is situated close to the property where the Second and Third Defendants were then living. The Plaintiff testified that being a non-Seychellois at the time of purchase, he could not own any immovable property in the Republic without the sanction of the Government. Therefore, he purchased the property and had registered it in the sole name of his wife, the First Defendant, who had all along been a Seychellois citizen. According to the Plaintiff, he purchased that property with the intention of making it the matrimonial home for himself, his wife and two children of their marriage. He paid a sum of R100,000 to the seller Mrs Dorothy Gozmao for the purchase price of the property and an additional sum of R18,000 for fixture and fittings as evidenced by exhibits P (2) to P (2) (c). Further, the Plaintiff testified that on purchasing the property it was mutually agreed upon between the Plaintiff and the First Defendant that the Plaintiff pays the purchase price but the transfer would be done in the name of the First Defendant, who would transfer it back to the Plaintiff upon his becoming a citizen of Seychelles. In any event, the Plaintiff testified that was the intention of the parties as well as the expectation of the Plaintiff.

A few months after the said purchase, the Plaintiff learnt about

an extramarital affair the First Defendant had clandestinely developed with another man. This resulted in a stormy relationship between the couple. Their marriage was on the rocks. In mid-1989, the wife applied to the Magistrates' Court seeking an order under Section 3 of the Summary Jurisdiction (Wives and Children) Act so that she could no longer be bound to cohabit with the Plaintiff. The said application was grounded on the allegations of persistent cruelty, neglect and habitual drunkenness against the Plaintiff. The Magistrates' Court on 31 October 1989 dismissed the application as none of those allegations made by the wife against the Plaintiff was found to be true - vide exhibit P6 (d).

Following her unsuccessful attempt to obtain a non-cohabitation order from the Magistrates' Court, the wife deserted the Plaintiff taking the law in her own hands. In fact, she left the matrimonial home on her own and went to live with her mother at English River, Mahe. In January 1990, the wife whole she was living in de fact separation from her husband filed a petition in the Supreme Court for a writ habere facias possessionem to evict the husband namely, the Plaintiff from the matrimonial house. In the said writ proceedings, the Plaintiff informed the Court that he did not stop his wife from returning to the matrimonial home and this invited the wife to reconcile and join him in the matrimony. The Court on 10 January 1990 vide exhibit P6(a) having considered all the circumstances of the case, refused to writ for eviction. However, the First Defendant did not return to the matrimonial home despite an attempt by the Court to reconcile the parties. In the meantime, the Plaintiff on 11 January 1990 obtained his Seychellois citizenship and become eligible in law to have the property registered or transferred in his name.

Two weeks after the Plaintiff obtained citizenship, on 29 January 1990, First Defendant (the wife) without the Plaintiff's knowledge or authority, went before an Attorney - Mr John Renaud - and effected the transfer of the property i. e the land

- Title S1640 - with matrimonial house thereon to her brother (the *Third* Defendant) and his wife *(the Second Defendant)* jointly for an alleged price of R100,000 as shown in the transfer deed, exhibit D 1. Immediately, that is to say, about a week after making the impugned transfer, the First Defendant, on 6 February 1990, received a sum of R50,000 from the Attorney Mr J. Renaud and on the same day left Seychelles for good without Plaintiff's knowledge. According to the Plaintiff, she went to England with another Englishman by name Mr Phil Mountsand, who had also been visiting Seychelles as a tourist at the material time.

In passing, it is pertinent to note that the statements, which the estranged wife (the First Defendant) has made in her letter dated 25 January 1990 (exhibit D8) addressed to her Attorney Mr J. Renaud, immediately before making the transfer in question. This letter reads:

> Dear Sir,
>
> I may become entitled to some money following the sale of a parcel of land title S1640.
>
> The parcel of land belongs to me and my husband, Robert Bason who presently live at Anse Aux Pins.
>
> The parcel of land, if sold will fetch R100,000.00, R19,000.00 out of which sum I have already received directly from the purchasers. Out of the remaining R81,000.00 you are authorized to deduct R35,000.00 and pay the same to Robert Bason.
>
> Yours faithfully,
>
> (Sd) Rose Bason (Mrs)"

The First Defendant, having gone to England with the man named above, applied to the Canterbury County Court therein, for dissolution of her marriage with the Plaintiff. On 5 December 1992 the English Court accordingly, dissolved the marriage of the couple and granted a decree of divorce.

In the meantime, the Plaintiff to his shock came to know about the secret transfer of his property by his wife behind his back and her sudden departure from the jurisdiction. He immediately, approached Mr Bernardin Renaud, who was then a legal practitioner (now a Judge of the Supreme Court), for legal assistance in order to recover his property, which had been transferred by the First Defendant to the third parties namely, the Second and Third Defendants.

According to the Plaintiff, when the matter was still in the hands of the said legal practitioner for the purpose of filing the instant suit in Court, the Third Defendant namely, the wife of the Second Defendant, without the Plaintiffs knowledge filed a petition before the Rent Board seeking an order for eviction of the Plaintiff from his matrimonial home on the ground that being a co-owner in title, she needed the suit-property for her personal occupation. The Plaintiff, in his evidence before the Board claimed inter alia, that the sale of the suit-property to the Second and Third Defendant herein, was a fraudulent transaction and intended to deprive him of his ownership. The Board after listening to the parties and observing their demeanor when giving evidence, was satisfied that the Plaintiff was telling the truth, when he told that the suit-property was his matrimonial home and that his wife had sold it without his knowledge. Hence, the Board found that there was no landlord/tenant relationship between the Plaintiff and the Third Defendant and in its judgment dated 22 January 1991, the Board dismissed the petition for eviction vide exhibit P6 (b). Being dissatisfied with the said judgment of the Board, the Third Defendant filed an appeal against it to the Supreme

Court. Having heard the appeal, the Supreme Court in its judgment dated 29 November 1991 vide exhibit P (6) (a) confirmed the findings of the Rent Board against the Third Defendant and dismissed the appeal with costs. In the said judgment, the Supreme Court inter alia, held as follows:

> The findings of the Rent Board in the instant case that the house was a matrimonial home and that the wife had sold it without his knowledge. These are fundamental matters to be decided by this Court in a suit filed by the Respondent (the Plaintiff herein) against his wife applying for a recession of the deed.

With these background facts, the Plaintiff by a plaint dated 27 January 1992, instituted the instant action in Civil Side No: 17 of 1992 against the three Defendants seeking justice against their alleged misdeed that resulted in the deprivation his ownership of the property. In fact, the Plaintiff had pleaded in the original plaint, that the said transfer of the suit-property was a "sham" and consequently sought the Court for a judgment to set aside the transfer in question and order the First Defendant (the wife) to retransfer the suit-property to the Plaintiff. The original suit summons was duly served on all three Defendants including the First Defendant, who had been then and is still residing in England. The First Defendant despite service of summons, defaulted appearance in Court whereas the Second and Third Defendant put up appearance and contested the suit. The Court presided by Bwana, J (as he then was) proceeded to hear the case ex parte against the First Defendant and inter parte against the other two Defendants. Having heard the case, the trial Judge on 8 April 1996, gave judgment for the Plaintiff finding inter alia, that the term "sham was similar to fraud" and so the purported transfer of the suit-property by the wife to the Second and Third Defendants was a fraudulent one.

Having been aggrieved by the said judgment, the Second and Third Defendants appealed against it to the Seychelles Court of Appeal in Civil Appeal No: 13 of 1996. In its judgment dated 21 May 1997, the Court of Appeal allowed the said appeal stating reasons thus:

> On review of the entire proceedings it is clear that the Supreme Court had misdirected itself on the question whether the issue of fraud has arisen in the case. And if so, that it has failed to advert to the question of standard of proof. Besides, consideration of the case of the Second and Third Defendants has been unduly tainted by the use made by the Supreme Court of the default judgment against the First Defendant.

Hence, the Court of Appeal set aside the judgment of Bwana, J. and ordered a new trial before another Judge. Accordingly, this Court reheard the case afresh and is now in the process of delivering the judgment in this matter.

In passing, I should mention here, on 22 March 2000, at the outset of the new trial, the Plaintiff with the leave of the Court, amended the original plaint by inserting the allegation of "fraud" to form part of the pleadings under paragraph 10 and 11 of the plaint. However, on 21 November 2000, counsel for the Defendants 2 & 3 informed the Court that he was not making any amendment to the statement of defence in response to the said amendment. The Court therefore, proceeded to hear the case ex parte against the First Defendant for her default and inter parte against the Defendants 1 & 2.

In essence, the Plaintiff gave evidence in support of all the facts that are marshaled hereinbefore. He also produced a number of documents including the record of proceedings involved in the previous litigations between the parties. All

those documents were admitted as exhibits. In the circumstances, the Plaintiff contends that the transfer of the 'suit-property" made by the First Defendant on 29 January 1990 in favour of the Second and Third Defendants is fraudulent and so seeks the Court for an order to set it aside and retransfer the suit-property to the Plaintiff.

On the other side, the Third Defendant testified for the defence and was the sole witness for the Defendants. He stated that he has been working as a supervisor at the Post Office for the past 25 years and his wife, the Second Defendant has also been a working woman. Since both were earning members of the family, they had sufficient savings in their account with Barclays Bank, Victoria and purchased the suit-property for R100,000 out of their savings of R90,000 plus a sum of R10,000 the Third Defendant had received from one of his sister by name Elizabeth, who was then living in Denmark. In support thereof, he produced a photo copy of a draft in the sum of R90,000 dated 9 January 1990, issued by the Barclays Bank PLC, Independence Avenue, Victoria, Seychelles in favour of the Attorney, Mr John Renaud. The Third Defendant also produced two credit advices for R17,298.90 and R16, 527.05 dated 8 August 1988 and 30 January 1990 respectively, claiming that those sums were sent to him by his sister Elizabeth from Denmark. Moreover, he testified that he never acted in collusion with his sister, the First Defendant in the sale transaction to defraud the Plaintiff. In cross-examination, however, he admitted that he knew the Plaintiff ever since he married his sister, the First Defendant. He knew that since the Plaintiff was a non-Seychellois in 1988, he could not buy the property. This witness also had known that matter personally, as it was discussed in the family in front of him soon after the purchase in 1988. Although, the Third Defendant knew that the First Defendant left the country six days after the transfer, he did not know the reason for such sudden departure and her failure to return to Seychelles until today. At one stage, the Third Defendant stated in the

cross-examination that immediately after purchasing the property, he straight applied for eviction against his brother in law, but subsequently he changed his version stating that he approached and talked to him before applying for eviction. When the Third Defendant was asked about the movables namely, furniture, bed, side table, radio, TV etc. found inside the house, he answered as follows:

> There are, but they do not belong to him (the Plaintiff). I believe they all sold together (to me), just as he (the Plaintiff) bought it.

Furthermore, the Third Defendant responded to the subsequent questions in cross-examination as follows:

> Q: You are saying that when you purchased purportedly, the house on the 29th January 1990, did you purchase everything in the house?
>
> A: We must make one thing clear that only now that we are going to claim the things that were present in the house, because, for all the times that he has been staying in the house.
>
> Q: He (the Plaintiff) is the father of your niece and nephew. The niece and nephew are living in the house and going to school in the district of Anse Aux Pins, Did you ever consult with Mr Bason, the father of your niece and nephew, about where his children were going to stay, after you say you bought the house on the 29th of January 1990?
>
> A: For this one I will not interfere. It must be their father and their mother who have to deal with this matter.

Having thus testified, the Third Defendant denied that he

involved in any fraudulent dealing with the First Defendant in the entire episode of the impugned transfer. According to him, he purchased the suit-property for the price of R100,000, which sum he paid in full to the Attorney Mr J. Renaud, who was acting on his behalf in the sale transaction in question. In view of all the above, the Defendants seek dismissal of this action with costs.

Firstly, as I identify the issues, there are only three fundamental questions before the Court for determination in this matter namely:

1. Did the Plaintiff have any proprietary interest in the suit-property title 51640?

2. Did the First Defendant transfer the suit-property to the Second and Third Defendants with the intention of defrauding the Plaintiff in that, the First Defendant fraudulently deprived the Plaintiff of his proprietary interest in the suit-property? And

3. Is the Plaintiff entitled to be registered as the owner of the suit-property?

Before, one proceeds to examine the evidence, it is important to go through the position of the law relevant to the aspect of "fraud" in civil matters.

Article 1116 of the Civil Code reads thus:

> Fraud shall be a cause of nullity of the agreement when the contrivances practiced by one of the parties are such that it is evident that without these contrivances, the other party would not have entered into the contract. It must be intentional but need not emanate from the contracting party.

It shall not be presumed it must be proved.

In fact, a contract is vitiated by fraud, for fraud affects the intention. It involves an act or omission which is deliberate or reckless without regard to the natural consequences that may ensue. Indeed, it is a matter of appreciation for the Court to determine whether there is a fraud or not. Even an excessive praise in an advertisement may amount to fraud if it is very convincing. However, here we are not concerned with fraud as an element in the commission of criminal offence - vide *Codification in a Mixed Jurisdiction* - by A. G. Chloros at 131. The nullity of the contract derives not only by the general rule of article 1134 of the Civil Code that "agreements shall be performed in good faith" but also from the specific provision of article 1116 quoted supra.

In the case of *Savy v Savy* SCAR (1978-1982) 325, the Court of Appeal reviewed the whole field of fraud in contract and the main elements constituting fraud.

1. It must be shown that fraudulent contrivances preceded the agreement or were used at the time the contract was entered into and had a direct effect on it.

2. Two principal element must be proved by the party seeking cancellation:

    a. That the other party had an intention to deceive; and

    b. That there was a material factor present consisting of contrivances, false allegations or the withholding of information which had induced the victim's consent to the agreement.

3. The word ″contrivances″ designates the material

or physical means employed by the person perpetrating the fraud achieve his end. It includes all tricks, all cheats, illusions and delusions, all fraudulent setup. In certain cases it consists in exploiting the physical or intellectual weakness or the vicious tendencies of a co-contractant, such as pandering to his habits of intemperance with a view to inducing him to sign an agreement to which he would not otherwise have subscribed.

4. As fraud vitiates consent, it is inevitable that a simple lie constitutes fraud. However, every lie does not amount to fraud. The lie must amount to *"dolus malus"*. What constitutes *"dolus malus"* depends on the circumstances of every case. In this respect consideration must be given to the position of the person, who utters the lie, as well as to the mental capacity and status of the person against whom the fraud is perpetrated, as for example his age or lack of education.

5. Even if fraud has been used, the party who relies on the fraud to ask for the nullity of the contract must not have committed a serious fault such as neglecting to check a statement which may easily be checked. It is indispensable that the fraud should have been the determining factor in producing the consent. If such consent has resulted in the victims own fault or negligence, annulment of the agreement will not be decreed.

6. Fraud usually vitiates consent. In certain circumstances, however, fraud may only lead to a divergence between the real intention of the parties and the intention of the parties as expressed in the deed, without vitiating consent. Proof of fraud in such a case allows such

divergence to be established and the real intention to be given effect to.

Indeed, all the above guidelines are generally applicable in cases, where there is privity of contract between the victim of the alleged fraud and the defrauder. In other words, in cases, where the victim is a party to the impugned contract that is allegedly vitiated by such fraud.

Coming back to the present case, it should be noted that the Plaintiff is obviously a third party to the contract of sale of the suit-property by the First Defendant to the Second and Third Defendants. Although the English doctrine of privity is stated as a principle in article 1165 of the Civil Code, article 1121 to which it refers has modified the doctrine, so that the claims by a third party are also enforceable against the contracting parties, provided that third party has any lawful interest in the matter affected by such contract. Indeed, this modification to the doctrine of privity has created the effect of obligations by the contracting parties towards third parties to the contract. This implies that a party to any contract is under a twofold legal obligation namely:

(i) not to defraud the other party to the contract by fraudulent means, inducement, misrepresentation of facts etc. and

(ii) not to defraud any third party, who has a lawful interest in the subject matter of the contract or is directly affected by the transaction involved in such contract.

In this particular case, it is evident that the Plaintiff has purchased the suit property during marriage out his own funds, utilizing withdrawing the sum from his bank account with the Standard Chartered Bank, vide exhibit P3. Hence, I conclude that the Plaintiff had and still has the proprietary interest in the

suit-property title S1640 by virtue of the payment he made towards the entire purchase price. In the circumstances, I find that although the First Defendant is not a party to the transfer or sale of the suit-property by the First Defendant to the Second and Third Defendants, still he is entitled in law to claim recession of the sale on the ground of fraud, as he has a lawful interest in the subject matter of the contract namely, the suit-property,

As regards the standard of proof in civil proceedings to prove a criminal act such as fraud, it is no higher than the standard of proof ordinarily required namely, on a balance of probabilities. See, *General Insurance Company of Seychelles Ltd v SeyBake Seychelles Limited* SCAR 1983-1987 at 252. However, to prove a serious allegation such as adultery in civil proceedings, it is said, the standard of proof required is not as high as in criminal law, but is high vide *Govinden v Govinden* (1971) SLR 19. Therefore, the more serious the allegation, the higher the degree of probability required and the more cogent the evidence required to overcome the likelihood of what is alleged and thus to prove it. See, *GIC v SeyBake* supra. In the light of the authorities of case law, I hold that to prove *fraud* in the present case, the standard of proof required is higher than on a "balance of probabilities" but obviously, lower than that of "beyond reasonable doubt".

On the allegation of fraud, the following facts and circumstances, to my mind, prove more than on a balance of probabilities that the First Defendant did transfer the suit-property only with a fraudulent intention of depriving the Plaintiff of his ownership thereof and so I find:

1. The First Defendant has unequivocally admitted in her own letter, exhibit D8 thus: I may become entitled to some money following the sale of a parcel of land title 51640. The parcel of land belongs to me and my husband, Robert Bason

who presently live at Anse Aux Pins. Indeed, the first part of her admission clearly shows that at the time of sale, she was not even sure if she was entitled to any share in the suit-property. She knew full well that the Plaintiff had proprietary interest in the property. Having known all these facts, she has deceptively proceeded to transfer the property to third parties, without the Plaintiffs knowledge. In the circumstances, what else could have been in her mind except a fraudulent intention to deprive the Plaintiff of his ownership?

2. In any event, the First Defendant as a reasonable wife should have been conscious of the facts that (i) she had been married to the Plaintiff (ii) the marriage was then in subsistence (iii) the suit-property was purchased during the subsistence of the marriage (iv) the suit-property formed part of the family asset and (v) their marital relationship had turned acrimonious with the possibility of dissolution. Hence, as a reasonable person, she should have known that such family assets should be settled or adjusted or disposed of, only after dissolution of the marriage of the parties. In spite of that knowledge, she has transferred the matrimonial property, during the subsistence of the marriage, that too, without her husband's knowledge. In the circumstances, what else could have been in her mind except a fraudulent intention to deprive the Plaintiff of his ownership?

3. The First Defendant knew very well that her husband had proprietary interest in the suit-property by virtue of the fact that he paid for the price and was in lawful occupation of the property. In spite of that she attempted to evict her husband and take possession of the suit-property by filing

the writ habere facias possessionem in the Supreme Court falsely alleging that the Plaintiff was in illegal occupation of the property. This conduct amounting to "dolus malus" clearly shows that even before offering the suit-property for sale, the First Defendant has at first place attempted to get vacant possession of the property obviously, with a hidden agenda of sale in mind. This cunning and treacherous act of the wife, in my view, amounts to "fraud" in the given circumstances of this particular case. As rightly observed by the Court of Appeal in *GIC* supra, what constitutes fraud in a matter, depends on the circumstances of every case.

4. Moreover, the Second & Third Defendants, being very close relatives and having lived in the neighborhood should have certainly known what was actually happening in the family of the Plaintiff during the period of the transfer. Any reasonable man for that matter, who genuinely intends to purchase the matrimonial home of his brother-in-law would have obviously, consulted or at the very least, would have got the concurrence of his brother-in-law before making the purchase. Moreover, after the purchase he did not had the courage even to speak to him personally in order to get the vacant possession of the house, rather he has asked his wife, to file an application for eviction before the Rent Board against his brother in law. In the given circumstances of this particular case, the conduct of the Third Defendant prior to, at and after the alleged purchase leads this Court to draw the only inference that he has also taken part in the fraudulent stratagem engineered by his sister, the First Defendant against the Plaintiff, a fortiori by accepting the transfer in favour of

himself and his wife.

5. I had the opportunity of observing the demeanour and deportment of the Plaintiff and that of the Third Defendant, when testifying in Court. I am satisfied that the Plaintiff was a credible witness and was speaking the truth that he was the one who paid for the price, when the suit-property was originally purchased in the name of his wife. There was a unilateral agreement that the First Defendant would retransfer the suit-property as and when the Plaintiff obtains Seychellois citizenship. At any rate, I am satisfied from the entire circumstances of this case that the Plaintiff had a "legitimate expectation" like any other husband in his position would have, that as and when he obtains Seychellois citizenship the wife would do the retransfer. On the contrary, the wife being driven by fraudulent intention has transferred the property to her brother and sister-in-law.

6. The suit-property was purchased in 1988 for the price of R100,000 but after 10 years it has been purportedly sold for the same price despite the notorious fact that the market value of immovable properties in Seychelles have substantially appreciated in the past ten years. I take judicial notice of it in this respect. No prudent owner- if really he owns- in the normal circumstances, will sell his property disregarding the appreciation of its market value. However, the First Defendant has acted otherwise playing a quick trick in this matter obviously, for reasons of quick sale and quiet slip.

7. "The truth will out" it is said. This is true in the case of the First Defendant. In fact, under cross-

examination he retorted angrily that the movables in the suit-property did not belong to the Plaintiff. That was the moment the truth came to light slipping out of his mouth, when he said "I believe they all sold together to me, just as the Plaintiff bought it" - vide supra. If there is truth in wine - in vino veritas - it comes out of anger too!

In view of all the above, I find the answers to all three fundamental questions (supra) in the affirmative thus:

1. Yes, the Plaintiff had and has proprietary interest in the suit-property title 51640 for having purchased the same from his own funds.

2. Yes, the First Defendant did transfer the suit-property to the Second and Third Defendants only with the intention of defrauding the Plaintiff in that, the First Defendant fraudulently deprived the Plaintiff of his proprietary interest in the suit property title 51640; and

3. Yes, the Plaintiff is entitled to be registered as the owner of the suit property.

In the result, I enter judgment for the Plaintiff as follows:

(a) The transfer of land Title No. 51640 made by the First Defendant Rose Bason on 29 January 1990, in favour of the Second and Third Defendants namely, Jacqueline Agnes Labonte nee Derjacques and Jean-Baptiste James Labonte being a fraudulent one, I hereby set aside the said transfer. I declare that the Plaintiff is the lawful owner of the said property Title No. S1640, and he is entitled to be registered as such in the land register, for having paid the consideration to its

previous owner Mrs Dorothy Jessie Gozmao (born) Corgate.

(b) Consequently, I direct the Land Registrar to cancel the registration of the transfer referred to in (a) above, and register the Plaintiff as owner of Title No. S1640 and give effect to the judgment given herein; and

(c) Having regard to all the circumstances of the case, I make no order as to costs

Record: Civil Side No 17 of 1992

Rose v Savy & Or

Civil Code - delict – damages – presumption of liability

The Defendant was passing another vehicle. He crossed the centre line and collided with the Plaintiff's truck. The Plaintiff was injured and his truck was damaged. The Defendant's truck was also damaged. The Plaintiff sued for negligence. The Defendant claimed that the collision was the Plaintiff's fault.

HELD:

> If a driver of a motor vehicle causes damage, they are presumed liable unless they prove that the damage was solely caused by the negligence of the Plaintiff, an act of a third party, or an act of God that is not related to the operation or functioning of the vehicle.

Judgment for the Plaintiff. R115,500 awarded.

Legislation cited
Civil Code of Seychelles, art 1382(2) 1383.

Cases cited
Sandra Vet v Oswald Tirant & Anor CS 128/1977 (Unreported)
A Camille & Anor v Seawood Ltd & Or CS 204/1983 (Unreported)

Phillippe BOULLE for the Plaintiff
Danny LUCAS for the Defendant

Judgment delivered on 27 May 2005 by:

KARUNAKARAN J: This is an action in delict arising from a collision between two motor vehicles namely, commercial

pick-ups. The Plaintiff in this action claims damages in the sum of R200,500 from the Defendants. This occurred as a result of the First Defendant's alleged negligent operation of a motor Vehicle registration number S1765 owned by the Second Defendant, which collided with and damaged the motor vehicle of the Plaintiff registration number 59450 driven at the material time, by one Mr Philippe Norcy Adrienne. The Defendant denies that any damage to the Plaintiffs vehicle was caused by the operation of the Defendants' vehicle and claims that the said collision occurred solely due to negligent operation of the Plaintiff's vehicle at the material time.

The collision, out of which the action arose, occurred on 4 September 1998 at around 12.15 pm on the public road at Providence, Mahe. At the material time, Mr Philippe Norcy Adrienne (PW2), a truck driver by profession, was driving the Plaintiffs 3.3 ton pick-up loaded with timber, traveling from the north to the south on the Providence main road. The First Defendant was driving his 1.5 ton pick-up registration number S1765 along the same road in the opposite direction traveling from the south to the north heading towards Victoria. The collision occurred between their respective vehicles on a spot close to the roundabout opposite to CCCL in the vicinity of the Providence Industrial Estate.

According to Mr Adrienne *(PW2),* he was driving the pick-up 59450, hereinafter called the *"*Plaintiff's pick-up*".* at a normal speed of 35 KM per hour on his lane of the road. That is, the seaside lane of the Providence main road. In fact, he was transporting timber from SMB depot at Hutau Lane in Victoria to Bougainville in the south of Mahe. The timber belonged to one of his client Mr Gilbert Sedgwick *(PW3),* a carpenter by profession who was also, traveling in the same pick-up at the material time, sitting at the front, on the passenger seat next to the driver Mr Adrienne. Another blue pick-up driven by a third party was also traveling towards the south behind the Plaintiff's pick-up. According to Mr Adrienne, his pick-up after

traversing a slight bend on the main road continued traveling towards the south along a straight stretch of road lying a few hundred feet before the said roundabout. The Defendant's pick-up was coming at a very high speed from the opposite direction, on the mountainside lane of the road. As there were some cars in front going towards Victoria, the First Defendant was trying to overtake them. In the process of such overtaking, the Defendant's pick-up crossed the midline and came onto the seaside lane of the road. The Defendants' pick-up thus, entered the wrong side of the road and collided with the Plaintiffs pick-up on its right side. The Plaintiffs pick-up having suffered a heavy impact on its offside, left the road, overturned and was pushed with great momentum towards the left extreme of the road until it halted hitting against some Takamaka trees situated at a distance of about 15 feet off the edge of the tarmac. As a result of the primary and secondary impacts the Plaintiffs vehicle sustained extensive damage to its body and engine. Both, Mr Adrienne (PW2) and Mr Sedgwick (PW3) got trapped inside, rolled along the pick-up and came out through the smashed windscreen. Both sustained bodily injuries and were taken to hospital for immediate medical treatment. The relevant part of the testimony of PW1 regarding the collision runs as follows:

> I was going on my left hand side. The other transport was coming on the right hand side and came onto my lane and hit my pick-up starting from the door to the back. I did not see then what happened to that pick-up which hit me. When the pick-up hit against me, I overturned and ended sideways. When the pick-up capsized the windscreen crashed and then we got out through the windscreen. After that the pick-up was revving, there were smock coming out and people who were standing there called telling us to get out of the pick-up, because it might catch fire. I ran in front; I could not see

> anything at the back of the pick-up because of the smoke. After all that settled I saw the other pick-up (i. e the blue pick-up, which was coming behind) had gone (off the road) and hit against the casuarinas trees. After everything had been cleared out I could see that pick-up which hit us in the middle of the road smashed and had turned itself around from the direction that it was originally coming and was facing the mountainside... All in all, at the end of the day there were three vehicles, which had been affected by the accident. .. the Defendant's vehicle had entered into and had taken half of my lane... My pick-up was badly damaged on the right. The cab was crooked and the petrol tank had been torn out and petrol was pouring out... The accident happened on the straight road...

Under cross-examination, Mr Adrienne also stated that he did not apply his brakes *(*at the material time*)* because the way *(*the First Defendant*)* was coming he would have caused a head-on collision. That was why he had to swerve to the nearest left to avert the collision by giving the Defendant way to pass.

PW3, Mr Gilbert Sedgwick, who was a passenger in the Plaintiffs pickup at the material time, obviously an eye witness to the accident testified corroborating the version of Mr Adrienne (PW2) in all material particulars as to how, why and under what circumstances the accident occurred. He further stated that he noticed the Defendant's vehicle at a distance of about 220 feet coming in front on a head-on-collision course. He immediately alerted his driver Mr Adrienne.

The Plaintiff, Mr Jeffrey Ross owner of the pick-up 59510 testified in essence that he purchased the said pick-up about

a year prior to the accident for the price of R150, 000 from one Mr Moulinie of Vines Pty Ltd. After its purchase he spent R20, 000 on repairs that was carried out by a mechanic one Mr David Lobo *(*PW3*).* Moreover, the Plaintiff testified that as soon as he heard about the accident he rushed to the scene the same afternoon and he saw his pick-up with extensive damages especially at the front and was leaning against some Takamaka trees on the seaside area at a considerable distance away from the tarmac. The pick-up appeared to be a complete write off. He had to engage the services of "Pelicser Breakdown Service" to tow the damaged pick-up to the garage. The Plaintiff however, admitted that although the pick-up was a write off after the accident, its salvage value could be around R35,000 The Plaintiff also testified that he was using the pick-up in his business for commercial trips to transport building materials and timber and was making a net profit of R4,000 per month after defraying the necessary expenses for it maintenance, fuel etc. The Plaintiff further testified as a result of the said accident and consequential condition of his pick-up beyond repairs, he suffered loss and damage including loss of revenue and moral damage, in addition to the complete loss of his pick-up being a write off.

PW4, Mr Richard Maillet of the Vehicle Testing Station testified that he inspected the Plaintiffs vehicle after the accident and opined that it had sustained extensive damage beyond economic repairs vide exhibit P2 and hence was a complete write off. Its value prior to the accident according to him, could not be more than R150, 000.

Mr David Lobo *(*PW3*)* testified that he carried out repairs to the Plaintiffs pick-up after the purchase and received the sum of R20,000 from the Plaintiff towards his charges. According to his opinion, the value of the Plaintiffs pick-up prior to the accident could be around R175,000. From his observation of the scene of accident, the Plaintiff concluded that the collision occurred solely due to the negligent operation of the

Defendant's vehicle at the material time.

Moreover, the Plaintiff produced a photograph (exhibit P3) of his pick-up taken prior to the accident and a receipt (exhibit P1) issued by "Pelicser Breakdown Services" in the sum of R1,500 The Plaintiff also produced in evidence, a video cassette in VHS format containing video clippings recorded from the SBC news bulletin, showing the scene of accident and the locations of the vehicles soon after the accident. This was marked as exhibit P6. The Plaintiff also testified that as a result of the collision he could not operate his business and sustained financial loss. Moreover, the Plaintiff stated that he underwent shock, anxiety, distress and mental trauma because of the said accident and resultant loss of earning.

By reason of the matters aforesaid the Plaintiff testified that he suffered loss and damage as detailed below:

(a)	Loss of Pick-up (written off)	R170,000.00
(b)	Loss of Revenue for 6 months at R4000 per month and distress	R 24,000.00
(c)	Towing of Pick-up	R 1,500.00
(d)	Moral damages	R 5,000.00
	Total	**R200,500.00**

In the circumstances, the Plaintiff claims that the Defendant is liable to compensate him for the said loss and damage and hence, prays the Court for a judgment in the sum of R200,500 with costs against the Defendant.

On the defence side, it is not in dispute that pick-up S1765 belonged to the Second Defendant Mr Louis Savy *(DW2),* who is none else than the father of the First Defendant, who was driving that pick-up at the material time. The First Defendant in his testimony denied the entire version of Mr Adrienne *(PW2)* as to how and under what circumstances, the collision occurred between the two vehicles. According to the

First Defendant, he was driving his pick-up at the material time of the accident at a normal speed, on his lane that is, the mountain side lane of the road and was traversing a slight bend. He testified that did not overtake any car or vehicle at the material time. He never entered into the other lane of the road at any point of time. According to the Eleventh Defendant, it was the Plaintiffs pick-up, which came onto wrong lane and collided with his pick-up causing extensive damage to the vehicle. One Mr Richard Savy *(DW3),* a brother of the First Defendant testified that he was a passenger in the Defendant's pick-up sitting at the front next to the driver seat. But, he did not see the First Defendant overtaking any transport at the material time. However, under cross-examination he became stoic and did not even deny the suggestion that he was hiding the truth and fabricated the facts to save his brother in this case. One Mr Frederick Savy *(DW4),* the auditor cum accountant of "Vines Pty Ltd" testified that the company was the previous owner of pick-up 59450, which was sold to the Plaintiff in 1997 for R100,000

In view of all the above, the Defendant contends that it was the Plaintiff's fault that caused the collision. Therefore, the Defendant denies liability alleging that the Plaintiffs negligent operation of his truck was the sole cause for the collision and resultant damages he allegedly suffered. In the circumstances, the Defendant seeks the Court to dismiss this action with costs.

Before I proceed to examine the evidence, I should mention here that since the Second Defendant died *pendente lite,* the Plaintiff has already withdrawn the case against him. Be that as it may. I carefully perused the entire evidence including the documents adduced by the parties in this matter. The Court also had the opportunity to inspect the locus in quo as well as to watch the video clips produced in evidence. Firstly, with regard to law involving the operation of motor vehicles, I note, Article 1383(2) of the Civil Code of Seychelles reads as

follows:

> The driver of a motor vehicle, which by reason of its operation, causes damage to persons or property shall be presumed to be at fault and shall accordingly be liable unless he can prove that the damage was solely caused due to the negligence of the injured party or the act of a third party or an act of God external to the operation or functioning of the vehicle. Vehicle defects, or the breaking or failure of its parts, shall not be considered as cases of an act of God.

This has been interpreted by the Supreme Court of Seychelles in *Sandra Vet v Oswald Tirant & or* CS 128 of 1977 to mean that when a pedestrian is involved in an accident with a motor vehicle, the driver of the motor vehicle is liable for any damage caused to the pedestrian unless the driver of the vehicle can prove that the accident was caused solely by the negligence of the pedestrian or the act of a third party or an act of God. However, in *A Camille & another v Sewood Ltd & another* CS 204 of 1983, when a motor vehicle was involved in an accident with another motor vehicle, it was held that there is no presumption that may be called to the aid of the injured party. Each driver is liable to the injured other party unless he can prove that the accident occurred solely through the negligence of the other party or the act of a third party or the act of God. In the present case it is a question of two drivers each of whom suffered damage to his vehicle, the presumption of law under Article 1382(2) arises against both drivers. Can it be said that either the Plaintiff or the Defendant has proved that the accident occurred solely through the negligence of the other injured party?

I diligently analysed the entire evidence on record. Firstly, on the question credibility I believe the Plaintiff and his witnesses

in every aspects of their testimony. They all appeared to be truthful witnesses. Especially, I believe PW2 and PW3, in their version as to how, why and under what circumstances the accident occurred. Their evidence is very cogent, reliable and consistent. Above all, their version is corroborated in all material facts by other independent evidence available on record. In fact, the observation made by the Court in locus in quo, the video clips filmed soon after the collision and the location and concentration of debris on the seaside lane of the road all corroborates the Plaintiffs side version in that the First Defendant's negligent operation of his vehicle S1765 was the sole cause for the collision. The testimony of the independent eye-witness Mr Gilbert Sedgwick, DW3 also corroborates the version of Mr Adrienne *(*PW2*)* in this respect. After taking the entire circumstances into account, I am of the view that the First Defendant drove his pick-up at a high speed and overtook the cars in front along the space available on the right lane of his road. Before overtaking those cars he failed to ensure that the other lane was clear of oncoming traffic and safe for his use. To my mind, he has ventured a high risk as an imprudent driver and has blindly overtaken the cars, when he could not have had a clear view of the oncoming traffic from the opposite direction and so I find. I do not believe the First Defendant and his brother *(*DW3*)* in their testimony that the Plaintiff's pick-up was on the wrong lane of the road at the material time and caused the accident.

Having considered the entire evidence in this case, I am satisfied more than on a preponderance of probabilities that the fault of the First Defendant was the sole cause of the collision in that, he failed to take necessary precaution to ensure that the road ahead of him was safe, before he attempted to overtake the cars and so I find. Having regard to all the circumstances of the case, in my judgment, the First Defendant has failed to act as a prudent driver in the entire episode. I completely reject the version of the First Defendant alleging negligence on the part of the other driver Mr

Adrienne, as I do not attach any credibility to his testimony. Hence, I find that the First Defendant is liable to make good the Plaintiff for the actual loss and damages the later suffered as a result of the accident.

As regards the value of the Plaintiff's pick-up I believe Mr Frederick Savy *(*DW4*),* the auditor cum accountant of "Vines Pty Ltd", in his evidence that the previous owner sold the pick-up 59450 to the Plaintiff in 1997 for R100,000 Therefore, I find that the actual value of the said pick-up prior to the accident was at R120,000 including the costs of repairs effected to the vehicle by the Plaintiff after the purchase. At the same time, the Plaintiff admitted in his evidence that the salvage value of the pick-up subsequent to the accident would be around R35,000 In the end, the Plaintiff has suffered a net loss of only R85,000 in respect of the pick-up.

Accordingly, I award the following sums to the Plaintiff:

1	Loss of Pick-up (written off)	R85,000.00
2	Loss of Revenue for 6 months At R4,000 per month and distress	R24,000.00
3	Towing of Pick-up	R 1,500.00
4	Moral damages	R 5,000.00
		R115,500.00

Wherefore, I enter judgment for the Plaintiff and against the First Defendant Mr Terence Savy in the sum of **R115,500.00** with costs.

Record: Civil Side No 443 of 1999