THE SEYCHELLES LAW REPORTS

DECISIONS OF THE SUPREME COURT, THE CONSTITUTIONAL COURT AND THE COURT OF APPEAL

2013

(Pp 1 – 328)

Editor

John M R Renaud, LLB (Lond)
Certificate in Legislative Drafting
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THE SEYCHELLES JUDICIARY

THE COURT OF APPEAL

Hon F MacGregor, President
Hon SG Domah
Hon A Fernando
Hon M Twomey
Hon J Msoffe

THE SUPREME COURT
AND THE CONSTITUTIONAL COURT

Hon F Egonda-Ntende, Chief Justice
Hon D Karunakaran
Hon B Renaud
Hon M Burhan
Hon G Dodin
Hon F Robinson
Hon ES De Silva
Hon C McKee

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Dijoux v Dijoux

Karunakaran J

30 January 2013 CS Dv 49/2005

Matrimonial property

After the parties' marriage was dissolved, the petitioner sought the market value of his half-share in the jointly owned house so that the respondent could become the sole owner.

JUDGMENT Petition granted.

HELD

1 The Supreme Court has jurisdiction pursuant to s 25(1) of the Matrimonial Causes Act, without prejudice to other powers of the court, on an application by a party to the marriage, to order as it thinks fit in relation to the property of a party to the marriage or the matrimonial home.

2 The decisive factor which the court must take into account in determining the issue as to the ownership of a property is the degree of contribution to that property.

3 In considering reasonableness, the duty of a judge is to take into account all relevant circumstances and give weight as they exist at the date of the hearing.

Legislation
Courts Act s 5
Matrimonial Causes Act s 25(1)

Cases
Mathiot v Mathiot SC 105/1994
Maurel v Maurel SCA CA 1/1997
Renaud v Renaud SCA CA 48/1998

Foreign cases
Cumming v Danson [1942] All ER 653
Lloyds Bank v Rosset [1990] All ER 1111

Counsel W Lucas for the petitioner
F Bonte for the respondent

KARUNAKARAN J

[1] This is a petition filed by the former husband - hereinafter referred to as "the petitioner" - against his former wife - hereinafter referred to as "the respondent" - for ancillary relief following the dissolution of their marriage. The petitioner, aged 72, partly incapacitated due to a stroke, who is now bedridden, prays this Court for a judgment:

> Declaring that the land Title S3054 with the matrimonial house situated thereon (hereinafter called the suit-property), which remains registered in the joint-names of the parties belongs to both in equal shares; consequently, ordering the respondent to compensate the petitioner for the market value of his half-share so that the respondent could become the sole owner thereof by having registered the property in her sole name.

[2] After living together for over 35 years, the parties separated in 2005. They have no children born of the marriage. In 2005, at the instance of a petition filed by the petitioner, the marriage was dissolved

on the ground that the marriage had been irretrievably broken down due to unreasonable behaviour on the part of the respondent. A final decree of divorce was also granted on 5 April 2006.

[3] The background facts of the case as they transpire from the evidence on record are as follows.

[4] On 29 July 1985, the parties got married. After the marriage they lived and cohabited at Anse Aux Pins. They were living in a rented house for about 5 years. That house was in a very bad state of repair. Therefore, the parties wanted to have a house of their own and move in. The petitioner identified a house at Anse De Genet; the suit property - situated on parcel S3054. He wanted to have it purchased in the joint names of the parties. With financial assistance by way of a housing loan from the Seychelles Housing Development Corporation both parties jointly acquired the property under a joint-purchase agreement. The petitioner testified that throughout the marriage, he was an earning member in the family. He contributed towards the purchase price of the property. He also spent money for the extension and renovation of the house. According to the petitioner, during the loan repayment period, he was working as a cook in a restaurant belonging to one Ferdinand at Anse Royale. He was earning a salary of R 2,500 per month and was repaying the housing loan by monthly instalments of R 675. He also produced a bunch of receipts in exhibit P4 showing all such payments for a total sum of R 9450. According to the petitioner, when the final document of transfer was made, the respondent stealthily without the petitioner's knowledge and consent, got the property registered in her sole name. When the petitioner came to know about it, he asked the respondent to re-register the property in their joint names. Therefore, the respondent subsequently, transferred an undivided half share in the property to the petitioner. Following the

dissolution of the marriage, the petitioner left the matrimonial home. Now the property is in the full use and occupation of the respondent. Admittedly, the present market value of the property is R 500,000 as per the valuation made by Ms Cecil Bastille, the Quantity Surveyor. In the circumstances, the petitioner seeks this Court to make a property adjustment order awarding him R 250,000 the 50% of the market value of the property so that the respondent shall become the sole owner of the property.

[5] On the other side the respondent denied the entire claim of the petitioner. The respondent testified that the petitioner never had any permanent job. He was not contributing any sum towards the purchase price or renovation or extension of the house. When their marriage was on the rocks, the respondent threatened to kill her and so was forced to transfer a half share in the property to the respondent. According to the respondent it was she who paid in full for the property availing herself of a housing loan and was repaying R 1000 every month to SHDC. She was working for Skychef for about 12 years and paid a total sum of R 81,000 to SHDC. The respondent claims that she is the sole owner of the property and seeks a declaration accordingly.

[6] I carefully analyzed the evidence on record and the arguments advanced by both counsel for and against their respective claims. I meticulously perused the provisions of law relevant to the issues. I went through the judgments of the Courts in the following cases so as to ascertain the law applicable in matters of this nature.

[7] *Mathiot v Mathiot* SC 105/1994, wherein the Court used both its inherent as well as statutory powers in determining the property disputes between the parties and granting ancillary relief following the dissolution of their marriage, vide page 6 of the judgment.

[8] *Maurel v Maurel* SCA CA 1/1997, wherein the Court of Appeal discouraged the use of the terminology "Matrimonial Property" in matters of such ancillary relief without giving alternatives. In that particular case, the respondent had claimed a beneficial interest in the appellant's property. She had applied under the Status of Married Women Act for a declaration to that effect. The Court held that the jurisdiction of the trial Court would have been confined to the equitable powers conferred upon the Supreme Court by s 5 of the Courts Act. In such cases, the claim to the beneficial interest could have been based only on equitable principles analogous to the English doctrine of implied, constructive or resulting trust as explained by the House of Lords in *Lloyds Bank v Rosset* [1990] 1 All ER 1111.

[9] *In Renaud v Renaud* SCA CA 48/1998 in respect of property disputes between the parties, following the divorce, the Court of Appeal held that the Supreme Court has jurisdiction pursuant to s 25(1)(c) of the Act, without prejudice to any other power of the Court, on an application by a party to the marriage, to grant order as it thinks fit in relation to the property of a party to the marriage or the matrimonial home. In addition, the Court may even exercise its equitable power to make any order in the interest of justice under s 5 of the Courts Act.

[10] Obviously, the law relevant and applicable to property claims or disputes between the parties to a marriage in matters of matrimonial causes is s 25(1)(c) of the Matrimonial Causes Act. At the same time, the Court is empowered by this section to grant any order as it thinks fit in relation to the property of a party to the marriage, who may apply for any relief in the nature of a declaration or otherwise.

[11] In the light of all the above I examined the evidence on record including the affidavits and documents adduced by the parties. I gave

diligent thought to the submissions made by both counsel. First of all, as regards the issue of repayments of the SHDC loan, on the strength of the evidence adduced by the parties, I am satisfied more than on a balance of probabilities that it was the respondent who has fully or to say the least substantially repaid the housing loan in question, except the sum of R 9450 which sum the petitioner, has directly paid from his own earnings. As regards the renovation and extension to the house, I find that the respondent was the one who contributed her money in full or to say the least substantially contributed towards the cost of those improvements made on the property. Although the respondent has not produced all the receipts as they are old dating back to 1980s for the loan-repayments and for expenses incurred on renovation and extension, in my considered assessment, she should have contributed approximately 80% towards the loan repayments and to procure the necessary construction materials and the labour costs for extension and renovation. Since the respondent has contributed towards repayments of the housing loan and to the renovation and extension of the house, I find that she is entitled to a 80% share in the present market value of the property, which amounts to R 400,000, whereas the petitioner is entitled to a 20% share, which amounts to R 100,000.

[12] Now, the question arises: Who should be given the sole ownership of the suit-property among these two co-owners upon payment of compensation paid to the other for his or her share?

[13] It is not in dispute that the petitioner has moved out of the suit property. He is presently living with another person in the South Mahé and has alternative accommodation, a house of his own. However, the respondent who has been continuously living in the suit property for the past about 30 years has no other house to live in. Hence, the degree of personal requirement for the respondent to have a shelter of her own by

acquiring the sole ownership of the suit-property is undoubtedly, higher than that of the petitioner, who already has a house to live in. Besides, the fact remains that the amount of contribution the respondent has made towards the purchase price is substantially more; in other words higher than that of the petitioner. In a situation of this nature, when two or more co-owners compete among themselves to acquire sole ownership of their co-owned property and especially, when their claims are based on the varying degree of their personal requirement and varying degree in the quantum of their contributions, the Court cannot fully honour its separate duty to do justice to each co-owner by granting each, the sole-ownership of the property. The Court is inevitably, placed in an impossible position. What is then, reasonable to do in the given circumstances of the instant case? In such a conflicting situation, to my mind, the only solution is to apply "reasonableness" and choose the "least detrimental alternative" and make a determination accordingly. As rightly observed by Lord Greene (M R) in *Cumming v Danson* [1942] 2 All ER 653 and p656:

> In considering reasonableness, it is in my opinion perfectly clear that 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, 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 the various factors in the situation. 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

[14] Applying the above dictum and in considering "reasonableness" in this matter, I gave due weight to various factors in the situation. In striking a balance amongst others, I find that the factor as to "higher degree of contribution" relied upon by the respondent outweighs the factors as to the "lesser degree of personal requirement" operates in favour of the petitioner. The factor as to the "degree of personal requirement" since based on equity, the Court ought to be cautious that this factor should not be allowed to unduly influence its mind in deciding which co-owner should be given the sole ownership and which one should be compensated for the contribution made. Having said that, I conclude that the decisive factor, which the Court ought to take into account in determining the issue as to "sole ownership", is the "higher degree of contribution" the respondent has made towards the repayments of the housing loan and renovation. Indeed, reasoning dictates that the respondent should be granted the sole ownership of the property since she has substantially contributed or has made major contributions towards loan-repayments a fortiori the higher degree of personal requirement. At the same time, justice demands that the respondent should also be compensated for the material, labour and financial contributions he has made.

[15] In view of all the above, and in summing up I make the following declaration and orders:

1) I hereby declare that the respondent Mary Eva Dijoux (born Talma) is entitled to sole ownership of the property namely, parcel of land Title S3054 situated at Anse Des Genets, Mahé, whereas the petitioner Alexis Marcel Dijoux is entitled to compensation in the sum of R 100,000 payable by the respondent in settlement of the petitioner's share in the property.

2) Further, I order the respondent Mary Eva Dijoux (born Talma) to pay the said sum of R 100,000 to the petitioner within six months from the date of the judgment hereof.

3) As and whereupon such payment under paragraph (b) above, is made in full by the respondent either directly to the petitioner or through his attorney, I order the petitioner to transfer thenceforth to the respondent all his rights and undivided interest in Title S3054 including all or any super structure thereon.

4) In the event, despite receipt of the said sum in full, should the petitioner Alexis Marcel Dijoux fail or default to execute the transfer in terms of order (3) above, I direct the Land Registrar to effect registration of the said parcel Title S3054 in the sole name of the respondent Mary Eva Dijoux (born Talma) upon proof to his satisfaction of payment of the said sum R 100,000 by the respondent to the petitioner; and

5) I make no order as to costs.

Pillay v Rajasundaram

Egonda-Ntende CJ

21 March 2013 SC CS 340/2010

Succession −Powers of executor

The plaintiff was an heir, defendant no 1 was the executor and defendant no 2 was an heir and co-executor of an estate. The plaintiff sought the annulment of a purported distribution of the estate on the ground that defendant no 1 acted alone and beyond his authority on the distribution of the estate.

JUDGMENT For the plaintiff.

HELD

1 The word 'distribute' in art 1024 of the Civil Code is restricted to determining the share of each heir in the remainder of the estate, leaving the heirs in a state of co-ownership in division.

2 The executor is not authorised by the law to choose which heir will succeed to what property.

Legislation
Civil Code arts 724(4), 1024, 1027

Counsel B Hoareau for the plaintiff
F Bonte for the defendants

EGONDA-NTENDE CJ

[1] The plaintiff is a son and one of the heirs of the late VTT Pillay who passed away on the 15 October 2001. Defendant no 2 is

an executor of the estate of the deceased. Defendant no 2 is a son, heir and co-executor with defendant no 1 of the estate of the said deceased. The plaintiff has brought this action seeking basically several remedies. He seeks compensation of R 4,000,000.00 being the present value of parcel C4240, one of the properties belonging to the estate which he claims to have developed. And that pending the payment of said sum that he is entitled to retain the said property. Further he seeks the annulment of a purported distribution of the estate of the deceased that was effected on 27 April 2010 as being void in law. He prays for a new distribution of the estate in accordance with the law and costs of this action.

[2] The defendants opposed this action, contending that no monies were due to the plaintiff. And that the distribution of the estate was lawful.

[3] During his final address to the Court, Mr Hoareau, counsel for the plaintiff, submitted with regard to the claim for the value of parcel C4240 as follows:

> Now my lord with regard to the case based on paragraph 9 of the plaint I would submit that there is no evidence as to the amount that was spent by the plaintiff in this case. That I would concede. I will concede there is no value as to the property and in that regard, in respect of paragraph 9 of the plaint, your Lordship, will have no other choice but to dismiss the plaint in that regard.

[4] I agree with counsel for the plaintiff. I am indebted to Mr Hoareau for being forthright in this matter. The claim for compensation of the value of parcel C4240 of R 4,000,000.00 from

the estate of the deceased is unsupported by evidence on record. It is dismissed with costs. So is the claim to retain possession of the said property on that account until payment of the said sum.

[5] I now turn to the remaining cluster of claims with regards to the distribution of the estate. The facts of what transpired with regard to distribution are not in dispute. Defendant no 1 after receiving values of the properties belonging to the estate, proceeded to divided and partition the properties into two portions, giving one portion to the group headed by the plaintiff and another portion to the group headed by defendant no 2. He ordered the group headed by the defendant no 2 to pay the plaintiffs an additional sum of money in order for the plaintiff's group to receive their share of the estate of their father, the deceased. He did not make provision for the debts of the estate which he indicated in his report only as outstanding and unpaid. Defendant no 2 the other co-executor then ratified and adopted the actions of defendant no 1. However defendant no 2 was not willing to pay the sum ordered by defendant no 1 to be paid to the plaintiff's group of heirs in his distribution scheme.

[6] Mr Hoareau has attacked these actions of the defendants as being void. Firstly that defendant no 1 should not have acted alone. They are required to act jointly. More importantly he attacked the division of the estate of the deceased as amounting to a partition of the same which went beyond the authority of the executors. The executors were only empowered to distribute the estate by declaring the share of each heir in the remaining properties of the estate, leaving the heirs in a state of indivision.

[7] Mr Bonte counsel for the defendants submitted that the fact that the defendant had acted alone was cured by the ratification and adoption of his actions by defendant no 2. He submitted that the

plaintiff was estopped from bringing this action as its remedy has been to appeal to the Court of Appeal as the defendants were complying with a Court of Appeal order. He prayed that this action should be dismissed with costs.

[8] Article 724(4) of the Civil Code of Seychelles, herein after referred to as the CCS, states:

> if any part of the succession consists of immovable property the property shall not vest as of right in any of his heirs but in a executor who shall act as fiduciary. In respect of such fiduciary the rules laid down in Chapter VI of Title 1, and Chapter V Section VII of Title II, of Book III of this Code shall have application.

[9] Article 1027 of the CCS states:

> The duties of an executor shall be to make an inventory of the succession to pay the debts thereof, and to distribute the remainder in accordance with the rules of intestacy, or the terms of the will as the case may be. He shall be bound by the debts of the succession only to the extent of its assets shown in the inventory. The manner of payment of debts and other rights and duties of the executor, in so far as they are not regulated by this Code, whether directly or by analogy to the rights of and duties of successors to moveable property, shall be settled by the Court.

[10] The duties of an executor or executors are many. Firstly the estate vests in the executors. The executors are entitled to possession

as well as the legal title thereto. The legal title thereto is reposed in executors as it is with fiduciaries not on their own account but in trust for the heirs or owners to be. The executors must gather in the estate and make an inventory of the same. The executors must pay the debts of the estate but only to the extent of the value of the estate. After paying off the debts of the estate the executors must then distribute the remainder of the estate, to the heirs to accordance with the terms of the will in respect of testate succession or in accordance with the law with regard to intestate succession, or a combination of both in appropriate circumstances.

[11] "Distribute" as a verb has many possible meanings or synonyms. It could mean to share, divide, parcel out, dispense, mete out, shell out and many others. It is contended for the plaintiff that "distribute" in the sense used in art 1024 of CCS, is restricted to determining shares of each heir in the remainder of the estate, leaving the heirs in a state of co-ownership in indivision. To take this argument to its logical conclusion it would mean that if there were ten heirs, and five heirs were entitled to half of what the other five heirs were entitled to, then an executor would have to declare that five were entitled to 13.34% each while the other five were entitled to 6.67% each of the immovable property in the estate and cause them to be registered as co-owners of the same in those respective shares. This would be so whether there was one immovable property or ten immovable properties remaining in the estate.

[12] In support of this argument Mr Hoareau contended that the law was in place to take care of what would follow after that. For instance if the parties did not want to stay in indivision there was provision for that in the law. The parties could apply to court for relief. On the other hand for an executor to partition the estate and

give one group of heirs a different property and another group another piece of property amounted to a partition of the estate for which the executor had no power. In so doing as was done in this case it was suggested that the executors acted in excess of their authority or without authority in law to do so.

[13] I am inclined to agree with Mr Hoareau as it appears that while the executors may have authority to dispose of properties of the deceased to settle debts, and in that regard may choose what property to sell for that purpose, once the executors determine that the remainder is for distribution to the heirs, their authority is limited to determining shares in the case of immoveable properties and causing the heirs to be registered as co-owners thereof leaving the co-owners to take any further steps as authorized by the law to choose which heir will succeed to what property. The duty of the executor will stop at determining the shares and in law causing those shares to be registered in the names of the heirs. Thereafter it is for the heirs to appoint for instance their own fiduciary or fiduciaries to manage the property and to take any other steps that the law allows them to take.

[14] I therefore find that the distribution by the executors date 27 April 2010 was voidable for not being in accordance with the law. I set it aside. I direct the joint executors to now proceed according to the law and pay off the debts of the estate. And then distribute the remainder in the appropriate shares to the heirs.

[15] As this is an administration of estate matter I direct that the estate of the deceased will pay one third of the costs of the plaintiff who has succeeded only in part and the costs of the defendants in this matter.

University of Seychelles American Institute of Medicine v Attorney-General

Egonda-Ntende CJ

22 March 2013 SC CS 97/2011

Contract – Mistake

The plaintiff sought damages from the defendant for breach of a contract. Both parties admitted that the contract was signed before the plaintiff came into existence. The plaintiff argued that the contract was entered into by mistake. The defendant contended that the contract was void ab initio.

JUDGMENT Plaint dismissed.

HELD

1 In order to consider whether a contract was entered into by mistake there must be two or more consenting parties to the contract who may have made the mistake.

2 A contract binds only parties to the contract. A third party may take the benefit of a contract instead of the party who entered into the contract but such party may ratify that contract in accordance with art 1120 of the Civil Code.

Legislation
Civil Code arts 1108, 1110, 1119, 1120

Counsel A Derjacques for the plaintiff
D Esparon for the defendant

EGONDA-NTENDE CJ

[1] The plaintiff is seeking to recover from the defendant the sum of R 250,212,500.00 with interest at the legal rate plus a multiplicity of other non- monetary relief and costs. The defendant opposes this action, denying that the plaintiff is entitled to the said sum or any portion thereof or to any of the other relief claimed. The defendant prays that this claim should be dismissed with costs.

[2] After protracted hearings over 18 months I reserved this case for judgment. And while I was reviewing the case for judgment I realised that there was an important question of law that had not been addressed by the parties. I invited counsel to address the Court on whether the plaintiff was actually a party to the contract that was the subject of the claim in this case. It had become apparent that the contract in question had been signed and concluded on 23 June 2000 while the plaintiff had been incorporated in Seychelles on 11 January 2001.

[3] The root of the plaintiff's claim is set in paragraphs 1 to 3 of the plaint. I will set them out below:

> 1) The University of Seychelles - American Institute of Medicine Incorporation Ltd, hereinafter referred to as the Plaintiff, was a private medical university, incorporated in Republic of Seychelles and which received a charter to establish itself, in the jurisdiction of Seychelles, from the Government of Seychelles, on the 23 June 2000.

2) The Government of Seychelles, hereinafter referred to as the Defendant, granted a charter, to the Plaintiff, through an agreement in writing, dated 23 June 2000, to establish[ed] a private medical university, within the Republic of Seychelles.

3) Inter alia, the said written agreement provided for the Plaintiffs to establish the said, university, confer medical degrees on students, that medical graduates of the Plaintiff would be eligible for licence within the Republic as medical practitioners, that the plaintiff would offer medical degree programs in accordance with United States Medical Licensing Examination programs, and that the said agreement would be in effect as long as the plaintiff operated a University within the Republic. It was further agreed that either party may terminate the said agreement by issuing one year's notice of its intention to do so, and in writing.

The defendant admitted the said three paragraphs in its written statement of defence.

[4] In spite of that admission it transpired in evidence that the plaintiff was incorporated in Seychelles on 11 January 2001. The plaintiff was therefore not in existence at the time the agreement was signed on 23 June 2000. The plaintiff could not therefore have been party to the agreement in question. It would follow that the plaintiff was suing on an agreement to which it was a stranger. The party mentioned in the agreement of 23 June 2000 is 'University of

Seychelles -- American Institute'. This person [if it qualifies to be a person] is not and cannot be the plaintiff.

[5] Mr Derjacques, counsel for the plaintiff, submitted that there was a mistake made by both the parties and that this was excusable under art 1110 of the Civil Code of Seychelles [hereinafter referred to as CCS] by a court. He referred the Court to a number of decisions by this Court on the doctrine of mistake in the law of obligations.

[6] Mr Esparon, counsel for the defendant, submitted that the said provision and whole concept of a mistake was inapplicable as mistake would only relate to the substance of the object of the contract which was not the case here. He submitted that in light of art 1108 of the CCS which provided the essential conditions of a valid contract, this contract before the Court was void ab initio. The plaintiff was not in existence at the time the contract was made. He had no capacity to enter into the contract. The only way he could have taken benefit of it was by novation, which is neither pleaded nor proved. He submitted that this action should be dismissed.

[7] Article 1110 provides:

> (1) Mistake shall only be a ground of nullity of the contract if it relates to the very substance of the thing which is the object of the contract. It shall not be a ground of nullity if it relates to the person with whom it was intended to enter into a contract, unless the personal qualities of that person are a principal consideration in the agreement.

(2) There is a mistake as to the substance if the parties would not have concluded the contract had they known of the true circumstances. However, the Court, in deciding whether a party made an operative mistake, shall be entitled to take into account whether the mistake was excusable in the circumstances.

(3) The innocent party to a contract that has been rescinded for mistake may claim damages under article 1382 of this Code if he sustains any damage as a result of the rescission of the contract.

[8] It is clear that in the first place in order to consider whether a contract was entered into by mistake there must be two or more consenting parties to the contract who may have made the mistake. This is not the case here. The plaintiff was not a party to the agreement in question. The plaintiff was not in existence at the time the contract was made. The plaintiff is not the successor in title to the party that signed the contract. So the question of mistake cannot even arise given that in effect there was no contract to which the plaintiff was a party so as to enable the plaintiff to invoke the concept of whether or not the mistake was excusable by court or not.

[9] Secondly as submitted by Mr Esparon the mistake must relate to the substance of the object of the agreement. This is not the case here. I have read the cases referred to me by Mr Derjacques on the issue of mistake and do not find them helpful at all in this case. The doctrine of mistake and whether it is excusable or not does not find application in the circumstances of this case.

[10] It is not in dispute that the plaintiff is a stranger in law to the contract in question. The plaintiff was not a party to the agreement in question for the simple reason that it was not in existence at the time the contract was made. When the plaint claims that the plaintiff signed the agreement in question this is a false averment, regardless of whether it is contested or not.

[11] Ordinarily, in accordance with art 1119 of the CCS, a contract binds only parties to the contract. A third party may take the benefit of a contract instead of the party who entered into the contract but such party must ratify that contract as his contract in accordance with art 1120 of the CCS. This was not done in this case.

[12] Article 1119 of the CCS states:

> Generally a person may only bind himself or stipulate in his own name for his own account, except as provided hereafter.

[13] Article 1120 of the CCS of states:

> Nevertheless, a person may undertake that another shall perform an obligation; but the person who has given the undertaking or has promised that a contract shall be ratified by another party, shall be liable for damages if that party refuses to do so. However, if that party ratifies the contract, it becomes retroactively effective as from the date of the original undertaking.

[14] The other party apart from the defendant that signed the agreement in question did not undertake that another person would undertake or perform its obligations. Neither did it promise that

another person would ratify this agreement and take over its obligations. The plaintiff has represented itself as the party that entered into the agreement in question. This is false. I am satisfied that the plaintiff cannot sue on this contract which it neither subscribed to nor ratified. This Court, as a matter of law and policy, will not lend its support to the pursuit of such claims. The plaint is dismissed with costs.

Eastern European Engineering v Vijay Construction

Egonda-Ntende CJ

25 March 2013 Misc Appl 275/2012

Provisional attachment – When appropriate

The petitioner sought the provisional attachment of money belonging to the respondent. The respondent opposed the interim measure on the ground that it was in a position to pay any eventual debt.

JUDGMENT Petition dismissed.

HELD

1 On filing an action for damages, it is unreasonable without more to order a provisional seizure of the defendant's assets to the value of the claim when the plaintiff may well not succeed in the damages claim.

2 An applicant for an attachment order must show that the defendant has acted in a manner that puts at risk the possibility of recovering the fruits of judgment should the applicant succeed in the head suit.

Legislation
Civil Code art 1152

Cases
Allied Builders v Denis Island Development Company CS 330/2003
Barker v Beau Vallon Properties (1975) SLR 115

Union Estate Management v Mittermayer (1979) SLR 140
Village Management v Geers SCA 3/1995
Zaccari v Andre (2008) SLR 136

Counsel P Pardiwalla for the petitioner
B Georges for the respondent

EGONDA-NTENDE CJ

[1] The petitioner sought an order for the provisional attachment of money belonging to the respondent in three accounts with two banks in Seychelles. As an interim measure before the hearing of the application inter partes an order for provisional attachment was granted against two banks for the sum claimed in the plaint of R 2,538,329.00. It turned out that the attachment of the respondent's account in Barclays Bank Seychelles Ltd satisfied this amount and the interim provisional attachment was lifted in respect of other accounts. This ruling is in respect of the main application and will determine whether to maintain, vary or discharge the interim order.

[2] Mr Pardiwalla, counsel for the petitioner, submitted that the petitioner had established all the requirements that needed to be established for an order of provisional attachment to issue. It was up to the respondent to come back to court after the issue of this order and satisfy the court that it should be lifted, which the respondent had not done. There is no affidavit in support of the respondent's side of the story. He prayed that the interim measure ought to remain in force. Mr Pardiwalla referred this court to the decisions of *Barker v Beau Vallon Properties* (1975) SLR 115, *Union Estate Management v Mittermayer* (1979) SLR 140 and *Allied Builders v Denis Island Development Company* CS 330/2003 in support of his submissions.

[3] Mr Georges, counsel for the respondent, submitted that following French jurisprudence the object of an order of provisional attachment is the protection of a defendant's assets from risk of disappearance or diminution in value so as to fail to satisfy a possible judgment that may be entered against the defendant in the head suit. He further referred to the case of *Zaccari v Andre* (2008) SLR 136 in which Karunakaran J had taken into account that there was a clear danger of the defendant avoiding satisfying the judgment that may be entered against him to order that assets of the defendant be seized provisionally.

[4] Mr Georges submitted that in the instant case that had not been shown and the respondent was well within a position to take care of any judgment or decree that may be passed against it. He prayed that this order for provisional attachment ought not to be granted. Mr Georges further submitted that the claim in this case is for damages of over R 12,000,000.00 when all the agreement allowed as a penalty was capped at 10 per cent of the contract value. He submitted that as damages were to be determined by the Court it was not right to attach assets to cover all the damages claimed by the petitioner as it may never be awarded by the Court.

[5] Without departing from the traditional jurisprudence on the grant of provisional orders for attachment of property, as propounded by Mr Pardiwalla, I am satisfied that the applicant is not entitled to the order for provisional attachment in the sum of R 12,538,329.00. The bulk of this claim is an alleged loss of profits for delay caused in opening the hotel and the cost of extra works incurred by the plaintiff. This would be in the form of damages to be awarded by the Court upon proof of liability, loss and damage including quantum. The Court of Appeal has previously frowned

upon granting security before trial for the full claim of damages on the ground that such damages would not at that stage have been determined to be due. See *Village Management v Geers* SCA 3/1995. By analogy this is equally applicable to an order for provisional attachment in relation to a claim for damages.

[6] Similarly in this action the claim for damages will be determined by this Court. It is yet to be determined. It may succeed or it may fail. It is unreasonable in my view, without more, simply on the filing of an action for damages, to order provisional seizure of a defendant's assets to the value of the claim for damages when the plaintiff may well never succeed to prove that the damages claimed are due. Secondly in this particular case the contract between the parties provided a penalty in case of a delay in completing the contractual works. The contract capped the penalty claim to 10 per cent of the contract value which the plaintiff has put at R 712, 329.00.

[7] Paragraph 6 of the petition states:

> The Respondent's breach is [in] not completing the works has caused delays in the opening of the Hotel resulting in loss of profits amounting to SR9,856,000.00 for which the Respondent is liable to the Petitioner.

[8] Neither the plaint nor the petition explains how the petitioner has arrived at this sum of money. I am unable on its face to determine the bona fides of this claim or that it is prima facie due to the plaintiff.

[9] At the same time regard may be had to the provisions of art 1152 of the Civil Code of Seychelles (CCS) which state:

> When the agreement provides that the failure to perform the contract shall make the debtor liable to a certain sum of money by way of damages, no larger or lesser sum may be awarded to the other party. This provision shall not apply if the failure to perform is due to fraud or gross negligence. In any case, the Court may reduce the sum agreed upon if it is manifestly excessive in the particular circumstances of the contract.

[10] The contract in question contained a provision for penalty in case of default which capped the amount to about R 712,329.00. It would appear to me that the above provision bars the plaintiff from claiming any further sums beyond what is provided in the contract unless the failure to perform was due to fraud or gross negligence. The plaint alleges neither fraud nor gross negligence. On its face and in light of the said provisions of art 1152 of the CCS, the plaint may well then fail to disclose a cause of action with regard to the claims for damages beyond the sum of R 712,329.00. This would be sufficient to defeat this application.

[11] At this stage I am unable to establish the bona fides for the claim by the plaintiff beyond the penalty provided for by the agreement between the parties which if the plaintiff is believed is capped at R 712,329.00. For the reasons set out herein above I decline to grant the provisional order for attachment for the sum of R 12,538,329.00. I set aside the interim order for provisional attachment dated 14 January 2013. I dismiss this petition with costs.

[12] Before I take leave of this matter I wish to study this matter a little further in light of the arguments put forth by Mr Georges. It is not in dispute that traditional jurisprudence in this jurisdiction tends to support the approach in law taken by Mr Pardiwalla rather than that urged upon this Court by Mr George. Nevertheless I do not think that that position is cast in stone in the light of the mischief it is now creating in the business ranks of this country. No doubt it can be very disruptive of many a company's operations. It is not unusual that an applicant will seek the attachment of a respondent's accounts virtually in all banks in Seychelles. In this case attachment was sought in respect of three accounts with two banks. The effect of such orders is to freeze a respondent's financial operations or place its financial affairs under great strain. This would be so without any blameworthy action on a defendant's side. All that is essentially required is the institution of a suit, and a claim that it is bona fide.

[13] In my view this is an unsatisfactory state of affairs. It disrupts the business operations of companies, who at this stage have no obligations adjudicated upon toward the applicant. And much as it is possible for a party to come to court and seek some relief from that order injury will have been done or suffered. The time has come for a review of this approach and to restrict such orders to defendants acting in such way as to defeat the possibility of a successful plaintiff from recovering the fruits of his or her judgment. A plaintiff or a party ought to show that the defendant has acted in a manner that is putting at risk the possibility of recovering the fruits of his judgment should he or she succeed in the head suit.

[14] The raison d'etre for provisional attachment of a defendant's moveable properties is to ensure that should the plaintiff succeed in the main suit the plaintiff would be able to enjoy the fruits of its

judgment. However at this stage no trial has taken place. No 'judgment' as such has been ordered against a defendant. Judgment may well be two or more years away. In this Court it is not uncommon to have cases last for five years without completion. It appears to me quite wasteful in economic terms, both to the owner and the nation that an order of the Court can sequester assets of the defendant for such a period, locking such assets out of economic or commercial activity to the benefit of the owner when the owner has done nothing wrong at that stage. All there is, is a suit filed against him. In my view there must be more.

[15] The order for provisional attachment ought to be invoked only in cases where its raison d'etre is at stake and not otherwise. The defendant should be acting in such a manner that puts at risk the plaintiff's ability to recover the fruits of his judgment. For instance if he is disposing of his assets with a view to avoiding satisfying any judgment that may be passed against him or he plans to relocate himself or his assets outside this jurisdiction again with the object of not satisfying a possible judgment being passed against him.

[16] In the instant case the impugned behaviour of the defendant company is set out in paragraph 5 of the supporting affidavit. I shall set it out:

> The Respondent is a building contractor carrying on its trade in Seychelles and engaged in several building projects at any one time. I feel that if his funds, to the limit claimed by the Petitioner, is not conserved through a provisional attachment order, he may use up the funds on other projects and not be able to satisfy any judgment given this case.

[17] The petitioner is aware that the respondent is engaged in business in Seychelles. The petitioner's director 'feels' that the respondent would not be able to meet a judgment against it because it may be working on other projects. Apart from the fact that the logic informing that 'feeling' appears to be warped, in my view, this Court should act on facts and not 'feelings' of parties. What is wrong with the respondent carrying on with its business while the litigation goes through its paces? It would appear to me that this is likely to create more wealth and ability to meet any judgment that may be obtained against the respondent rather than the reverse in ordinary circumstances. There are no extra ordinary circumstances alleged here.

[18] It is possible in my view to infer from paragraph 5 of the affidavit of the petitioner, and I do infer, that the respondent is in a position to meet any judgment that would be passed against it given that it is known that it is a building contractor that is engaged in several building projects at any one time. I conclude that it is unnecessary in the circumstances of this case to order provisional attachment against the respondent.

Bradburn v Government of Seychelles

Renaud, Burhan JJ

26 March 2013 CC 06/2008

Fair hearing – Bail − Remand

The petitioner was arrested and charged with trafficking in a controlled drug. The petitioner argued his constitutional right to a fair hearing had been violated because he had been in detention 10 months before trial. He also contended that whilst in custody he was treated as a convicted prisoner and was not kept away from convicted persons in contravention of his constitutional rights. He sought compensation for the violations.

JUDGMENT Petition dismissed.

HELD

1 To invoke the jurisdiction of the Constitutional Court in respect of a remand order, the order which resulted in detention must be in contravention of art 18(7) not art 19(1) of the Constitution.

2 Persons in remand custody are persons who have been refused bail or who are unable or unwilling to meet the conditions set out in the bail bond. They are to be kept away from convicts.

Legislation
Constitution arts 18, 19(1), 46(1), 119(2)
Misuse of Drugs Act s 29

Cases
Beeharry v R SCA 11/2009
Sandapin v Government of Seychelles SC CC 13/2010
Poonoo v R SCA 38/2010

Foreign legislation
ICCPR art 15

Counsel F Elizabeth for the petitioners
A Madeleine for the respondents

The judgment of the Court was delivered by
BURHAN J

[1] This is an application by the petitioner under art 46(1) of the Constitution of the Republic of Seychelles alleging that his constitutional rights under art 19(1), art 18(3) and art 18(11) have been contravened by the respondents in this case.

[2] The petitioner further claims the following redress and relief in the prayer to the petition:

a) Make an order declaring that there have been several violations of the petitioner's rights by the acts and omissions of the respondents, their employees, servants or preposee.

b) Make an order enlarging the petitioner on bail and pending his trial.

c) Award compensation in favour of the said petitioner for the said violations in the sum of R 50,000.00.

[3] The background facts of the case as admitted by the parties are that the petitioner in this case was arrested and charged with

trafficking a controlled drug on 8 March 2008. The petitioner was thereafter remanded to custody and kept in Montagne Possee prison. The trial was fixed for the 21, 22 and 23 January 2009. It is admitted that at present the petitioner has been convicted of the said offence and is serving a term of imprisonment at Montagne Possee prison and therefore the relief sought in prayer (b) ie that the petitioner be released on bail pending trial does not arise.

[4] It is the contention of counsel that the petitioner was remanded to custody on 8 March 2008 and "by the time the case comes up for trial," he would have spent 10 months in prison and therefore the order for his detention pending his trial contravenes his constitutional rights under art 19(1) of the Constitution to have a fair hearing within a reasonable time by an independent and impartial court established by law.

[5] Article 19(1) of the Constitution reads as follows:

> Every person charged with an offence has the right unless the charge is withdrawn, to a fair hearing within a reasonable time by an independent and impartial court established by law.

[6] It appears the petitioner is complaining not of the fact that the hearing of the case was not within the reasonable time requirement but that his detention pending his trial for a period of 10 months, contravenes his right to have a fair hearing within a reasonable time. It is apparent on a reading of paragraphs 2 and 3 of the petition that the petitioner was detained pending trial in the Montagne Possee prison after being charged and by a remand to custody order of a competent court. On the question of bail, it is settled law that a person produced before court has a right to bail

subject to certain permissible derogations contained in arts 18(7)(a)–(f) of the Constitution. The burden of establishing the derogations lies firmly on the shoulders of the prosecution which is seeking a remand to custody order. The law also provides for the accused who are remanded to custody to be produced before court at regular intervals for the remand order to be reviewed if necessary. Further the said remand order made by a trial court is subject to appeal - refer case of *Beeharry v Republic* SCA 11/2009.

[7] The petitioner does not seek to contest the constitutionality of the remand to custody order on the grounds it did not fall within the derogations contained in art 18(7)(a)–(f) but seeks to complain that the order for his detention pending his trial contravenes his constitutional rights under art 19(1) of the Constitution to have a fair hearing within a reasonable time by an independent and impartial court established by law as he would have spent over 10 months in remand. It is the view of this Court that to invoke the jurisdiction of the Constitutional Court in respect of a remand order, the remand to custody order which resulted in the petitioner's detention at Montagne Possee prison must be in contravention of art 18(7) of the Constitution and not of art 19(1) of the Constitution.

[8] The right to have a fair hearing within a reasonable time as envisaged by art 19(1) of the Constitution has been dealt with by this Court in the case of *Sandapin v Government of Seychelles* SC CC 13/2010 which held:

> in reviewing compliance with the reasonable time requirement, the Court always begins by determining the starting point (dies a quo) and the end (dies ad quem) of the period to be considered Basically the court assesses whether the length of proceedings from the starting point to the end in the case before it has been reasonable or not.

[9] In this instant application the petitioner has sought to complain of non-compliance of the reasonable time requirement even prior to the trial being concluded in respect of a period of 10 months. The main ground for his complaint is that the accused has been detained. It is the view of this Court that if the detention is based properly on a remand order by a trial court under the permissible derogations contained in art 18(7)(a)–(f), if dissatisfied with the said order on the grounds that the remand time period is too excessive, the petitioner has an immediate remedy which is a right of appeal to the Seychelles Court of Appeal and move the appellate court on the grounds that the remand period is excessive and that the person be released immediately even prior to his date of trial. For the aforementioned reasons this Court is of the view that the petitioner cannot seek to complain under art 19(1) that the remand order has resulted in a non-compliance with the reasonable time requirement as required for by this particular article.

[10] It is apparent that though the aforementioned alleged contravention is mentioned in his petition, counsel for the petitioner has not sought to further elaborate or submit on this matter in his submissions.

[11] The other contravention complained of by the petitioner is in respect of art 18(3) of the Constitution. Article 18(3) reads:

> A person who is arrested or detained has a right to be informed at the time of arrest or detention or as soon as is reasonably practicable thereafter in, as far as is practicable, a language that the person understands of the reason for the arrest or detention, a right to remain silent, a right to be defended by a legal practitioner of the person's choice and, in the case of a minor, a right to communicate with the parent or the guardian.

[12] In this alleged contravention too, other than a reference to it in the petition, counsel for the petitioner has not sought to elaborate further in his submissions on this issue. Be that as it may, the trial Court has concluded the trial in this instant case and counsel for the petitioner has not brought to the notice of this Court that a finding has been made by the trial Court, that the petitioner had not been informed of his constitutional rights under art 18(3) at the time of his arrest. In the absence of such a finding by a trial court we see no merit in this alleged contravention.

[13] Counsel for the petitioner further contends that whilst in custody at the Montagne Possee prison, he was treated as convicted prisoner and was not kept away from convicted persons in contravention of his constitutional rights under art 18(11) of the Constitution.

[14] Article 18(11) reads as follows:

> A person who has not been convicted of an offence if kept or confined in a prison or place of detention,

> shall not be treated as a convicted person and shall be kept away from any convicted person.

[15] Persons placed in remand custody, sometimes referred to as remandees or detainees, are those persons who have not yet been sentenced and held in custody prior and during their trial on criminal charges. Persons in remand custody are persons who have been refused bail or are unable or unwilling to meet the conditions set out in the bail bond. The difference between sentenced and remanded persons is referred to in the United Nations International Covenant on Civil and Political Rights (ICCPR).

[17] Article 10 of the Covenant reads as follows:

> 1 All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
>
> 2 (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall all be subject to separate treatment appropriate to their status as unconvicted persons;
>
> (b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.
>
> 3 The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

[16] Accommodating persons in remand separately from sentenced prisoners and minimizing the restrictions on these remandees are standards set by the United Nations. Therefore persons held in remand custody unlike convicted prisoners should be treated with the minimum of restrictions that still enable prisoner safety, good order, security and management of the prison. It is for this reason that our Constitution too embodies art 18(11).

[17] It is to be noted that art 18(12) and 18(13) of our Constitution read as follows:

> Article 18(12) of the Constitution
>
> An offender or a suspect who is a minor and who is kept in lawful custody or detention shall be kept separately from any adult offender or suspect.

[18] Article 18(13) reads as follows:

> A female offender or suspect who is kept in lawful custody or detention shall be kept separately from any male offender or suspect.

[19] One would observe that while art 18(11) contains the words "kept away", arts 18(12) and 18(13) include the words “kept separately”. When one considers the affidavit of David Vijoen of Montagne Possee on behalf of the respondents, it is apparent that the cells of the remand prisons are located on the first floor while those of the convicted prisoners are located on the second floor. Further it is stated that the petitioner has had his meals with the other remandees and not with the convicted prisoners. He further states all activities of the remandees were done separately to that of the convicted prisoners. We see no reason to disbelieve the averments contained in the said affidavit. We are satisfied that these facts

indicate that steps are being taken to ensure that the remandees are being "kept away" from the other convicted prisoners. For the aforementioned reasons we find no merit in the alleged infringement of the petitioner's rights. However we recommend that in order to prevent further allegations being made, it would be ideal if the remandees are located for all purposes in a different building or at a separate location altogether.

[20] Counsel for the petitioner also referred to the fact that s 29 of the Second Schedule of the Misuse of Drugs Act contravenes art 119(2) of the Constitution. However we note that this matter has not been raised in his petition and would be *ultra petita* as no relief has been claimed in the prayer of the petition. We see no reason to decide once again this issue as it has already been decided by the highest forum in the Seychelles in the case of *Poonoo v Republic* SCA 38/2010.

[21] For the aforementioned reasons we see no merit in the allegations made by the petitioner and proceed to dismiss the said petition. No order is made in respect of costs.

Cointy v Beau Vallon Properties

Burhan J

15 April 2013 SC C 21/2012

Employment Act s 61 − Interpretation

The Employment Tribunal upheld the preliminary objection of the respondent that the application filed by the appellant was out of time. The appeal was against the dismissal of that application.

JUDGMENT Appeal dismissed.

HELD

1 When an Act gives a person aggrieved by an order a certain period for appealing, the time runs from the day on which the order was orally pronounced not from the day of service.

2 Where something is to be done "within" a stated time, that means it is to be done at some time during the course of the stated time immediately preceding the stated date.

Legislation
Employment Act s 61, sch 1 part 11
Interpretation and General Provisions Act s 57
Public Holidays Act ss 2, 3, 4
Proclamation of Public Holiday SI 2011/94

Counsel F Elizabeth for the appellant
P Pardiwalla for the respondent

The judgment was delivered by
BURHAN J

[1] By ruling dated 24 May 2012, the Employment Tribunal proceeded to dismiss the application made to the Tribunal by the

appellant. The Tribunal upheld the preliminary objection of the respondent that the application filed in the Tribunal by the appellant was out of time and therefore not in conformity with s 61(1E) of the Employment Act, as amended by Employment (Amendment) Act 21 of 2008.

[2] This is an appeal against the said ruling.

[3] Section 61(1E) of Employment Act reads as follows:

> A party to a grievance shall bring the matter before the Tribunal within 30 days if no agreement has been reached at mediation.

[4] The background facts of the case are that the appellant who was employed as an Operational Director by the respondent registered a grievance against the respondent in terms of s 61(1) of the Employment Act before the competent officer, on the grounds of being unfairly dismissed from service.

[5] In terms of s 61(1A) of the Employment Act, the competent officer endeavoured to bring about a settlement of the grievance by mediation but failed. Thereafter, as permitted by s 61(1E) as set out above, as no agreement was reached by the parties at the mediation proceedings before the competent officer, the appellant proceeded to file an application on 13 January 2012 before the Employment Tribunal. The appellant alleged unfair dismissal and claimed monetary benefits up to the end of the contract as set out in the mediation certificate MED/R/198/11 dated 6 December 2011, annexed to his application dated 13 January 2012. It appears a further amended application was filed on 23 February 2012 on the grounds that the appellant continued to incur additional financial loss as a result of the unfair termination of his employment.

[6] According to the proceedings and submissions made by counsel, it is common ground that mediation was completed on 1 December 2011.

[7] It is counsel for the appellant's contention that the time period would run from the date on which the certificate issued in terms of s 61(1D) was served on the appellant which in his submission was after 6 December 2011, the date of the certificate.

[8] Section 61(1D) reads as follows:

> If the competent officer is unsuccessful in the mediation he shall issue a certificate to the parties *as evidence that mediation steps have been undergone by the parties*.
>
> [Emphasis added]

[9] Section 61(1E) sets out that the application to the Tribunal shall be brought "within 30 days if no agreement has been reached at mediation". There is no mention in this section of the application being brought within 30 days after the parties have been served with a certificate that the mediation has failed. On consideration of s 61(1D) as set out above, it is the view of this Court that the intention and purpose of issuing the certificate is to indicate that parties have complied with the requirement set out in s 61(1A) of the Act, in that they have taken mediation steps and not come directly to the Tribunal circumventing mediation as the section specifically states that a certificate shall be issued "as evidence that mediation steps have been undergone by the parties." Therefore this section has no bearing on s 61(1E) of the Act as suggested by counsel for the appellant.

[10] Counsel for the respondent's contention is that the appellant was present at the said mediation and therefore should have been well aware that no agreement had been reached by the parties at the mediation on 1 December 2011. Section 61(1E) specifically states that the application to the Tribunal shall be brought within 30 days if no agreement has been reached at mediation. There is no indication by the appellant that he was not present at the mediation or that he was unaware of the fact that no agreement had been reached at the mediation until he received the certificate. Further, *Maxwell on the Interpretation of Statutes* (1991 ed) at page 8 states:

> When an Act gives persons aggrieved by order of justices a certain period after making of the order for appealing … the time runs from the day in which the order was verbally pronounced and not from the day of service.

[11] Therefore it is the view of this Court that the time period would start running from the date that the mediation was concluded with no agreement reached and not from the day the certificate was served on the appellant. In the light of the aforementioned reasoning, I find no merit in the contention of counsel for the appellant.

[12] Section 57(1)(a) of the Interpretation and General Provisions Act (Cap 103) (hereinafter referred to as the Interpretation Act) reads as follows:

> In computing time for the purposes of an Act
>
> (a) A period reckoned by days from the happening of an event or the doing of any act or thing is exclusive of the day on which the event happens or the act or thing is done.

[13] Therefore as mediation was held and concluded on 1 December 2011, this day should be excluded and the counting of the period of time would commence in this instant case from 2 December 2011. The application before the Tribunal was filed on 13 January 2012. Based on s 57(1)(a) of the Interpretation Act, the period of 30 days would begin to run from 2 December 2011 and the total period up to 13 January 2012, the date the application was filed by the appellant in the Employment Tribunal would therefore be 43 days in this instant case.

[14] Section 57(1)(d) of the Interpretation Act reads as follows:

> Where the last day of a period is an excluded day, the period includes the next following day not being an excluded day.

[15] Section 57(4) of the said Act refers to an "excluded day" means a public holiday or a bank holiday declared under s 51 of the Financial Institutions Act.

[16] It is to be noted however in this instant case the last day of the period of 30 days does not fall on an excluded day.

[17] Sections 2, 3 and 4 of the Public Holidays Act read as follows:

> Section 2
>
> The several days specified in the Schedule to this Act (hereinafter referred to as "public holidays") shall be kept, except as hereinafter provided, as close holidays in all courts of law, in all Government offices and in all banks in Seychelles and shall be legal holidays for all persons throughout Seychelles.

> Section 3
>
> An act required to be done by or before a judge or officer of any court or by or before any Government official upon any day which is a public holiday may be lawfully done upon the day not being itself a public holiday, next following such first mentioned public holiday.
>
> Section 4
>
> Where any public holiday except Sunday falls on a Sunday the next following day, not being itself a public holiday, shall be a public holiday.

[18] On a reading of these sections based on the law and in the interests of justice, it would be appropriate to exclude all public holidays from the 30 day period. Therefore in this instant case as per the Schedule of s 2 of the Public Holidays Act, the following could be considered as public holidays. All Sundays (in some jurisdictions referred to as a "dies non"), 8 December 2011 ie the feast of Immaculate Conception, Christmas day, in this instant case as Christmas day had fallen on a Sunday 26 December 2011 could be considered as a public holiday. The first and second January 2012 could be treated as public holidays and once again as Sunday had fallen on a public holiday ie 1 January 2012 , 3 January has been proclaimed as a public holiday: refer Proclamation of Public Holiday SI 94 of 2011.

[19] Excluding all public holidays (including Sundays) as mentioned above would result in the following days namely 4, 8, 11, 18, 25, 26 December 2011 and 1, 2, 3 and 8 January 2012 being excluded. This would result in a total of 10 days being excluded from the 43 days. Therefore time period taken by the appellant for the

filing of the application to the Employment Tribunal has been 33 days.

[20] Section 61(1E) of the Employment Act refers to the application being filed within 30 days. The phrase "within 30 days if no agreement has been reached at mediation" as set out in s 61(1E) encompasses a limited time span. Where something is to be done "within" a stated time that means, it is to be done at some time during the course of the stated time immediately preceding the stated date.

[21] In *Black's Law Dictionary* the word "within" when used in relation to time, has been defined as meaning any time before, at or before, at the end of, before the expiration of, not beyond, not exceeding, not later than. In *Stroud's Judicial Dictionary of Words and Phrases* (8th edition), it is more frequently used to delimit a period inside which certain events may happen. The words within 30 days in the said section in the view of this Court, restricts the right of the appellant to file application beyond the time frame of 30 days given. The appellant in this case has filed it after this period and even on considering the submissions of counsel for the appellant no plausible explanation has been given by him up to date to condone the delay.

[22] Further I am inclined to agree with the finding of the Employment Tribunal that in terms of Schedule 1 Part 11 paragraph 2(3) of the Employment Act 1995, specific provision is provided for by law for the competent officer to use his discretion to allow a grievance to be registered after the prescribed period of 14 days. In s 61(1E) relevant to an application before the Tribunal no such discretion is available in law. Therefore in the view of this Court the

words "shall bring the matter within 30 days" in s 61(1E) is imperative in nature and restricts the right of the appellant to file an application beyond the timeframe of 30 days given and casts a mandatory duty that the application be filed within the prescribed time. The appellant in this case has failed to file his application within the prescribed time as set out in s 61(1E) of the Employment Act.

[23] For the aforementioned reasons the appeal is dismissed with costs.

Bossy v Chow

Domah, Fernando, Msoffe JJA

3 May 2013 SCA 47/2011

Tenancy − Damages – Continuing occupation after eviction

After the tenancy agreement was terminated, the respondent continued in occupation despite an eviction order. The appellants appealed against a decision for not allowing loss of earnings and interest for the continuing occupation by the respondent.

JUDGMENT Appeal partly allowed.

HELD

1 Continuing occupation of premises after an eviction order gives rise to a monetary claim not in terms of rent but as an indemnity for continuing occupation.

2 Damages are not speculative. They are actual.

Foreign cases
Pillay v Juddoo SCJ 316/1990
Peerally v Ramalingum SCJ 335/2010
Ramkhalawon v Rambarun SCJ 348/2012

Counsel S Freminot for the appellants
F Elizabeth for the respondents

The judgment of the Court was delivered by
DOMAH JA

[1] The Chief Justice in a long-standing eviction dispute between the parties made an order for the immediate vacation of the property in lite. The plaintiffs had also claimed damages as follows: R 6,798,904 for loss of earnings from September 2007 to 30 June 2010 plus interest at 10% per annum; R 105,205 as loss of earnings for July 2010 to date plus interest at 10% per annum; R 6,575 per day for as long as the respondents remained on the property plus interest at 10% per annum; R 315,000 being unpaid rent from September 2007 to date interest at 10% per annum; R 9,000 per month from August 2010 on the first day of each month for as long as they remain on the suit property interest at 10% per annum. The judge did not allow any of the above monetary claims.

[2] The present appeal is only against the orders for dismissal of the claims for damages. The grounds are stated to be as follows:

1) the learned trial judge erred in not allowing losses in paragraph 10 although he specified the wrongful occupation would give rise to an action for damage in favour of the owners of the property;

2) the learned trial judge erred in not allowing for any loss of earnings although he had been positive about this in paragraph 12;

3) the learned trial judge erred in not considering a different percentage of damages in proportion to the value of the suit property as to value of suit in paragraph 13.

Ground 1

[3] Ground 1 refers to the comment made by the Judge in paragraph 10. He stated that the Court had decided on 31 March

2011 that the lease was revoked on 29 November 2008 in accordance with the judgment of the Court of Appeal dated 29 November 2006 and that until that decision is set aside, it would appear that the continued occupation of the suit property by the defendants from 29 November 2008 until they vacate the property would give rise to an action in damages in favour of the owners of the property.

[4] We agree with the proposition of law that an overstay following an order for eviction will give rise to a monetary claim. This monetary claim is not in terms of rent but in terms of indemnity for continuing occupation: see *Pillay v Juddoo* SCJ 316/1990*; Peerally v Ramalingum* SCJ 335/2010; *Ramkhalawon v Rambarun* SCJ 348/2012.

[5] From the evidence adduced, we note the following from which the indemnity may be assessed: R 9,000 as rent as from December 2008 on the basis that the suit property covers an area of 46,615 m² which would bring a reasonable return of 2.4,000,000 per year.

Ground 2

[6] Ground 2 refers to the comment made by the Judge in paragraph 12. The Chief Justice stated that the plaintiffs are under a duty to prove loss or the damage that they have suffered as a result of the wrongful occupation of the suit property by the defendants; that they would have to show for instance that they have lost income they would have made by renting out the suit property to interested parties; or that they have been put to expense by being denied use and occupation of the suit property by the defendants; and, that the loss of earnings (rental income) or the incurring of such expenses would be the damage or part of the damages that they have suffered.

[7] We agree with the Chief Justice. Damages are not speculative. They are actual. They are compensation for loss sustained. They have to be proved. No evidence was adduced to show that there were tenants waiting to take a lease of the property in its state and that the longer the respondent held on to the property the more the owner was losing rental from the waiting tenant.

Ground 3

[8] Ground 3 refers to the comment made by the Judge in paragraph 13. The Chief Justice's comment was as follows:

> What the plaintiffs have done in this case is to prove the value of the suit property, that is, the price the suit property may fetch in the market place. And then claim 10% per annum of the market value of the said property as the appropriate return on the said property. I am far from sure that this equates to proof of loss and damages that they have suffered for the wrongful occupation of their property by the defendants.

[9] We agree with him as regards to that proposition of law and its application to the facts of this case, all the more so when the Judge also stated that while he found the liability for wrongful occupation established, the plaintiffs had failed to prove the damage that they have suffered as a consequence of the wrongful acts of the defendants. He also found that the claim of 10% per annum was arbitrary in the sense that it has no connection with actual loss or damage suffered by the plaintiffs or the loss or damage caused by the defendants. Damages are compensatory in nature.

[10] Be that as it may, it is clear that the respondent had been ordered to quit, leave and vacate the property since 29 November 2008 in accordance with the Court of Appeal judgment dated 29 November 2006. While the appellant is not entitled to claim rent or damages from him, he is entitled to a sum as indemnity for the period of the overstay. We base ourselves on the figures given by the appellant as monthly rental to conclude that a sum of R 3,500 per month would be reasonable as indemnity for illegal use and occupation.

[11] In the circumstances, we allow the appeal in part and we make an order of indemnity for the material period as follows:

November 2008 to April 2013: (53 x R 3,500) = R 185,000

which sum we order the respondent to pay to the appellant with costs.

Dorasamy v R

Fernando, Twomey, Msoffe JJA

3 May 2013 CR SCA 05/2011

Drug trafficking – Evidence

The appellant appealed against a conviction for possession of a controlled drug. The appellant argued that the judge erred in law in holding that the prosecution had proved its case beyond reasonable doubt as it failed to attach sufficient weight to the evidence provided by the appellant.

JUDGMENT Appeal dismissed.

HELD

1 When a rebuttable presumption of law applies, upon proof or admission of a fact (referred to as the primary fact) another fact (referred to as the presumed fact) is presumed, in the absence of further evidence. Once the prosecution has adduced some evidence on the primary fact, the defence bears an evidential burden to adduce evidence to rebut the presumed fact.

2 The standard of proof to be met by the defence seeking to rebut the presumed fact under s 18 of the Misuse of Drugs Act is determined by the substantive law in relation to the presumption in question.

3 A fact is said to be proved when its existence is directly established or when upon material before it the court finds its existence to be so probable that a reasonable person would act on the supposition that it exists.

Legislation
Constitution art 19(2)(b)
Misuse of Drugs Act s 18

Counsel B Hoareau for the appellant
D Esparon for the respondent

The judgment of the Court was delivered by
FERNANDO JA

[1] The appellant appeals against his conviction by the Supreme Court for the offence of possession of a controlled drug namely heroin. There is no appeal against sentence.

[2] The appellant was indicted before the Supreme Court for trafficking in a controlled drug by virtue of having been found in possession of 2.45 grams of heroin, which gives rise to the rebuttable presumption under s 14(c) of the Misuse of Drugs Act for having possessed the said controlled drug for the purpose of trafficking. The trial Judge had rightly come to the conclusion as the pure quantity of the heroin found in the 2.45 grams was 16% namely 0.392 grams, the appellant cannot be convicted on the basis of the presumption in s 14(c) for trafficking but only of possession of the said controlled drug.

[3] The appellant had in his grounds of appeal stated that the trial Judge had erred in law in holding that the prosecution has proved its case beyond a reasonable doubt as he failed to attach sufficient weight to the following items of evidence and facts, namely:

i) that the appellant did not attempt to ride away from the NDEA officers despite having the opportunity to do so;

ii) that it was the appellant who assisted the NDEA agents in the search of his motorbike;

iii) that the motorbike was such that any person could have easily placed the drug under the seat without the appellant's knowledge as displayed during the examination of the motorbike;

iv) that PW 2 Mickey Barbe, was not very forthcoming in respect of his answer regarding the phones he possessed and the phone calls he received around the time of the arrest of the appellant.

It has also been urged as a ground of appeal that the trial Judge erred in law in holding that the provisions of s 18 of the Misuse of Drugs Act apply to a motorbike.

[4] The grounds of appeal in a nutshell are set out the prosecution case. The prosecution case is that on the day of the incident around 12.30 pm, the appellant had been riding a Yamaha black motorbike when three police officers from the National Drug Enforcement Agency (NDEA) who were on patrol in a rented car had intercepted the appellant and signaled him to stop his motorbike near Fresh Cuts. The appellant had cooperated when signaled to do so and one of the officers, PW 2, had conducted a body search on him wherein nothing illegal was found on him. The appellant had then been requested to ride his motorbike in front of the NDEA vehicle to the NDEA office. This was after he had been told that a search on the motorbike will be carried out at the NDEA office. The

appellant had as instructed ridden his motorbike to the NDEA office followed by the NDEA car. As per the evidence of PW 2 the appellant had not at any point in time tried to get away from the NDEA car and had been very cooperative. At the NDEA office when conducting the search of the motorbike they had found a white tissue underneath the small back seat of the motorbike which had fallen down when removing the seat. The appellant had said that it was not his and that he did not know what it was when questioned about it. The small tissue contained a light brown powder that was wrapped in a foil and a small plastic. The substance, according to the Government Analyst, has been identified as "illicit heroin (Diacetylmorphine) with a purity of 16%". There is no challenge to the expertise of the Analyst, his analysis, or the chain of evidence. The appellant had assisted the officers in the search of his motorbike in advising them how to remove its seats. He had been "very calm and collected", but looked "a bit frustrated" when the motorbike was being searched.

[5] In the Report on Locus in Quo where the Court had examined the motorbike which was parked outside the NDEA Office the trial Judge had reported that the defence counsel had demonstrated that a person can place his hand underneath the back seat of the motorbike where the drugs were found, which the Judge accepts. This was to show that the drugs could have been placed under the seat by a third party. It is the appellant's position that someone had placed the drug underneath the seat of the motorbike and had tipped off the police that he was carrying drugs in his motorbike. This was the reason that the NDEA officers decided to carry out a search of the motorbike at the NDEA office after having done a body search of the appellant. D1, a record of phone calls received by PW 2, produced by the defence shows that PW 2 had

received a call from a payphone at Market Street, 25 minutes before the appellant was intercepted by the police. Both NDEA officers who testified for the prosecution have categorically denied receiving any calls concerning the appellant on the day of the incident. PW 2 has however admitted that he did receive calls on his mobile that day but has no recollection of who the callers were.

[6] Thus the crux of the defence is to the effect that the behaviour of the appellant after his interception by the NDEA officers is not consistent with his guilt and there was a possibility of the drugs having been placed underneath the seat by a third party without the appellant's knowledge.

[7] The trial Judge has relied on the presumption relating to vehicles in s 18 of the Misuse of Drugs Act which reads as follows:

> Where a controlled drug is found in a vehicle, vessel or aircraft, other than a vessel or aircraft referred to in section 17, it shall be presumed, until the contrary is proved, that the drug is in the possession of the owner of the vehicle, vessel or aircraft and of the person in charge of the vehicle, vessel or aircraft for the time being.

Section 17 states:

> Where a controlled drug is found in any vessel or aircraft arriving from any place outside Seychelles, it shall be presumed until the contrary is proved, that the drug has been imported in the vessel or aircraft with the knowledge of the master or captain of the vessel or aircraft.

Knowledge can be inferred from the manner of the concealment of the substance and the manner of its packaging. In the instant case the drugs were concealed underneath the seat of the motorbike and placed in a plastic that was both wrapped in a foil and tissue.

[8] Where a rebuttable presumption of law applies, on the proof or admission of a fact, referred to as a primary fact, and in the absence of further evidence, another fact, referred to as a presumed fact, is presumed. Once the prosecution has adduced sufficient evidence on that fact, the defence bears an evidential burden to adduce some evidence to rebut the presumed fact. The standard of proof to be met by the defence seeking to rebut the presumed fact is determined by the substantive law in relation to the presumption in question.

[9] The burden resting on an accused under s 18 is heavy. The words "until the contrary is proved" make it clear that the presumption has to be rebutted by proof and not by a bare explanation which is merely plausible. A fact is said to be proved when its existence is directly established or when upon material before it the Court finds its existence to be so probable that a reasonable man would act on the supposition that it exists. Unless, therefore, the explanation is supported by proof, the presumption created by the provision cannot be said to be rebutted.

[10] In the instant case the appellant seeks to rebut the presumption by asking the Court to consider his behaviour after he was stopped by the police, namely that he cooperated with the police in the search of his body and motorbike and also assisted them in searching the motorbike. He also relies on the fact that there was a possibility of a third party introducing the drug underneath the seat of his motorbike without his knowledge. If we are to go along with

the first argument of the appellant, all that a person apprehended with drugs need do is to put on a bold front and cooperate with the police in the search of his body or vehicle and claim when drugs are found that they have been planted. That will be a precedent wrought with many dangers which this Court is unwilling to set. As regards the appellant's second argument, namely, the suggestion of the possibility of the drugs being planted without an iota of evidence for such a basis does not suffice. The appellant's dock statement leaves no room for a court to even consider the possibility of the drugs having been planted by a third party. His statement is to the effect that he lives opposite the Mont Fleuri police station and that he had not moved out of his house on the day of his arrest, prior to his riding his motorbike taking the road to Providence, where he was arrested shortly after leaving his house. Had there been any evidence as to where the motorbike was parked at his house prior to the appellant riding it that day, namely at a place where others could have access, when he last rode the motorbike prior to his arrest on 26 August 2009 and for how long it had been parked there prior to his riding it; there would have been some material for the Court to consider. The appellant does not come up with the name or of a possible motive for someone to falsely implicate him by planting drugs under the seat of his motor bike. We are conscious that in applying the presumption under s 18 we have to take into consideration all the pertinent circumstances that may cast doubt on the guilt of the accused but the behaviour of the appellant after he was stopped by the NDEA officers and his argument that it was possible for a third party to slip the drugs under the seat of his motorbike alone does not suffice.

[11] We do not attach any significance to the phone call received by PW 2 from a payphone at Market Street, 25 minutes before the appellant was intercepted by the Police, as both NDEA officers who testified for the prosecution have categorically denied receiving any calls concerning the appellant on the day of the incident.

[12] We see absolutely no merit in the appellant's argument that s 18 of the Misuse of Drugs Act referred to at paragraph [7] above, does not apply to motorbikes. In *Blacks Law Dictionary* (9th Ed, 2009), 'vehicle' is defined as "an instrument of transportation or conveyance…." Under s 2 of the Road Transport Act (Cap 206):

> "Vehicle" means any kind of wheel transport propelled or drawn by mechanical power, animal or persons and used or intended to be used for the conveyance of goods or persons on any road, and includes a rickshaw, a bicycle and a tricycle.

[13] We therefore dismiss the appeal.

[14] We wish to however bring to the notice of the Attorney-General that in the future in drafting an indictment in a case of this nature reference should be made to s 18 of the Misuse of Drugs Act in the statement of offence, in view of the fact that the drugs were found in the vehicle and not on the appellant's person. This becomes necessary in view of the provisions of art 19(2)(b) of the Constitution which states that "Every person who is charged with an offence shall be informed at the time the person is charged or as soon as is reasonably practicable, in, as far as is practicable, a language the person understands and in detail, of the nature of the offence." Since the appellant had not made this a ground of his appeal and also failed to place any arguments before us after the said omission in the indictment was brought to the attention of his counsel at the hearing

of the appeal, we are satisfied that no prejudice had been caused to him as a result of the failure to refer to s 18. We are therefore of the view that this omission has not occasioned a failure of justice.

Dugasse v R

Domah, Fernando, Twomey JJA

3 May 2013 CR SCA 25, 26 and 30/2010

Drug trafficking – Aiding and abetting – Conspiracy – Controlled delivery – Evidence

The appellants were convicted of aiding and abetting the trafficking of a controlled drug. They claimed that the judge erred in concluding that guilt had been proved beyond reasonable doubt and that the prosecution had failed to prove all the elements of the offence of conspiracy.

JUDGMENT Appeal dismissed.

HELD

1 The court has a discretion as to whether to give a corroboration warning in cases involving accomplice evidence.

2 Liability arises for aiding and abetting the commission of a crime when the offence is established and where there is a principal offender.

3 The important element with regard to assistance is that there must be a connection between the assistance and the commission of the offence, and the assistance should have helped the principal to carry out the offence.

4 Abetting involves inciting, instigating or encouraging the commission of an offence. Any form of encouragement suffices and it does not matter if the principal had already

decided to commit the offence or that the encouragement was ignored by the principal.

5 There is an essential difference between aiding and abetting, namely, encouragement unlike aiding must have come to the attention of the principal although it may have been ignored.

6 The mens rea for both aiding and abetting is that the secondary party should have intended to do the act of assistance or encouragement or could have foreseen the commission of the offence as a real possibility, and should have intended or believed the act would assist or encourage.

7 The crime of conspiracy requires an agreement between two or more persons to commit an unlawful act with the intention of carrying it out. It is the intention to carry out the crime that constitutes the necessary mens rea.

8 For conspiracy, it is not necessary to prove that the accused was a party to the original scheme.

9 Controlled delivery is an investigative tool in order to expose the organised gangs behind the intercepted consignment. There is no legal impediment to the authorities adopting such procedures in investigations of this nature.

10 It is not obligatory on the courts to give a corroboration warning in cases involving accomplice evidence and it is at the discretion of judges to look for corroboration when there is an evidential basis.

Legislation
Constitution
Criminal Procedure Code s 61A
Courts Act
Evidence Act
Misuse of Drugs Act s 27, 28(b)
Penal Code s147

Cases
Finesse v Banane (1981) SLR 108
Kim Koon & Co v R (1969) SCAR
Lucas v R SCA 17/09

Foreign cases
Davenport [2009] All ER (D) 30 (Mar)
Harris (1979) 69 Cr App R 122
Singh v State of Punjab Crim App no 528-5278/2009 (SC India)
R v Anderson [1986] AC 27
R v Makanjuola [1995] 1 WLR 1348
R v Easton (1995) 2 Cr App R 469
R v Turnbull [1977] 1 QB 224
Yip Chiu-Cheung v R (1994) 99 Cr App R 406

Foreign legislation
Criminal Justice and Public Order Act 1994 (England)
1998 UN Convention against illicit Traffic in Narcotic Drugs and Psychotropic Substances
2000 UN Convention against Transnational Organised Crime
2003 UN Convention against Corruption

Counsel F Elizabeth for the first appellant
J Camille for the second appellant
N Gabriel for the third appellant
D Esparon for the respondent

The judgment was delivered by
FERNANDO JA

[1] All three appellants, namely the first, second and third appellants, appeal against their conviction under count 2, for aiding and abetting in the trafficking of a controlled drug, namely 536.1 grams of powder containing mono-acetyl-morphine which is an ester of morphine and under count 4, for conspiracy to commit the offence of trafficking in the same drug. In the Notices of Appeal filed on behalf of the appellants by their counsel there is no appeal against the sentences imposed on them. Counts 2 and 4 were set out as alternative counts to counts 1 and 3.

[2] Counts 2 and 4 read as follows:

> Count 2 in the alternative to count 1
>
> Statement of Offence
>
> Aiding and abetting the trafficking of a controlled drug contrary to section 27(a) as read with section 5, section 2 and 26(1)(a) of the Misuse of Drugs Act (Cap 133) and punishable under section 29 Misuse of Drugs Act and the Second Schedule referred therein as read with section 23 of the Penal Code.
>
> Particulars of Offence

Nelson Payet, Dominique Dugasse and Christopher Dunienville on or about the 30th May 2009, with common intention aided and abetted Ernestine Isaacs to traffick in a controlled drug namely 536.1 grams of powder containing monoacetylmorphine which is an ester of morphine being a controlled drug by selling, giving, transporting, sending, delivering or distributing, or offering to do any such acts.

Count 4 in the alternative to Count 3

Statement of Offence

Conspiracy to commit the offence of trafficking in a controlled drug contrary to section 28(b) as read with section 5, section 2 and 26(1)(a) of the Misuse of Drugs Act and punishable under section 28 and 29 of the Misuse of Drugs Act and the Second Schedule referred therein.

Particulars of Offence

Nelson Payet, Dominique Dugasse and Christopher Dunienville on or about the 30th May 2009, agreed with one another and with another person namely, Ernestine Isaac, that a course of conduct shall be pursued which , if pursued , will necessarily involve the commission of an offence by them under the Misuse of Drugs Act, namely the offence of trafficking of 536.1 grams of powder containing monoacetylmorphine which is an ester of morphine being a controlled drug by selling, giving,

transporting, sending, delivering or distributing, or offering to do any such acts.

[3] At their trial before the Supreme Court the numbering of the accused were different. The first appellant stood charged as the second accused, the second appellant stood charged as the third accused and the third appellant stood charged as the first accused. The change in the numbering had been made by this Court in view of the order their appeals had been filed. In order to avoid any confusion the appellants would be referred to in this judgment by their surnames.

[4] The following grounds of appeal had been filed on behalf of the first and third appellants, namely, Dugasse and Payet:

1) The learned Judge erred when he concluded that the Respondent has proved its case beyond any reasonable doubt in that:

   i) The Respondent failed to prove an essential element of the offence of aiding and abetting the trafficking of a controlled drug under count 1 namely that the 1st and 2nd Appellants "aided" and "abetted" Ernestine Isaac.

   ii) The learned Judge erred when he concluded that the Respondent has proved the offence of conspiracy to commit the offence of importation of a controlled drug under count 3 in that the Respondent failed to prove a essential ingredient of the offence namely "conspiracy" beyond a reasonable doubt.

2) The learned Judge erred when he convicted the Appellants of count 1 and count 3 since the charges are defective in that it did not specify the place where the offence are alleged to have been committed.

3) The learned Judge erred when he convicted the Appellants since no offence was committed by either by Ernestine Issac or the Appellants on the 30th May since the Police had substituted the illicit substance with a substance which was not illegal on the said date.

[5] We are surprised at the carelessness displayed by counsel for appellants Dugasse and Payet in filing the grounds of appeal. The appellants were not convicted of counts 1 and 3 but of counts 2 and 4 which were in the alternative to counts 1 and 3 respectively. The appellants have not been convicted of conspiracy to import but of conspiracy to traffic under count 4. At the hearing of the appeal counsel for the appellants sought permission of the Court to correct these defects for which permission was granted. Grounds (i) and (ii) in ground 1 are vague and meaningless as it merely repeats the offence itself as an element of the offence. Ground 2 becomes a mere technicality since on a reading of ground 3 it is clear that the appellants were well aware of an incident that took place on 30 May 2009 and both appellants in their dock statements admit being at Gondwana, Providence around the time the offences were alleged to have been committed as per the prosecution case. Further the appellants had proceeded to trial on the basis of the charges and no objection had been raised to the alleged defect in the charge at

any stage of the trial. At ground 3 the appellants have accepted that a substance which was not illegal had been substituted for the illicit substance on 30 May by the police. The question whether the conviction can be sustained in view of this substitution will be dealt with later.

[6] The following grounds of appeal had been filed on behalf of the second appellant, namely D'unienville:

i) The learned trial judge erred in law, in holding, that the evidence of Ernestine Isaac, whose status was clearly one of an accomplice, to the effect that she delivered the boots to the Appellant and that the Appellant paid her a certain sum of money had been corroborated by the NDEA Agents who stopped the car.

ii) The learned trial judge erred in law in convicting the Appellant on the uncorroborated evidence of Ernestine Isaac, whose statement was that of an accomplice, to the effect that the appellant was one of the persons present at the time the boots were delivered.

iii) The learned trial judge erred in law and on the facts in not attaching sufficient weight to the fact that, Ernestine Isaac had testified that the Appellant was wearing a short sleeve t shirt and yet she failed to mention that the Appellant had a massive tattoo on each arm, which tattoos were shown to the learned trial judge, as real evidence.

iv) The learned trial judge erred in law and on the facts in accepting the evidence of Ernestine Isaac, who had clearly been discredited under cross-examination and shown to be a witness not worthy of belief.

v) The learned trial judge erred in law and on the facts in holding that the prosecution had proven all the elements of the offence of aiding and abetting the trafficking of a controlled drug, more specifically the actus reus of the said offence.

vi) The learned trial judge erred in law and on the facts in holding that the prosecution had proven all the elements of the offence of conspiracy to trafficking in a controlled drug, more specifically the existence of such conspiracy.

[7] The main witness for the prosecution was Ms Ernestine Isaacs, an accomplice in the case, who turned State Witness in terms of s 61A of the Criminal Procedure Code (Cap 54) as amended by Act No, 4 of 2007. According to her testimony before the Court, she had been procured by two persons in South Africa to be a carrier of the seized drugs; to the Seychelles, on a promise of payment. She had been handed a pair of boots in which the drugs were concealed and had been instructed to wear the boots at all times. One of the said persons had dropped her off at the Cape Town airport where she was to board a flight to Johannesburg and thereafter onwards to the Seychelles. She had arrived in the Seychelles on the morning of 30 May 2009. According to her she had never been to the Seychelles nor did she know anyone in the Seychelles. Her instructions were to

contact one of her accomplices in South Africa after she had cleared through Immigration and Customs at the Seychelles International airport. The understanding was that she would then be given the number of a person to whom she had to deliver the drugs. She had arrived in Seychelles in the morning of 30 May 2009 on an Air Seychelles flight. On arrival at the Seychelles International Airport she had been questioned at Customs because she was not in possession of sufficient money to stay over in the Seychelles for the one week duration she claimed that she intended to stay and had not been in a position to give the name of any person whom she knew in the Seychelles. All that she had with her was USD 100, Euro 100 and R 300 and a hotel reservation at 'Le Surmer', all provided and arranged by her contacts in South Africa. This aroused the suspicion of the customs authorities in Seychelles who carried out a body search on her and her belongings. The sole of the boots that were given for her to wear were scanned and when cut open revealed that something was concealed therein. It was then that the authorities discovered three packets of a powder-like substance concealed inside each of the boots. This on examination later was found to be an ester of morphine. There is no challenge in this appeal to the expertise of the Analyst, his analysis of the drugs or the chain of evidence. There is no challenge to the evidence of Ernestine Isaacs that she came over to Seychelles with drugs concealed in her boots. In fact the defence position had been that she was a carrier and part of a drug ring.

[8] Ms Isaacs on being detected with the drugs agreed to cooperate with the National Drug Enforcement Agency (NDEA) authorities to track down the counterparts in Seychelles who were involved in the drug transaction. Therefore on instructions by the NDEA authorities she called her contact in South Africa to say that

she had arrived in the Seychelles and was okay. PW 9 Sgt Seeward corroborates Ms Isaacs evidence in this regard. A few minutes after she had made the call to South Africa Ms Isaacs received a call on her mobile from a local cell phone bearing the number 517742. She had informed the caller that she was on her way to the hotel. The NDEA authorities had then informed her to act as per instructions she received from the caller in Seychelles and was handed back the boots to proceed to 'Le Surmer' hotel. The drugs that were found inside the boots were substituted with milk powder. On arrival at the hotel around 1 pm she had received another call from the same local number who had called her earlier and asked whether everything was okay with the boots and informed that they will call her back in two hours. Just before 3 pm she had received a call from the same local number which call she could not take as she was a bit away from her phone. On her calling the same number she had been told to wear the boots and take a taxi and come to meet the caller. But after 3 pm he had called again to say that a car was waiting outside the hotel for her. Going out of the hotel she had seen a blue coloured car parked outside and the person whom she identified in Court as the third appellant, namely, Payet, was on the driver's seat. She had sat on the passenger seat next to the driver. Prior to leaving the hotel she had kept the NDEA officers informed of her movements. As she got into the car Payet had driven off and got to a bushy area within a short while. PW 9 who was in surveillance in the area had recognized Payet as the driver of the car. On arriving at this place the person whom she identified in Court as the first appellant, namely Dugasse, had got into the car and sat behind the driver's seat. She had had a good view of him as he emerged out of the bushes and walked around the car before getting into it. Dugasse had asked her whether she was okay. Payet had then moved the car a bit forward when the

person whom she identified in Court as the second appellant, namely D'unienville, had got into the car and sat behind her on the passenger's seat. He had then asked her how she was and requested her to give him, her boots. While she was in the process of giving him the boots Payet had removed some money from the cubby-hole on the dashboard and given it to one of the men at the back. D'unienvielle had then got out of the car, stood near the window of the front passenger seat and given Ms Isaacs Euro 700 to meet the hotel bills. Dugasse had also given her R 2000. D'unienvielle and Dugasse had then walked away. Thereafter Payet had taken a U-turn and started to proceed back along the road they had come. It is at this stage that the NDEA officers had stopped the car and arrested Payet.

[9] Ms Isaacs had identified all three appellants in Court. There had been no identification parade. In the dock statement of Payet, he states that on the day of the incident around noon, he was informed by one of his clients that there was a lady to be taken to Gondwana at Providence. He had then gone to '369' also known as 'Le Surmer' where a lady at the hotel had come and got into the car without saying anything to him. Prior to the lady getting into the car he had done several rounds around 'Le Surmer'. He had then taken the lady to Gondwana. On reaching Gondwana he had seen Dugasse, one of his clients, who walked up to the car and got into the back seat of his car. Thereafter another person, who he does not know, had approached the car and had started talking to the lady. The lady had handed over a handbag to that person. That person had then gone away after having told Payet to take the lady back to the hotel. Payet states that he had a conversation with Dugasse while inside the car about animal food. Dugasse had paid him R 200 for the trip. We are conscious that the references to Dugasse and the other person cannot be taken as evidence against Dugasse or D'unienville, but certainly

will be evidence in determining whether Payet had aided, abetted and conspired with Ms Isaacs to traffic in drugs. We have also not taken into consideration the rest of the contents of Payet's dock statement which makes reference to matters not admitted by Dugasse.

[10] Dugasse in his dock statement states that he took a boat at about 12.30 pm and came to Mahe with D'unienville at his instance. He admits calling Payet on 30 May again at the instance of D'unienville and requesting him to pick up a lady at Anse Etoile. He admits getting into Payet's car when he came along with a lady. He states that D'unienville spoke to the lady who was seated on the front seat. He admits having a conversation with Payet about animal food and giving Payet R 200 for the hire. He states thereafter that he took a boat and went back to Praslin with D'unienville. Here again we are conscious that the references to D'unienville and Payet cannot be taken as evidence against D'unienville or Payet but certainly will be evidence in determining whether Dugasse had aided, abetted and conspired with Ms Isaacs to traffic in drugs. We have taken into consideration only those portions of the statement in which Dugasse speaks about himself.

[11] D'unienville in his dock statement admits that he came back to the Seychelles on 30 May from a flight from Johannesburg. This is the same flight Ms Isaacs arrived in Seychelles. He denies any involvement with Payet and Dugasse. Ms Isaacs while testifying before the Court had gone on to describe D'unienville as a tall, light complexioned and broad shouldered person with brownish hair and was wearing glasses, a sleeveless yellow vest and grey shorts when she saw him at Gondwana. Ms Isaacs' identification of D'unienville in Court was about 2 ¾ months after the incident at Gondwana,

Providence. Defence challenges the correctness of the identification made by Ms Isaacs of D'unienville on the basis that she failed to mention that he had tattoos on both arms. The defence in cross-examining Ms Isaacs had not specifically questioned her about the tattoos on the arms off D'unienville other than asking her whether there was anything peculiar about his body to which she had answered that he had broad shoulders. Ms Isaacs' evidence is to the effect that she had seen D'unienville on the evening of 29 May 2009, that is the day before she saw him at Gondwana, Providence when she went to a smoking lounge at the Etwatwa restaurant at the Johannesburg airport about half an hour prior to boarding the flight to the Seychelles. She had been cross-examined at length by the defence as to the circumstances under which she had seen D'unienville at the restaurant at the Johannesburg airport. According to Ms Isaacs, D'unienville had been seated on the fourth table on her right, speaking to an old man and had been smoking a cigarette as well. He had been wearing white shirt. At a certain stage D'unienville had walked past her. She had been at the restaurant for about five minutes. D'unienville in his dock statement had not denied that he was at the smoking lounge at the Etwatwa restaurant at the Johannesburg airport prior to boarding the flight to the Seychelles or that he was wearing a white shirt on his flight back to the Seychelles. The trial Judge in dealing with the identification of D'unienville by Ms Isaacs, which is the third ground of appeal had this to say:

> With regard to the identity of the 3rd accused at the scene of delivery witness Isaac positively identifies him as after he had got down from the car, he had stood near the window of the front passenger seat where she was seated and had spoken to her … It is

> apparent that by wearing glasses at the scene of delivery he was attempting to look different as such he would have also taken steps to conceal the obvious tattoo marks on his arms.

[12] In commenting about Ms Isaac's evidence the trial Judge states "That the evidence of Isaacs was fully tested by intense cross-examination and firmly withstood all the rigours of cross-examination as well." Taking into consideration the circumstances under which Ms Isaacs came to identify D'unienville at Gondwana and in Court as the person whom she had seen at the Etwata restaurant at the Johannesburg airport, we do not want to disturb this finding of fact by the trial Judge as to the identification of D'unienville, not having had the advantage of seeing her demeanour as a witness before the Court. It is a fundamental rule that factual findings of the trial courts involving credibility are accorded respect when no glaring errors, gross misapprehension of facts, and speculative, arbitrary, and unsupported conclusions can be gathered from such findings. The reason for this is that the trial court is in a better position to decide the credibility of witnesses having heard their testimonies and observed their deportment and manner of testifying during the trial. We are also of the view that the identification of D'unienville satisfies the test propounded in the *Turnbull* Guidelines, namely the circumstances under which the identification came to be made, the length of time Isaacs had D'unienville under observation, the distance between the two, that there was nothing to impede the observation in any way, as for example, by passing traffic or a press of people, that Isaacs had seen D'unienville less than 24 hours before she saw him again at Gondwana, that only a period of 2 ¾ months had elapsed between

the original observation at the Johannesburg and Gondwana and the subsequent identification in Court.

[13] The trial Judge having stated that Isaacs' evidence has to be considered as that of an accomplice had warned himself that it is an established rule of law that it is dangerous to convict on the evidence of an accomplice unless it is corroborated. He then had gone on to itemize the evidence that corroborated the testimony of Isaacs. It has therefore become necessary to examine the necessity for a corroboration warning, which was a requirement under the common law of England where the witness is an accomplice, that has been followed by our courts for a long period of time and even after, the promulgation of our 1993 Constitution which provides for equal protection of the law; and the enactment of the Criminal Justice and Public Order Act of 1994 in England, which came into force on 3 February 1995 and which abrogated the requirement for the corroboration warning.

[14] In the case of *Lucas v R* SCA 17/09 decided on 2 September 2011 this Court held that it is not obligatory for the courts to give a corroboration warning in cases involving sexual offences and we left it to the discretion of judges to look for corroboration when there is an evidential basis for it, after having given due consideration to the provisions of the 1993 Constitution, the Evidence Act (Cap 74), the Courts Act (Cap 43), reviewing the cases of *Kim Koon & Co v R* (1969) SCAR and *Finesse v Banane* (1981) SLR 108, and the provisions of the Criminal Justice and Public Order Act of 1994 in England which came into force on 3 February 1995 and which abrogated the requirement for the corroboration warning in sexual offence cases and cases involving accomplice evidence.

[15] We stated in that case that:

… to think that we are bogged down with and have to blindly follow the English law of evidence as it stood on the 15th October, 1962, that is almost 50 years ago is an affront to our sovereignty as a Nation and retards our jurisprudential development. We have in adopting the 1993 Constitution solemnly declared our unswaying commitment to maintain Seychelles as an independent State politically and to safeguard its sovereignty. We have vested our legislative power which springs from the will of the people in our National Assembly. Therefore the principle enunciated in the Kim Koon judgment as regards the applicability of the English law of evidence in the Seychelles should be only if it is not otherwise inconsistent with the 1993 Constitution which provides for equal protection of the law and if considered relevant and keeping in line with the modern notions of the law of evidence acceptable in other democratic counties. Paragraph 2(1) of Schedule 7 of the 1993 Constitution should be given a fair and liberal meaning and the continuation in force of existing law should not be understood as making applicable to the Seychelles the English law of evidence which has now been abrogated. The requirement for the court to give the jury a warning about convicting an accused on the uncorroborated evidence of a victim in sexual offence cases was abrogated in England by section 32 of the Criminal Justice and Public Order Act of 1994, which came into force on February 3 1995.

[16] For a detailed discussion please see the case of *Lucas v R* SCA 17/09.

[17] In *R v Makanjuola* [1995] 1 WLR 1348 and *R v Easton* (1995) 2 Cr App R 469 it was argued on behalf of the appellants that the Judge should in his discretion have given the full corroboration warning notwithstanding the abolition of the requirement on the basis that the underlying rationale of the common law rules could not disappear overnight. That argument was roundly dismissed by the Court on the basis that any attempt to re-impose the "straightjacket" of the old common law rules was to be deprecated. It was held, however, that the judge does have a discretion to warn the jury if he thinks it necessary. Lord Taylor CJ giving the judgment of the Court, said that they had been invited to give guidance as to the circumstances in which, as a matter of discretion, a judge, in summing up, ought to urge caution in regard to particular witness and the terms in which that should be done. His Lordship said:

> The circumstances and evidence in criminal cases are infinitely variable and it is impossible to categorise how a judge should deal with them. But it is clear that to carry on giving 'discretionary' warnings generally and in the same terms as were previously obligatory would be contrary to the policy and purpose of the 1994 Act. Whether as a matter of discretion, a judge should give any warning and if so its strength and terms must depend upon the content and manner of the witness's evidence, the circumstances of the case and the issues raised. The judge will often consider that no special warning is required at all. Where, however, the witness has been shown to be unreliable,

> he or she may consider it necessary to urge caution. In a more extreme case, if the witness is shown to have lied, to have made previous false complaints, or to bear the defendant some grudge, a stronger warning may be thought appropriate and the judge may suggest it would be wise to look for some supporting material before acting on the impugned witness's evidence. We stress that these observations are merely illustrative of some, not all, of the factors which judges may take into account in measuring where a witness stands in the scale of reliability and what response they should make at the level in their directions to the jury. We also stress that judges are not required to conform to any formula and this court will also be slow to interfere with the exercise of discretion by a trial judge who has the advantage of assessing the manner of a witness's evidence as well as its content.

[18] Thus it is clear that as per the English law of evidence presently, it is a matter for the judge's discretion whether any corroboration warning is appropriate in respect of a complainant of a sexual offence case, a case involving accomplice evidence or in respect of any other witness in whatever type of case. In the case of *Singh v State of Punjab* Crim App no 523–528/2009 (SC India) the Supreme Court of India stated:

> The law on the issue can be summarized to the effect that the deposition of an accomplice in a crime who has not been made an accused/put on trial, can be relied upon, however, the evidence is required to be

> considered with care and caution. An accomplice who has not been put on trial is a competent witness as he depones in the court after taking oath and there is no prohibition in any law not to act upon his deposition without corroboration.

[19] There would need to be an evidential basis for suggesting that the evidence of the witness might be unreliable. Where some warning is required, it is for the judge to decide the strength and terms of the warning. An appellate court should be disinclined to interfere with the judge's exercise of his discretion save in a case where the exercise of discretion had been wholly unreasonable.

[20] We therefore hold that it is not obligatory on the courts to give a corroboration warning in cases involving accomplice evidence and we leave it at the discretion of judges to look for corroboration when there is an evidential basis for it as stated earlier. We are satisfied with the approach adopted by the trial Judge in dealing with the evidence of Isaacs.

[21] It has been the defence position that Ms Isaacs is "part of a drug trafficking ring, that goes to different countries and sell drugs for a living" and that it was her boyfriend who organized for her to come to the Seychelles to bring drugs into the country. The defence had also questioned her in the following terms:

> Now, I put it to you that during your interview it was agreed between you and the police officers that the exhibits which are in court will be removed from the boots and another substance will be based in the boots for you to continue with the transaction.

[22] Thus the fact Ms Isaacs came to the Seychelles as a courier as part of a drug trafficking ring, to deliver dangerous drugs to a person or persons in the Seychelles and that the drugs were substituted with another substance is accepted by the defence.

[23] Ms Isaacs' evidence that she had not been to Seychelles before, did not know anyone here, had been asked to call a number in South Africa, and that she did receive calls from a local number, and had been instructed to get into a car that was waiting outside 'Le Surmer' hotel has not been challenged. Her evidence that Payet drove her to a place in Providence where Dugasse and D'unienville (D'unienville's identification is challenged, but not Isaacs' evidence of another person getting into the car) got into the car, has been accepted by Dugasse and Payet. The defence does not allege that there was a reason for Ms Isaacs to falsely implicate the three appellants as the other members of the drug ring or that she bears a grudge against them, save the fact that she decided to testify for the prosecution to save her skin and return to South Africa. We are of the view the content and manner of Ms Isaacs' evidence, the circumstances of the case and the issues raised in this case did not require the trial Judge to exercise extreme caution in acting on her evidence against Payet and Dugasse.

[24] The dock statements of Payet and Dugasse have to be examined in the light of the defence position in regard to Ms Isaacs and her evidence. The defence suggestion that Ms Isaacs was part of a drug ring fits in ideally with her evidence and the dock statements of Payet and Dugasse. It is difficult to conceive that Payet was an innocent taxi driver who took Ms Isaacs on a hire to Gondwana, Providence, on the afternoon of 30 May in view of his dock statement as set out in paragraph 8 above. Hovering around 'Le

Surmer', picking up Ms Isaacs and proceeding straight to a bushy area in Gondwana, stopping for two other persons to get into his vehicle at two different places, shows his complicity in the crime. Again the dock statement of Dugasse as set out in paragraph 9 coming to Gondwana on a boat from Praslin to meet Nelson who was in a taxi with a lady, shows his complicity in the crime. Their statements corroborate the evidence of Ms Isaacs who undoubtedly is an accomplice. The fact that the police did not find the boots that were with Ms Isaacs when they stopped Nelson's car when he was returning after the incident and the presence of Euro 700 and R 2000 also corroborates Ms Isaacs' testimony. We are of the view that this is a reasonable inference to be drawn in view of the above facts and the circumstances of the case. The absence of the boots and the presence of the money with Ms Isaacs, which was not with her before, fits in ideally with the defence suggestion that Ms Isaacs is part of a drug ring who came over to the Seychelles to sell drugs. We therefore dismiss ground (i) of the appeal by D'unienville.

[25] In regard to ground 3 raised by the appellants Payet and Dugasse, the challenge is that the police had substituted the illicit substance with a substance which was not illegal. It is clear that as accepted by the defence, this was a case of controlled delivery. Controlled delivery is an investigative tool in order to expose the organized gangs behind the intercepted consignment. Controlled delivery has been defined in the 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances as "the technique of allowing illicit or suspect consignments of drugs *or substances substituted for them,* to pass out of, through or into the territory of one or more countries, with the knowledge and under the supervision of their competent authorities, with a view to identifying persons involved in the commission of offences …" [emphasis

added]. Identical provisions are found in the 2000 UN Convention against Transnational Organized Crime and the 2003 UN Convention against Corruption. Seychelles is a party to all three treaties by accession or ratification and thus we see no legal impediment to the NDEA authorities adopting such procedure in the investigation of crimes of this nature in the Seychelles. There is a need for a concerted and co-ordinated enforcement method to identify all the people involved in the trafficking. Appellants Payet and Dugasse have not argued that the substitution is contrary to law or has in any way caused prejudice to their defence save for the lame argument that they could not be said to have committed the offence due to the substitution. The defence had accepted the fact that what was contained in the boots of Ms Isaacs was in fact drugs and that another substance was substituted for it as referred to at paragraph 18 above. The behaviour of all three appellants on the afternoon of 30 May 2009 clearly shows that they all acted under the belief that the boots contained controlled drugs. We therefore see no merit in ground 3 of appellants Payet and Dugasse. Further we are of the view that s 28(b) of the Misuse of Drugs Act under which the appellants stood charged under count 4 and referred to at paragraph 24 below caters for such an eventuality. A similar provision is found in our Penal Code. Section 147 of the Penal Code deals with a situation where an offence can be committed in view of one's criminal intention although the outcome desired is a physical impossibility when it states:

> Any person who, with intent to procure a miscarriage of a woman, *whether she is or is not with child*, unlawfully administers to her or causes her to take any poison or other noxious thing or uses any force of any kind, or uses any other means whatever, is guilty of a felony, and is liable to imprisonment for fourteen years. [Emphasis added]

[26] In *Harris* (1979) 69 Cr App R 122, H and other persons attempted to make amphetamine. They had the correct formula but incompetently obtained the wrong ingredients and did not fully understand the process of production. They were convicted of conspiring to produce a controlled drug contrary to s 4(1) of the MDA. It was held the offence was capable of performance but merely ineptly carried out. We therefore dismiss ground 3 of appellants Payet and Dugasse.

[27] At ground (v), appellant D'unienville has taken up the position that the prosecution had failed to prove all the elements of the offence of aiding and abetting the trafficking of a controlled drug, more specifically the actus reus of the said offence. We have decided to examine this ground in relation to all three appellants despite our comments at paragraph 5 above in respect of a similar ground badly drafted by counsel for appellants Payet and Dugasse.

[28] The offence of aiding and abetting referred to in count 2 is set out in s 27(a) of the Misuse of Drugs Act as follows:

> A person who aids, abets, counsels, incites or procures another person to commit an offence under this Act … is guilty of an offence and liable to the punishment provided for the offence and he may be charged with committing the offence.

[29] One becomes liable on the basis of aiding and abetting in the commission of a crime when the offence is established and where there is a principal offender. The actus reus of the offence of aiding the commission of an offence involves any type of assistance given prior to or at the time of the commission of the offence. The assistance rendered need not be the sine qua non or the sole cause for the offence. The fact that the principal could have carried out the offence without the assistance is not an issue. It is also not necessary to prove that the assistance was sought or the principal offender was aware of the assistance. The important element being that there must be a connection between the assistance and the commission of the offence and should have helped the principal to carry out the offence. However the principal offender may be free from criminal liability or the prosecution may not be able prosecute him/her as his/her identity is not known or the prosecution may decide not to prosecute him/her and call him/her as a witness for the prosecution. Often the distinction between the principal offender and secondary offender/s is so misty that the law treats all the persons as having individually committed the offence and provides for charging them with committing the offence. Abetting involves inciting, instigating or encouraging the commission of an offence. Any form of encouragement suffices and it does not matter if the principal had already decided to commit the offence or that the encouragement was ignored by the principal. There is an essential difference between aiding and abetting, namely encouragement unlike aiding

must have come to the attention of the principal, although it may have been ignored. The mens rea for both aiding and abetting is that the secondary party should have intended to do the act of assistance or encouragement or could have foreseen the commission of the offence as a real possibility, and should have intended or believed that such act will assist or encourage. The secondary party thus should have had knowledge as to the essential elements of the type of offence committed although knowledge of the precise crime intended to be committed by the principal is not necessary. When one examines the evidence in this case, namely that of Isaacs, Payet and Dugasse as set out in paragraphs 6 – 9 above, it is clear that a case of aiding in the trafficking of a controlled drug is clearly made out. The references to both aiding and abetting in count 2 of the indictment is permissible under s 114(b)(i) of the Criminal Procedure Code. We therefore dismiss ground (v) of appellant D'unienville's appeal and ground 1 (i) of the appeal by Payet and Dugasse. However we take the view that the inclusion of common intention in count 2 as set out at paragraph 2 above was misconceived, but had not caused any prejudice to the appellants.

[30] D'unienville in ground (vi) of his appeal states that the prosecution had failed to prove the existence of a conspiracy and thus the offence of conspiracy to trafficking in a controlled drug had not been established. We have decided to examine this ground in relation to all three appellants despite our comments at paragraph 5 above in respect of a similar ground badly drafted by counsel for appellants Payet and Dugasse.

[31] The offence of conspiracy referred to in count 4 is set out in s 28(b) of the Misuse of Drugs Act as follows:

> A person who agrees with another person or persons that a course of conduct shall be pursued which, if pursued-
>
> (b) would necessarily amount to or involve the commission of an offence under this Act by one or more of the parties to the agreement *but for the existence of facts which renders the commission of the offence* impossible*,* is guilty of the offence and liable to the punishment provided for the offence. [Emphasis added]

[32] The essence of conspiracy is the agreement. When two or more agree to carry their criminal scheme into effect, the very plot is the criminal act itself. Nothing need be done in pursuit of the agreement; repentance, lack of opportunity and failure are all immaterial. Proof of the existence of a conspiracy is generally:

> a matter of inference, deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them……Overt acts which are proved against some defendants may be looked at as against all of them.
>
> Vide *Archbold* (2012) 33-14.

[33] To be guilty of conspiracy, it is not necessary that the accused was a party to the original scheme. It is not necessary to prove that the defendants met to concoct or originate the scheme. A conspiracy may exist between persons who have neither seen nor corresponded with each other. If a conspiracy is already formed, and a person joins it afterwards, he is equally guilty with the original

conspirators. Vide *Archbold* (2012) 33-25. So far as mens rea of the offence is concerned it needs be established that the accused, when he entered into the agreement intended to play some part in the agreed course of conduct in furtherance of the criminal purpose which the agreed course of conduct was intended to achieve. Vide Lord Bridge in *R v Anderson* [1986] AC 27. Lord Griffiths in *Yip Chiu-Cheung v R* (1994) 99 Cr App R 406 said:

> The crime of conspiracy requires an agreement between two or more persons to commit an unlawful act with the intention of carrying it out. It is the intention to carry out the crime that constitutes the necessary mens rea.

[34] In *R v Anderson* [1986] AC 27, it was held that there was no requirement that the prosecution should prove against any particular alleged conspirator that he intended that the offence the subject of the conspiracy should be committed. Thus it would be sufficient for an alleged conspirator who had full knowledge of the plan to have agreed to play a minor role by way of assistance. There can be 'chain' and 'wheel' conspiracies. In a chain conspiracy, A agrees with B, B agrees with C, C agrees with D, etc. In a wheel conspiracy, A at the hub, recruits B, C and D to his scheme. The facts of this case are suggestive of a wheel conspiracy. In either case, the alleged conspirators must each be shown to be party to a common design, and they must be aware that there is a larger scheme to which they are attaching themselves. Vide *Davenport* [2009] All ER (D) 30 (Mar). The engaging of Ms Isaacs as a courier who had never been to the Seychelles before and who did not know anyone in the Seychelles; her arrival in the Seychelles with hardly any money to support her stay here; her bringing in the drugs concealed inside the

boots; her instructions to call and her calling a number in South Africa once she got out of the airport; Ms Isaacs being called from a number in Seychelles on four occasions when she was at 'Le Surmer' hotel; the caller inquiring whether the boots were okay; Ms Isaacs being informed that transport had arrived; the vehicle driven by Payet appearing outside 'Le Surmer' and speeding away to Gondwana once she had got into the vehicle; Payet stopping at two different places to pick up Dugasse and D'unienville who arrived that afternoon from Praslin on a boat to Gondwana; the handing over of the boots containing the substance substituted for drugs to D'unienvelle; the payment to Ms Isaacs; clearly establish that the three appellants along with Ms Isaacs and some others in South Africa were party to a conspiracy for trafficking in drugs. We see no substance in ground (vi) of appeal by D'unienville.

[35] We therefore dismiss the appeals of all three appellants.

Financial Intelligence Unit v Cyber Space Ltd

Domah, Twomey, Msoffe JJA

3 May 2013 SCA 21/2011

Internet copyright infringement – Proceeds of crime – Fair trial – Interpretation

The appellant sought freezing and receivership orders against the respondent's money at a bank alleging that it was derived from websites illegally developed by the respondent to allow access to unlicensed and unauthorised materials on the internet. The Supreme Court held that the appellant had failed to show that the respondent had engaged in the crime of conspiracy and ordered the freeing of the respondent's account. The appellant appealed that judgment.

JUDGMENT Appeal dismissed.

HELD

1 A court cannot consider allegations of conspiracy to defraud if it cannot be established in the first place that a website or a similar technology authorises the violations of copyright laws in Seychelles.

2 Requiring an internet service provider to install a filtering system to monitor electronic communication of users would not be respecting the requirement that a fair balance be struck between the right to intellectual property on the one hand, and the freedom to conduct business, the right to protection of personal data, and the freedom to receive or impart information on the other.

3 Intellectual property rights are not absolute rights and have to be balanced against other rights such as free expression and privacy.

4 The whole thrust of the Proceeds of Crime (Civil Confiscation) Act is for the Judge who hears the application to test the evidence of the applicant to see if a prima facie case is made out before shifting the burden of proof to the respondent.

5 The interpretation of legislation by a court consists of both the elucidation of its substantive provisions as well as of its procedural provisions.

6 Applications under the Proceeds of Crime (Civil Confiscation) Act have to follow the established procedure.

Legislation
Code of Civil Procedure s 12
Copyright Act ss 6, 7, 21(1)
Proceeds of Crime (Civil Confiscation) Act ss 4, 8, 24
Penal Code s 339
Anti-Money Laundering Act s 3

Cases
Financial Intelligence Unit v Mares Corp (2011) SLR 404
Financial Intelligence Unit v Sentry Global Securities (2012) SLR 331

Foreign cases
Canadian Ltd v Law Society of Upper Canada [2004] 1 SCR 339
Society of Composers, Authors and Music Publishers of Canada v *Canadian Association of Internet Providers* [2004] SCC 45

Prosecutor v Neij (Stockholm District Court's 5 Division No B 13301-06, Sweden)
EMI Records v UPC Communications Ltd 2010 IEHC 377
Public Prosecutors v Web masters 0648038112 22/11/2012 (Italy)
Scarlet Extended v SABAM Case C-7/10 (European Court of Justice)
Dramatico Entertainment v British Sky Broadcasting [2012] EWHC 268
F McK v GWD [2004] 2 IR 470
World Intellectual Property Organisation Arbitration and Meditation Centre decision, 12 Jan 2011, D2010 – 1803

Foreign legislation
European Union Directive (2001/29 EC)
Digital Minimum Copyright Act (USA)
EU Directive 2000/31/EC

Counsel B Galvin for the appellant
F Elizabeth for the respondent

The judgment was delivered by
TWOMEY JA

[1] In this first case involving internet copyright infringement in Seychelles, the appellant seeks freezing and receivership orders pursuant to ss 4 and 8 respectively of the Proceeds of Crime (Civil Confiscation) Act 2008 (POCA) against the assets of the respondents being money amounting to R 3,244,081.23 at BMI Offshore Bank (Seychelles) Limited allegedly derived from criminal conduct.

[2] It is clear from the proceedings that this case has come before the courts in several different actions prior to the present appeal before this Court. For the purposes of this appeal however, we are only concerned with the record of proceedings before us,

based on a s 4 POCA application started by notice of motion dated 12 February 2012 before the Supreme Court in which the appellants deponed in the affidavit of its officer, Liam Hogan, that the money in the bank account of the respondent directly or indirectly constituted benefit from criminal conduct.

[3] Mr Hogan outlined the grounds for his belief as based on the facts that the websites known as www.torrrentreactor.com and www.torrentpivacy.com belonging to the respondent operate illegally by allowing access or facilitating access to unlicensed and unauthorised materials on the internet. He relied on a number of witness statements namely those of Paul Warren of the International Federation of the Phonographic Industry, James Mullan of EMI Records, Michael Smith of Sony UK and Claire Sugrue of Universal-Island Records, all stating that the websites were not:

> licensed, permitted or authorised to make available, upload, reproduce, communicate to the public, distribute, supply or otherwise exploit (including sub-licence), or to aid, abet, encourage, authorise or assist in any way any third party to make available … or otherwise exploit any album or other sound recordings owned by [their] companies in any format whatsoever in the world.

[4] He further deponed that the overall activity of these websites was to profit by facilitating the illegal downloading of material subject to international copyright and other legal restrictions thereby defrauding the owners of the intellectual property in the material and others who had expended money in its production and distribution. He deponed that such activity amounted to criminal conduct in almost all developed countries and in the United Kingdom amounted

inter alia to the common law offence of conspiracy to defraud. He added that the conduct of lodging this money subsequent to the said criminal conduct amounted to the offence of money laundering in Seychelles contrary to s 3 of the Money Laundering Act 2006 as amended in 2008.

[5] The respondent's director and beneficial owner, Mr Dmitry Fakhrudinov swore an affidavit on 11 June 2012 in which he deponed that the company's websites operated legally and had been in operation for approximately nine years, that there had never been any legal proceedings in any country in the world in respect of the websites, that the websites did not "host or hold any materials, content, data or digital files", that no criminal offence had been committed by the company and that the company operated in compliance with both the United States' Digital Millenium Copyright Act and the European Union Directive (2001/29 EC) on copyright.

[6] Contained in the affidavit of Liam Hogan, the appellant's officer, was a further statement that the respondent in submitting documents of proof of funds in the frozen accounts produced a written agreement for advertising between the respondent and a company named Darton Software Corporation which Mr Hogan stated are false documents created and uttered to mislead the bank and which could amount to an offence under s 339 of the Penal Code. Replying to this averment the respondent's director in his counter affidavit stated that the money in the frozen bank account was proceeds from advertising services rendered to Darton Software Corporation on the respondent's website.

[7] In his ruling delivered on 28 September 2012, the Chief Justice Egonda-Ntende dismissed the application with costs finding that:

> the applicant [had] not established the existence of an agreement by the Respondent and another or more persons to defraud any other person [and] on a balance of probability the Applicant [had] failed to show that the Respondent [had] engaged in the crime of conspiracy to defraud the persons or companies that are alleged to be the victims of this matter.

He ordered the applicant to "defreeze the Respondent's account."

[8] The appellant applied for a stay of execution of the order pending the appeal of the ruling before the Court of Appeal. This was disposed of by the following statement of the Chief Justice:

> Perhaps you could talk to our learned colleague; you might easily find agreement on the issue without necessarily invoking a ruling of this court on this matter.

[9] Such agreement did not materialise and the appellant then sought the stay of execution before the Supreme Court which was refused and appealed before a single judge of the Court of Appeal. The President of the Court of Appeal, MacGregor, in his ruling of 13 November 2012 dismissed the application for stay of execution of the defreezing order.

[10] The respondent subsequently filed a notice of motion in which it stated that its account remained frozen despite the court order. He further asked that he be allowed to submit the statement of

account and expenses amounting to R 693, 813.57 in relation to losses incurred from the freeze and also his legal expenses. At the hearing of this appeal we were informed that the money in the respondent's bank account had since left the jurisdiction for Cyprus. This may have been an ill-judged move given the intervening collapse of the banking sector in Cyprus but it disposes of the need for consideration of this application by this Court.

[11] There is also an application before us by the appellants to admit further documentary evidence namely the decision of the World Intellectual Property Organisation Arbitration and Mediation Centre of 12 January 2011 in case D2010-1803 in which it was found that the disputed domain name www.torrentreactor.com should be transferred to Alexey Kistenev. It is the appellant's contention that this proves that Alexey Kistenev as the beneficial owner of Darton Software Corp is linked in some way to the respondent as the latter claims in the affidavit of its director and beneficial owner Dmitry Fakhrudinov that it is the owner of the website www.torrentreactor.com. The application was resisted though not strenuously and we allow it as it is in the circumstances of the case and in the interest of justice helpful in assisting the Court in clarifying some of the issues raised.

[12] The appeal from the ruling of the Chief Justice in relation to the dismissal of the application for an interlocutory order is now before this Court for consideration. The appellant's grounds of appeal can be summarised as follows:

1 That the Chief Justice erred in law in not finding that the statutory belief together with the facts adduced in the affidavit and supporting evidence tendered by the appellant at trial were

sufficient to warrant the making of the interlocutory order under s 4 of POCA.

2 That the Chief Justice erred in law in holding that the respondent had satisfied the Court that the property was not the proceeds of crime.

3 That the Chief Justice erred in law in holding that it was necessary for the appellant to establish the crime of conspiracy.

4 That the Chief Justice erred in law in holding that the evidence taken as a whole did not establish criminal conduct to the standard that would warrant an interlocutory order being made under s 4 (1) of POCA.

[13] We shall proceed to consider all the grounds together given the inextricable link between them. We have to acknowledge at this stage that this appeal presents difficult legal issues which have not yet been resolved in this jurisdiction. We say this for the reason that the evidence in the case raises the following issues:

1 Has there been an infringement of the artistic works as alleged?

2 Do the works alleged to have been infringed benefit from copyright protection in Seychelles?

3 Does the facilitation of such infringement by a person amount to a criminal act? If so does it constitute conspiracy to defraud?

[14] These issues were certainly not addressed fully at the hearing of the application and yet are at the crux of this case. At the

very least expertise on the technology involved could have been provided to the Court. In fact, a survey of cases in different jurisdictions indicates that the infringement of artistic works over the internet by protocols such as BitTorrent has not yet been satisfactorily resolved. It was also crucial to the success of the appellant's case that it be established that the respondent allows the downloading of BitTorrents or provides peer to peer services (P2P) and that users of its website are engaged in a criminal in Seychelles or elsewhere. Different jurisdictions have tried to tackle the liability of internet service providers or P2P services for hosting, transmitting or publishing user-supplied content that may infringe copyright of the content. There is no universal consensus on this issue and much of what has been decided is based on copyright legislation of individual states.

[15] Safe harbour or mere conduit statutory defences in the US and Europe, respectively, offer some immunity to intermediaries. In the Irish case of *EMI Records v UPC Communications Ltd* 2010 IEHC 377 Charleton J although sympathising with the music industry accepted that UPC, an internet service provider was a mere conduit with no liability for content travelling on its network. P2P intermediaries have escaped liability in some jurisdictions (vide in Canada - *Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339 and *Society of Composers, Authors and Music Publishers of Canada v Canadian Association of Internet Providers* [2004] SCC 45) but not in others (vide *The Pirate Bay* trial in Sweden - *Prosecutor v Neij* (Stockholm District Court's 5 Division [Stockholms Tingsrätt] No B 13301-06)). Those cases analysed the meaning of *authorisation* by the intermediary to users violating copyright within the definition of copyright laws and individual state laws relating to complicity and conspiracy. The key point of

contention is that operators must have *authorised* the users to commit copyright infringement [Emphasis added]. The Court cannot move on to consider the allegation of conspiracy to defraud if it cannot be established in the first place that the respondent's website authorises the violation of copyright laws in Seychelles as was the situation in the Italian case of *Public Prosecutors v Web masters* 0648038112 22/11/2012 (Italy).

[16] We have also considered the decision of the European Court of Justice in the case of *Scarlett Extended v SABAM* Case C-7/10 (European Court of Justice) in which it found that requiring an internet service provider to install a filtering system to monitor electronic communications of users:

> would not be respecting the requirement that a fair balance be struck between the right to intellectual property, on the one hand, and the freedom to conduct business, the right to protection of personal data and the freedom to receive or impart information, on the other.(Paragraph 53).

[17] In the *Scarlett* case, it is clear that the Court emphasised the fact that intellectual property rights were not absolute rights and that they had to be balanced against other rights such as free expression and privacy. Although the case involved internet service providers it is clear that it has similar implications for search engine operators or other websites that act as search engines. The decision in *Scarlett* which indicated the balancing act that must be carried out by courts will undoubtedly be considered in the appeal in the British case of *Dramatico Entertainment v British Sky Broadcasting* [2012] EWHC 268, another case in which the Court considered the responsibility of

intermediaries when their end-users carry out infringing acts online, finding in favour of the rights holders of intellectual property.

[18] In the present case it is not clear whether the respondent's websites www.torrrentreactor.com and www.torrentpivacy.com are akin to *The Pirate Bay* websites or are solely advertisers for websites that permit the downloading of torrent for the BitTorrent protocol. No evidence has been brought in terms of what a user accessing the respondent's websites can do. The witness statements of James Mullan, Michael Smith and Claire Sugrue only indicate that the respondent's websites are not licensed to authorise the distribution of sound recordings owned by their companies EMI, Sony and Universal-island records respectively. The evidence of Paul Warren of the International Federation of the Phonographic Industry only confirms that no data is stored on the respondent's website and therefore the downloading of copyrighted material is not from the respondent's website but from other websites advertised by the respondent. It is unclear from the evidence adduced by the appellant whether the respondent's websites are search engines or only advertising websites; whether accessing the websites enables or assists downloading of torrent files or whether they only advertise the provision of such services by other sites.

[19] This is important as search engines do not own content but only organise and provide access to material that is posted on websites generating revenue by selling advertising. In this context it is interesting to note that the EU Directive 2000/31/EC [37] states that providers of information services are not responsible for the information transferred. In order to be responsible, the service providers must initiate the transfer. It is certainly debatable whether the activity carried out by search engines involving the reproduction

of copyright content that has been made available on the internet by third parties gives rise to infringement of such copyright. As pointed out above different cases in different jurisdictions have come to different conclusions. Further, P2P technology distributes large data files by breaking them up into small pieces and sending them over the internet to the requesting user. It has not been considered whether in terms of the technology involved it is possible to determine which of the small pieces were uploaded and downloaded legally.

[20] It should be noted that the Copyright Act, Cap 51 of the Laws of Seychelles does not cover foreign works (vide ss 6 and 7 of the Act), unless they are first made, performed or published in Seychelles. The Act does not provide a definition of copyright infringement, but it does in s 21(1) describe offences that might infringe copyright. It does not impose liability for authorising acts of copyright infringement nor does it contain any provision concerning internet copyright infringement. Foreign works can be protected but they have to be registered for protection through a licensed agent in Seychelles. Infringement of copyright is indeed a criminal offence in Seychelles punishable to imprisonment for five years and to a fine of R 30,000 (s 21(6)). But in this respect, no evidence was tendered to show that the artists or their agents had registered their copyright in Seychelles. Jurisdictional issues in relation to both users of the website and the owners of copyright were also not addressed in this case.

[21] The appellant also contends that the respondent through its associated website www.torrentprivacy.com also derives income from providing anonymity for users to access sites that permit the downloading of copyrighted material. Anonymity on the internet is

yet another challenge for internet crime but the issue in the present case is not whether it is illegal or not to provide or use anonymity for downloading material but whether the provision of such a service may or may not authorise the illegal downloading of copyrighted material. The appellant has been unable to demonstrate this necessary causal chain to the Chief Justice and to us.

[22] When the matter came for hearing before the Supreme Court on 18 July 2012, there was a discussion between counsel and the Chief Justice in reference to the procedure to be adopted for the hearing of the motion. This discussion emanates from the fact that although s 24 of POCA mandates the Chief Justice to make rules to regulate the procedure in such cases this has still not been done. Further, although the Court of Appeal in both the cases of *Financial Intelligence Unit v Mares Corp* (2011) SLR 404 and *Financial Intelligence Unit v Sentry Global Securities* (2012) SLR 331 made strong and urgent calls for the making of such rules, they are still awaited. The Chief Justice at the hearing of the present case stated that that part of our judgment in respect to procedure "must be treated with respect but has no legal effect." He further stated that the Court of Appeal:

> was attempting to write rules of procedure which was not their business… We have to continue applying the law and hopefully the Court of Appeal will continue clarifying it. I hope it won't throw us in more confusion than it has done.
>
> (verbatim transcript of P2 of Supreme Court proceedings of *FIU v Cyberspace*).

[23] With all due respect to the Chief Justice the procedure laid down in *Mares Corp* (supra) by the Court of Appeal was interpreted from the provisions of POCA, in an attempt to assist him in filling an important gap in this difficult area of law. This interpretation was clearly within the remit of this Court's jurisdiction. The Court can properly interpret laws - in fact that is its duty - and the interpretation of legislation consists of both the elucidation of its substantive provisions as well as its procedural provisions. This is especially so in this case since POCA expressly provides for the making of rules and five years nearly have elapsed since its enactment with no rules forthcoming. Further, the interpretation of the Court of Appeal of legislation is binding on the Supreme Court. Until the Rules are made, *Mares Corp* (supra) remains the law with respect to the procedure therein stated.

[24] It is an open secret that, cases taken under POCA run the risk of being dismissed for want of proper procedure or worse still for the lack of a fair hearing. Evidence in such cases which may help either side in furthering its case is not being presented because of the uncertain and sometimes chaotic procedure adopted in the absence of strict rules of procedure. The procedure adopted in his particular trial is an example of this unhappy state of affairs.

[25] The present application was contested. The Court should have followed the procedures as indicated in POCA and on established precedent. It should have considered whether there was evidence for the reasonable belief of Mr Liam Hogan. If it so concluded, it should have then ruled on whether a prima facie case was made out. The whole thrust of the POCA legislation, as can be gleaned from a reading of s 4 is for the judge hearing the application to test the belief evidence of the applicant to see if a prima facie case

is made out before shifting the onus of proof onto the respondent and to determine whether the burden of proof shifted onto the respondent has been satisfied. We said as much in both *Mares Corp* and *Sentry Global Securities.* The precedent of the Supreme Court of Ireland in the case of *F McK v GWD (Proceeds of Crime Outside the State)* [2004] 2 IR 470 is extremely useful on this point. We found it both proper and logical to turn to that Irish precedent given the fact that the Seychelles POCA 2008 is a replica of the Irish POCA 1996. In that judgment McCracken J identified the different functions of ss 3 and 8 (the equivalent of our ss 4 and 9 of the Act) in relation to the procedures to be adopted by the trial judge in considering an application when presented with belief evidence (see p 491 of his judgment). The procedure identified by McCracken J was as follows:

> … the correct procedure for a trial judge in circumstances such as those in the present case is:
>
> … He should consider the evidence given by the member or authorised officer of his belief and at the same time consider any other evidence … which might point to reasonable grounds for that belief;
>
> if he is satisfied that there are reasonable grounds for the belief, he should then make a specific finding that the belief of the member or authorised office is evidence;
>
> only then should he go on to consider the position under s. 3. He should consider the evidence tendered by the plaintiff, which in the present case would be both the evidence of the members or authorised

> officer under s. 8 and indeed the evidence of the other police officers;
>
> he should make a finding whether this evidence constitutes a prima facie case under s. 3 and, if he does so find, the onus shifts to the defendant or other specified person;
>
> he should then consider the evidence furnished by the defendant or other specified person and determine whether he is satisfied that the onus undertaken by the defendant or other specified person has been fulfilled;
>
> if he is satisfied that the defendant or other specified person has satisfied his onus of proof then the proceedings should be dismissed;
>
> if he is not so satisfied he should then consider whether there would be a serious risk of injustice.
>
> If the steps are followed in that order, there should be little risk of the type of confusion which arose in the present case.

[26] The procedure as outlined by McCracken J could not be clearer. In *Mares*, we tried to resolve the procedure in contested cases by using the general provisions of the Seychelles Code Civil Procedure absent specific rules under POCA. It is eminently clear that there is logic and sense in that approach as in the absence of precise rules of procedure this would avoid a miscarriage of justice. POCA is without doubt a completely new area of law, the scope and limits of which have to be learnt. The Court is conscious of the very great potential unfairness of permitting hearsay evidence and belief

evidence in any legal proceedings. Both are capable of gross abuse and this is why clear procedures should be used to safeguard against such abuse. In this case, the applicant had called a witness from the UK probably at great expense while the respondent's director has also flown in from Russia also at great expense. Neither had been served with notices to appear for cross-examination of their statements or affidavits. Both were sitting outside the courthouse when without notice they were called to be cross-examined in Court, in this case extraordinarily and without much explanation the respondent's witness was called before that of the applicant!

[27] This resulted in the respondent's case being made before that of the applicant contrary to the provisions of both the Civil Procedure Code and POCA. There had been no finding of a prima facie case made out by the appellant. We can only state in the politest of terms that had the rules been made or *Mares Corp* applied such a questionable procedure would not have occurred. It is not only contrary to current rules of procedure but also probably unconstitutional as it breaches fair procedure requirements. The belief evidence of Mr Liam Hogan as contained in his affidavit was never challenged by cross-examination in the s 4 proceedings but the appellant's attorney Mr Galvin proceeded to first cross-examine Mr Fakhrudinov followed by the respondent's attorney, Mr Elizabeth cross-examining the applicant's witness, Mr Paul Warren.

[28] The procedure adopted at trial was not challenged by the appellant in his grounds of appeal or even by the respondent. The departure from established rules of procedure is in our view a serious case for concern. Seychelles has an adversarial system. Applications under POCA have to follow the established procedures in this jurisdiction which are similar to those of common law countries. We

cannot put it any simpler than by saying the prosecution or the plaintiff goes first! The only exception to this general rule is in the procedure for personal answers contained in s 12 of the Seychelles Code of Civil Procedure. However, as things stand, even if we are to follow the correct method of procedure as we have established, this case falls at the first hurdle. Given the uncertainty in terms of criminal conduct resulting from the technology of the BitTorrent protocol the trial Judge was in no position to form a view as to whether or not the belief evidence was reasonable and whether a prima facie case was made out by the appellant. It was not even necessary to shift the burden of proof onto the appellant and to consider whether the respondent had on the balance of probabilities acquitted himself of the burden of proof.

[29] It is also evident that the respondent's director has not been truthful in his evidence as concerns the relationship between Cyberspace and Darton and the provenance of the money in the bank account of Cyberspace. However, it is our view that the appellant produced a lot of material which only diluted the real issue of his application. It was unable to establish a prima facie case under s 4 of POCA. A simpler and more focussed application might have won the day before the trial Court. We are unable to come to a different conclusion to the Chief Justice and in the circumstances see no merit in any of the grounds of the appeal and dismiss them in their entirety with costs.

[30] We wish to place on record that we have found the extensive submissions of counsel extremely helpful in both the procedural and substantive issues raised in this case. The law established by POCA is still developing in Seychelles and the cooperation of the Bar and the FIU in this context is gratefully acknowledged. We are reassured

to hear that rules of procedure under the Act are to be submitted to the National Assembly in the near future. It cannot come soon enough.

Georges & Anor v Guinness Overseas Limited

Domah, Twomey, Msoffe JJA

3 May 2013 SCA 02/2011

Contract − Option to redeem − Intention of parties

The appellants sold land with the option to redeem from the respondent in a set time and also on the condition that the respondent should offer first to the appellants before selling it to a third party. The Supreme Court recognised the appellant's right to redeem the property but held that they had been given more than enough time to do so. The appellants claimed that the Supreme Court failed to ascertain the intention of the parties and the legal basis for the formation of the option to redeem.

JUDGMENT Appeal allowed.

HELD

1 The intention of contracting parties is to be found in the words used.

2 The intention can be inferred from the subsequent conduct of the parties.

3 The intention of the parties may be inferred from the words of a contract.

4 The option to redeem between contracting parties has legal effect whether it is written or not. It does not have effect as regards third parties unless registered.

5 Sellers of property with an option to redeem do not lose the right until they have been given reasonable notice to exercise the option.

6 If the seller fails to exercise the option to repurchase within the prescribed period, by serving reasonable notice on the buyer, the buyer remains the owner. Notice must be served in order for time to start running.

Legislation
Civil Code arts 1108, 1134, 1156, 1162, 1659, 1662, 1673
Land Registration Act ss 3, 81

Cases
Chow v Bossy SCA 7/2005
Cook v Lefevre (1982) SLR 46
Dogley v Renaud (1982) SLR 187
Lesperance v Vidot SCA 25/2007
Wilmot v W & C French (Seychelles) (1972) SLR 144

Foreign cases
Scammel v Ouston [1941] AC 251

Counsel B Georges for the appellant
F Chang-Sam for the respondent

The judgment was delivered by
MSOFFE JA

[1] The facts of the case giving rise to this appeal are adequately set out in the judgment of the Supreme Court (Egonda-Ntende, CJ) dated 31 January 2011.

[2] The first appellant asserted that at all material times he was the beneficial owner of the land parcel V4801 situated at La Louise, Mahe. The second appellant was said to have been the lawful owner of the property prior to October 2003. For quite some time the first appellant was a Director of Seychelles Breweries Limited in which the respondent is a shareholder.

[3] Paragraphs 3–12 of the judgment of the Supreme Court capture in sufficient detail the spirit behind the filing of Civil Side No 285 of 2009 which is the subject of this appeal. In view of their importance, we take the liberty to reproduce the paragraphs verbatim as under:

> [3] The plaintiff no. 1 borrowed some money from Seychelles Breweries Ltd sometime prior to 2000. He secured the said sum of money with a charge over V 4801. In 2000 the plaintiff no. 2 agreed to transfer to the defendant beneficial ownership of the land in question by a declaration of trust and a caution in favour of the defendant. In 2000 the plaintiff no. 2 executed an undated transfer in favour of the defendant. The parties sought to sub-divide and transfer a portion to the defendant but the Government refused sanction for the defendant to purchase only a portion of the land.
>
> [4] The plaint further contends that the parties subsequently agreed that the whole parcel of land will be transferred to the defendant upon the plaintiff no. 1 being advanced more money on the following conditions:
>
> (a) The plaintiffs would have an option to redeem the whole parcel by refunding all sums paid by the defendant.
>
> (b) In the alternative to (a) the plaintiff's would have right to purchase back the said land at their convenience.
>
> (c) That in any case should the defendant wish to sell the land first option to purchase would be offered to the plaintiffs who would pay for in foreign exchange

for the lower portion and in Seychelles rupees for the upper portion.

(d) And lastly that the plaintiff no. 1 would continue to look after the property.

[5] The plaintiff no. 1 claims that in accordance with that agreement he provided a watchman to reside on the property. He has paid the watchman for cleaning the place, paid electricity bill up to 2006 and water up to date. The plaintiff no. 1 has been advised that the defendant is selling this property to a third party in breach of the agreement between him and the defendant, hence this action.

[6] The defendant opposes this action. Firstly, it sets up a point of law that the right to redeem or right of first purchase, if such right existed, (which is denied), those rights are time barred and prescribed by law.

[7] The defendant admits that the plaintiff no. 2 was the legal owner of the land but denies that the plaintiff no1 was the beneficial owner thereof. The defendant avers that it purchased the land from plaintiff no. 2 whose shares were held by Bourbon Nominees Ltd. Plaintiff No. 2 owner the freehold of the land and Auberge Louis XVII (Pty) Ltd owned the leasehold interest in the land. All the shares of Auberge Louis XVII (Pty) Ltd were held by Bourbon Nominees Ltd. Bourbon Nominees Ltd, on 1 April 2000, declared in 2 separate documents that it was holding all the shares of plaintiff no. 2 and Auberge Louis XVII (Pty) Ltd as a nominee for Guinness Ltd. The documents were signed by plaintiff No. 1 and Annette Georges as directors of the Bourbon

Nominees Ltd were holding the said shares as nominees for the defendant.

[8] Originally, the defendant was interested only in purchasing the lower part where the Auberge Louis XVII restaurant was. However, as the plaintiff no. 1 failed to pay his loans and became more indebted it was agreed that the defendant will purchase the whole parcel of land. On 16 October 2003 plaintiff no 2 unreservedly transferred and defendant unreservedly purchased the whole of the property. The defendant did not agree or commit itself to sell back the property to the plaintiff.

[9] The defendant denied that it ever agreed that the plaintiff no. 1 looks after the property and only became aware later on of an occupant of one of the houses on the property during an inspection of the property. The arrangement with the occupier of the house was without the authority, consent or knowledge of the defendant. The plaintiff did not have the authority and or consent of the defendant to connect water and electricity to the houses on the property. There was no agreement that the plaintiff no. 1 would meet those costs.

[10] The defendant states that it was always its intention to sell the property to any willing buyer and that it sold this property to Sans Souci Properties (Pty) Ltd and in so doing the defendant denies that it breached any of the plaintiffs' rights as it had unfettered right to dispose of the said property.

[11] In February 2009, the plaintiff lodged an application with the Land Register to enter a caution prohibiting the defendant from dealing with this land

> on the ground that he had a right of first offer to purchase the property. The defendant objected to this application. But prior to doing so and in spite of the fact that the plaintiff enjoyed no such right, the defendant offered the plaintiff no. 1 time to buy the said land but the plaintiff failed to do so within the deadline set by the defendant. Following the plaintiff's failure to purchase the said land the defendant sold it to Sans Souci Property (Pty) Ltd for the same price as it had offered it to the plaintiff no. 1.
>
> [12] With regard to the plaintiff no. 2, the defendant denies that it has any right to redeem or buy back the said property and put it to strict proof of its claims. The defendant prays that this court dismisses the plaintiffs' suit with costs.

[4] It is evident that before the Supreme Court the first appellant and or in the alternative the second appellant sought to exercise the option to redeem the parcel of land V4801 from the respondent by paying the price thereof and other incidental costs; in the alternative, an order that the respondent should offer the land to them before selling it to a third party; in the further alternative, an order that the respondent sell to them at market value the land, if the appellants wish to purchase it.

[5] The Chief Justice carefully considered the parties' respective rival positions in the matter. In the process, it is evident from paragraphs 15–22 of the judgment that he held the general view that the parties appeared to have agreed that the appellants may purchase back the property in question and time to do so was provided, and on all such occasions the appellants failed to do so. In other words, in his judgment the Chief Justice recognized the

appellants' right to redeem the property but opined that they had been given more than enough time to do so but to no avail. In the result, the suit was dismissed hence this appeal.

[6] In this appeal the Chief Justice is sought to be faulted on the following grounds:

1) Not considering the legal basis for the formation of the Option to Redeem and in ignoring the law on the matter entirely.

2) His finding (at paragraph [18] that the letter exhibit D4 had modified the buyback option as agreed by the parties and that the right to redeem was now to be exercised prior to the registration of the transfer deed) in that he failed to appreciate (i) that the Appellants or either of them had no need to claim any buyback option pending the registration of the transfer deed as the property belonged to the second Appellant until such registration and (ii) that an option to Redeem only has application after the property has been sold and not prior to the sale.

3) Failing to appreciate that the parties had agreed to an option of one year being granted upon the sale of the property, which option was never modified subsequently since the property was old on the same conditions and for the same price as had been agreed then.

4) Failing to appreciate the fact that throughout the transaction leading to the sale of the property the

first Appellant had always insisted on the right to repurchase the property and the Respondent had always agreed to that.

5) Not considering the evidence that the property had been left in the possession of the first Appellant after the sale and in not drawing from that fact the conclusion that the intention of the parties in so doing was more indicative of the existence of an option to Redeem than not.

6) Failing to apply the provisions of the law as to the intention of the parties and fairness to the peculiar facts of the case and drawing appropriate conclusions therefrom.

7) Failing to appreciate the peculiar relationship between the first Appellant and the Respondent and the impact that this had on the intention of the parties as to the existence or not of an Option to Redeem.

8) Failing to appreciate the circumstances which led to the sale of the property to the Respondent and, in particular, to the sale of the upper portion to facilitate the transfer of ownership.

[7] It occurs to us that in a fair determination of this appeal the underlying consideration lies on two major points ie *the intention of the parties and the option to redeem.*

[8] In addressing the above points we will work on the premise that the parties in this case are agreed that the agreement in the

whole matter was a valid contract in terms of art 1108 of the Civil Code of Seychelles which lists conditions that are essential for the validity of an agreement thus:

1) The consent of the party who binds himself,

2) His capacity to enter into a contract,

3) A definite object which forms the subject-matter of the undertaking,

4) That it should not be against the law or against public policy.

[9] Further to the above point we will also work on the premise that the agreement in this case had the full force of law in terms of the provisions of art 1134 of the above Code. In other words, art 1134 encompasses what Barry Nicholas in his book *The French Law of Contract*, Second Edition, at page 32 terms "the theory of the autonomy of the will" to the effect that "Agreements legally formed have the character of loi for those who have made them". That is, contracts are binding because they are an expression of the free will of the parties.

[10] In Seychelles the law is settled that in the interpretation of contracts the common intention of the parties should be sought. This is the essence of art 1156 of the Code. In other words, as was stated by this Court in *Chow v Bossy* SCA 7/2005, when interpreting a contract the first step is to determine the intention of the parties. It is also settled law that intention may be inferred from subsequent conduct – See *Lesperance v Vidot* SCA 25/2007. Coincidentally, this Court's decision in *Lesperance* (supra) also finds support in the statement in Beale, Bishop and Furmston *Contract Cases and Materials* (Fourth Edition) at page 183 that:

> It is the subsequent history which gives the best guide to the parties' intention at the material time.

[11] The intention of the parties may also be inferred from the words of a contract. Thus, as pointed out in *Cook v Lefevre* (1982) SLR 46, in the absence of clear evidence, it may be assumed that the parties used the words in the sense which they are reasonably understood. On this, there is also a very useful guidance from the English case of *Scammel v Ouston* [1941] AC 251 - where at page 268 it was stated:

> The object of the court is to do justice between the parties and the court will do its best, if satisfied that there was an ascertainable and determinate intention to contract, to give effect to that intention, *looking at substance and not mere form. The test of intention is to be found in the words used.* If these words, considered however broadly and unethically and with due regard to all just implication, fail to evince any definite meaning on which the court can safely act, the court has no choice but to say that there is no contract.
>
> [Emphasis added]

[12] The case of *Wilmot v W. & C. French (Seychelles)* (1972) SLR 144 at page 148 is also a good statement of the law that the way in which the parties have given effect to or acted upon a deed is one of the best pointers to its interpretation.

[13] Under art 1162, in case of doubt, the contract is interpreted against the person who has the benefit of the term and in favour of the person who is bound by the obligation. Therefore, in the event of a conflict between the true intention and the intention expressed in

the contract document, the former prevails –See *Lefevre* (supra) and *Dogley v Renaud* (1982) SLR 187.

[14] The option to redeem is covered under art 1659 of the Code whereby the seller reserves for himself the right to take back the thing sold upon returning the principal price and making a refund provided in art 1673. Article 1673 distinguishes between options that are registered and those that are not. The inference here is that there can be options to redeem that are oral or inferred or privy to the co-contractants only. That is why the Litec Code Civil 1982 at page 643 states that for its validity between the parties it is not necessary that the stipulation to redeem be written in the sale agreement itself.

[15] Briefly stated, the law as to options to redeem is as stated by the appellants in their heads of argument that:

a) The option to redeem usually proceeds from a debt situation but does not have to. The buyer is not interested in owning the property, only in being repaid. The property is held as security.

b) The seller transfers the property to the buyer, but reserves the right to take back the property against a refund of the price paid (Article 1763). It is the seller who reserves the option, not the buyer who gives it (Article 1659).

c) The option is usually reserved in the deed itself.

d) The option must be taken at or before the sale.

e) There are no formalities for redeeming the sale. All that is required is that the seller must inform the buyer

of his intention before the period of prescription expires.

f) In Seychelles, unlike France, the law since 1964 provides that the buyer must give notice to the seller prior to the option to redeem expiring. If the buyer does not do so, the period within which the option can be exercised is extended until notice is given.

[16] The articles of the Civil Code have been impinged on by the Land Registration Act which seeks to ensure that the title to the land only passes when registered. However, the saving provision of s 3 of this Act preserves the application of art 1659.

[17] In essence, the option to redeem between contracting parties has legal effect whether it is written or not. It does not have effect as regards third parties unless it is registered.

[18] Paragraph 1 of art 1662 provides that if the seller fails to exercise his option to repurchase within the prescribed period, the buyer remains irrevocably the owner. However paragraph 2 thereto, which exists in Seychelles and therefore unique for that matter, provides that the buyer is bound to serve reasonable notice to the seller of the impending expiry of the option. Hence, notice must be served otherwise time does not start running. We may digress a bit here and state that, as shall be demonstrated hereunder, no notice was ever served by the respondent in this case. All in all, under the law, as stipulated above, all the appellants had to do was, and still is, signify the wish to repurchase.

[19] In this case, there is no serious dispute that the parties entered into an agreement to sell the property with an option to

redeem in view of the clear words used in the respective documents and the oral evidence in the case. This is mainly evidenced by the contents of exhibits P8 and P9. Under exhibit P8 the appellants offered to sell the whole plot with liberty to repurchase it. The respondent accepted the offer (vide exhibit P9) subject to "obtaining the sanction of the Government for such purchase". At first the Government declined to give the sanction as evidenced by the contents of exhibit P11. Later it gave its sanction with certain conditions as reflected in the contents of exhibit P14. The appellants contemplated appealing to the Government to review the conditions upon which the sanction was granted. Hence, on 17 January 2003 the first appellant wrote a letter to the Administration Manager of Seychelles Breweries Ltd, exhibit D4.

[20] In the judgment of the Chief Justice, as per paragraph 18 thereof, he opined that exhibit D4 modified the option to redeem as initially set out in exhibit P9, to become an option to buy back "prior to the registration of the transfer deed".

[21] In his submissions in the Heads of Argument Mr Chang-Sam, advocate for the respondent, generally supported the position taken by the Chief Justice in the case before him. In particular, Mr Chang-Sam concentrated his submissions in the Heads of Argument in the contents of exhibit D11 on the transfer of the property to Guinness Overseas Limited − a document which was witnessed by both the appellant and Mr Andrew J Richardson for Guinness Overseas Limited. Mr Chang-Sam maintained that this is an authentic document in which there is no express term of reservation in favour of the appellants.

[22] With respect, the positions taken by both the Chief Justice and Mr Chang-Sam are not entirely correct for the simple reason that

in both law and fact these were not the only documents in the case. There were other equally important documents to be considered. Nonetheless, the finding by the Chief Justice (paragraph 18) is important in that it at least recognized that there had at some point (exhibits P8 and P9) been an option to redeem or to buy back the property. At any rate, in terms of art 1162 if there was doubt in the interpretation of exhibit D4 in its relevance in relation to exhibits P8 and P9 the document would still be interpreted in favour of the appellants.

[23] We have carefully looked at all the documents which are relevant in a fair determination of the case. In similar vein, we have addressed our minds to the oral evidence in the case. Having done so, it will be fair to say that the intention of the parties was all along clear that the appellants always reserved the option to redeem or to buy back the property. Exhibits P8, P9 and documents J19, J21 and J22 are very clear on this. J19 and J21 in particular, have all the elements of an option to redeem. By these two documents the appellants took the option and not the respondent giving it. The price is the refund of the sums paid by the respondent. It is also significant to mention here that the option was taken before the sale of the property.

[24] We appreciate that at the hearing of the appeal Mr Chang-Sam referred us to exhibit P21 (a), specifically paragraph two thereof, in which the respondent "categorically and unequivocally" denied that the appellants had any right of "first option" to redeem the property and thereby "decided to temporarily put on hold any negotiation or offer relating to the sale of the property for a period of fifteen (15) days from the date of receipt" of the letter by the appellants. In response, in his letter dated 26 June 2009 (exhibit

P22), the appellants accepted the offer to sell the property for the sum of GBP 550,000. In Mr Chang-Sam's view, by virtue of these documents the appellants were given reasonable notice and that the option to redeem was no longer an issue. However, in our considered opinion, we go along with the appellants' view under paragraph 5 of exhibit P22 that the time given was very short. In our view, the period of 15 days was unreasonable and oppressive in the circumstances of the case in view of the importance of the sums involved, the currency, and the general philosophy of the change of law in 1964.

[25] Further to documentary evidence, it is also clear from the oral evidence on record that the appellants never withdrew their intention to repurchase the property. In other words, this was a live issue all along as reflected in the evidence of Gabriel (the respondent's witness) thus:

> Q And this is exhibit D11, it is a transfer made by MYGS …
>
> A Yes
>
> …
>
> Q Could you look at the figures (of) consideration stated in D11…
>
> A This amount are the figures which are referred to in the correspondence…
>
> Q So basically it means that the money was not paid and this is why the property was (transferred)
>
> A Yes
>
> Q Was there any conditions attached to this that he had to (buy) back.

A In there, there is none if I may say I don't know attested during the negotiations there was the talk and the understanding that he would buy back or would be offered to him the top part if we were selling the property. There was that conversation.

Q When the transfer was made was that put as a condition?

A No there is nothing in the transfer.

…

Q You have just stated Mr. Gabriel that there was an understanding that Mr. Georges would buy back the property.

A Not the whole property but the top part of the property. This was at the initial stage of the conversation. Even at the latest stage it was still my understanding but when the deed was done this was not in the deed.

Q But in your letter (19 November) you said that only part of the property was going to be sold back to Mr. Georges.

A If remember well it was a loan taken on the property and then he will repay but at a stage I was made to understand that Mr. Georges has agreed that if he sell the whole property he will have the option to buy the top part.

…

Q So there is no mention of only part of the plot, it speaks of the plot as a whole, is that correct?

A Yes.

[Emphasis added]

[26] As already stated, pursuant to the decision of *Wilmot* (supra) and other cases cited above, the conduct of the parties and the way in which the said parties have given effect to a deed is one of the best pointers as to intention. It is evident from the record that after the transfer and for a period of five years thereafter the respondent did not take possession of the property. Instead, the property was left in the possession of the appellants as confirmed by the evidence of Mr. Gabriel thus:

> Q Mr. Gabriel do you know whether the (Respondent) ever physically took possession or occupied V4801 after they purchased it.
>
> A After we purchased the property was more or less with him as a caretaker.
>
> Q Mr. Georges was the one who carried on caretaking of the property?
>
> A He was keeping the property, he was cutting the grass …

[27] We think that the only reason for doing the above was that the parties recognized that the intention was that the appellants were to buy back the property and it was therefore in their interest to maintain and ensure the upkeep of the property in question.

[28] As mentioned above, Mr Chang-Sam heavily relies on the contents of exhibit D11. In our view, however, this document has its own shortcoming and difficulty in the case. No notice was given prior to the expiration of the option to redeem or to buy back. The failure to give reasonable notice offended the provisions of paragraph 2 of art 1662 which, for ease of reference, we quote as under:

> However, the buyer shall be bound to serve reasonable notice to the seller of the impending expiry of the option. Failure to do so shall extend the time of repurchase until the expiry of any subsequent reasonable notice.

[29] This paragraph was introduced by an amendment to the law of Seychelles in 1964 to ensure that sellers of property with an option to redeem do not lose the property until they have been given reasonable time of the expiry of the option. Apparently in his submissions in the heads of argument Mr Chang-Sam did not address this aspect of the case.

[30] There is yet another aspect in the case which is worth discussing or addressing here. A look at exhibit P26 will show that the property has since been transferred to a third party. To be precise and specific, it was transferred to Sans Souci Properties on 5 November 2009. In law, specifically art 1108 read together with Barry Nicholas (supra), this is a valid contract between the parties in that it is an expression of the free will of the said parties. It is also a valid contract in the sense that it creates rights and obligations between the parties capable of enforcement in law. However, to the wider world or public this is not a valid contract because the document has not been registered. In this regard, paragraph 2 of art 1673 read together with s 3 of the Land Registration Act are relevant. Yet again, for ease of reference, we quote them in full hereunder.

[31] Article 1673 paragraph 2 provides:

> When the seller takes possession of his property as a result of the exercise of the option to redeem he takes it free from all encumbrances and mortgages

> with which the buyer may have burdened it on condition that that option has been properly registered at the office of the Registrar-General before the inscription of the said encumbrances and mortgages. He shall be bound to execute the leases which were granted in good faith.

[32] And s 3 reads:

> Except as otherwise provided in this Act, no other written law relating to land registered under this Act so far it is inconsistent with this Act, but save as aforesaid any written law relating to land, provided by this or any other Act, shall apply to the land registered under this Act whether expressed so to apply or not:
>
> Provided that nothing contained in this Act shall be construed as permitting any dealing which is forbidden by the express provisions of any law or as overriding any provision of any other written law requiring the sanction or approval of any authority to any dealing.

[33] So, in effect this means that in both law and fact in redeeming the property the appellants will not be bound by the above contract (exhibit P26). This is for the simple reason that the document has no legal force between the appellants and the parties therein because of non-compliance with the above specific legislation in the matter.

[34] At the hearing two specific questions were asked by the Court about the value of the property and the sums outstanding. We were assured that there is no dispute between the parties on these points.

[35] For the forgoing reasons, we are satisfied that the appeal has merit. We hereby allow it. We accordingly set aside the decision of the Chief Justice and substitute therefor the following. We give the appellants the option available in law to redeem the property. In the event that the option to redeem is not exercised by the appellants within six months of this judgment we order the Land Registrar, pursuant to s 81(1) to remove any caution or encumbrance registered against the said title in favour of the appellants. We make no order as to costs.

Gill v Film Ansalt

Domah, Twomey, Msoffe JJA

3 May 2013 SCA 28/2009

Reinstatement of dismissed case − Equity

The Supreme Court allowed a motion to reinstate a plaint which had been dismissed after the case had been called many times. The defendant appealed.

JUDGMENT Appeal allowed.

HELD

1 The court can recall an order for dismissal only if parties, on the same day, present themselves to the court and the defendant raises no objection to reinstatement.

2 Where a part-heard case has been dismissed for want of prosecution and there is no common agreement between the parties reached on the same date for it to be restored to the list of cases, the plaintiff may re-lodge the case, subject to the plaintiff paying the costs of the case that has been dismissed.

3 The rationale behind the mandatory provision in the law and its strict interpretation lies in the court's responsibility to assume control of the judicial process under the rule of law and introduce the degree of certainty required for the courts, the profession and the litigating public.

4 Delayed representation by prospective counsel cannot be equated with the non-appearance by the respondent on call of a case.

5 Courts have a duty to intervene to stop abuse of judicial process.

6 The rule to close the door of the court to a litigant can only be applied when the facts are such as to amount to an abuse, otherwise there is a danger of a party being shut out from bringing forward a genuine subject of litigation.

Legislation
Code of Civil Procedure ss 33, 63–69, 133, 150, 194–198

Cases
Biancardi v Electronic Alarms SA (1975) SLR 193
Bouchereau v Guichard (1970) SLR 35
Gomme v Morel SCR 06/2010
Petit v Bonte SCA 9/1999

Foreign cases
Brisbane City Council v Attorney-General [1979] AC 411
Bradford & Bingley Building Society v Seddon [1999] 1 WLR 1482
House of Spring Gardens v Waite [1990] 2 All ER 990
In Re Norris [2001] 1 WLR 1388

Counsel P Pardiwalla for the appellants
B Georges for the respondent

The judgment was delivered by
DOMAH JA

[1] The Supreme Court on 6 July 2009 delivered a ruling reinstating a plaint with summons lodged on 24 July 2000 whereby the respondent was vindicating its rights over two properties in Praslin. The plaint had been dismissed on 19 November 2007, after it had been called pro forma ten times previously and been part–heard on 18 March 2005. At the call of the case for the purposes of

obtaining a date for continuation, neither the respondent nor his counsel was present. Counsel for the appellants, therefore, made a joint motion for the dismissal of the case. One of the reasons which was advanced by the appellants was the manner in which the case had been handled by the respondent dragging its feet with the case and dragging the appellants unnecessarily to court so many times. The Court allowed the motion and dismissed the plaint.

[2] Soon after the dismissal, and at the very same session, Mr Georges appeared before the Court, not as counsel for the respondent but as its prospective counsel and apologized for his absence when the case was called. He explained that he had been present earlier but since the Court had not yet started, he proceeded to another division for a short matter. As ill luck would have it, the present matter was called in his absence. He, therefore, moved that the case be reinstated. The Court decided that it could not do so in the absence of due notice to the appellants. Counsel explained his predicament. First, his own appearance in the case had yet to be regularized as Mr Lucas who was still in the case had not yet withdrawn. The following exchange between the Court and counsel is worth reproducing:

> Court: … I am convinced that you were counsel for the Plaintiff.
>
> Mr Georges: I am not, my Lord. I'm certainly not representing for the Plaintiff. I don't want to enter in an argument with the Court.
>
> Court: Mr Georges, if you say you're not appearing I need not tell you and you can simply go free because you are not representing any parties.

> Mr Georges: Of course, my Lord, I will be appearing in this case. I have been instructed to appear once Mr Lucas has withdrawn and what I want to know is …
>
> Court: If you read my order carefully, can you read my order?
>
> Mr Georges: Yes.
>
> Court: Neither the Plaintiff nor the Counsel appeared, that's why the case was dismissed, not necessarily you or x, y, z.

[3] In the light of those pertinent remarks by the Court and the clear legal position, we are mystified as to the reasons for which the Court still gave a date for mention to counsel, which was 4 February 2008. What it should have done was give until the end of the day for counsel to secure the attendance of the appellants and their green light for a reinstatement pursuant to s 150 of the Seychelles Code of Civil Procedure. The dismissal order could then have been varied. Short of that, the court becomes *functus officio:* see *Bouchereau v Guichard* (1970) SLR 35.

[4] We reproduce the entry in the case of *Bouchereau v Guichard* (supra) for the sake of showing the scope and limitation of the powers of the court with regard to a recall of an order for dismissal. It can only be done if parties, on the same day, present themselves to the court with the defendants not raising an objection to the reinstatement.

> Court: It is now 8.45 a.m. Neither plaintiff nor learned counsel present. Under Rule 17 of the Magistrates' Court Rules, case dismissed.

> Later on the same day, parties appear at 9.10 a.m.
>
> Mr Rene for plaintiff
>
> Defendant present
>
> Defendant agrees to allow the present case to proceed.
> Mr Rene thought that the case was for 9.00 a.m.
>
> Case adjourned to the 8th for mention and defence.

[5] What took place in this case is exactly the contrary of what obtains in settled law and judicial process. On a plea by a prospective counsel, the Court gave a mention date to 25 February 2009 in the absence of both the respondent and the appellants. On 25 February 2009, nothing more happened on behalf of the respondent. Counsel appearing for the appellants insisted that the case stood dismissed and the status was as at 19 November 2007. The Court quite rightly declined to overturn its order of dismissal. On 4 April 2008, however, four months later, the Court was in the presence of a motion that the matter be restored to the cause list. The procedure is one unknown to our law and our jurisprudence.

[6] The motion for restoration was set for hearing on 12 March 2009 on which day counsel sought an adjournment. The Court, in the circumstances, ordered that parties make written submissions and file them on 26 March 2009. On 26 March 2009, counsel found another impediment to the progress of the case. Mr Lucas had been playing a number of roles in the matter: that of representing the respondent, that of appearing as counsel for the respondent and that of deposing as a witness. The Court had made a clear comment on the propriety of his conduct as a result of which he had indicated his intention to withdraw but had still not done so. Mr Georges did not

think it proper that he should stand for the respondent without Mr Lucas having first withdrawn. The Court must have been exasperated with the state of affairs characterized by the laches of the respondent – and rightly so. It proceeded to consider the submissions on the motion regardless and delivered its ruling on 6 July 2009, reinstating the case to the cause list. As it is, over seventeen months had elapsed between the dismissal date and the date for the reinstatement.

[7] The appellants have put up six grounds of appeal against the order of reinstatement. They are as follows:

> 1) The learned judge erred in entertaining the application of the Respondent, filed on 4 April 2008 to set aside a dismissal order and restore civil side 182 of 2000 to the cause list (the Application") inasmuch as the Application was bad in law and incompetent and in any event made out of time.
>
> 2) The learned Judge erred in his finding that no legal remedy was available under our laws to a litigant whose case has been dismissed for lack of representation on a date other than the date fixed in the summons, such as the Respondent, and in invoking the equitable powers of the Supreme Court to set aside his previous dismissal order and restore the Respondent's case.
>
> 3) Even assuming an equitable remedy is available in such circumstances, the Respondent was not entitled to such remedy, given its conduct in the

case, in particular its lack of diligence and chronic failure to secure the attendance of its witnesses and counsel, causing inordinate delay in the proceedings.

4) The learned judge erred in his account of the history of the case and his attribution fo the delay in the proceedings to the departure of a Judge. The case had to be reheard *de novo* not because of a change of Judge but because in 2003, (after the case was partly heard by Judge Judhoo) the Respondent joined seven (7) other defendants in the cause.

5) The learned judge erred in not considering the history of the case, including the delays, in determining the Application. If the learned Judge had properly construed and taken into account the history of the case he would have found that the delays were almost wholly the result of the lack of diligence of the Respondent in the prosecution of its case, and it is more than likely than not that the learned Judge would have come to a different determination of the Application.

6) The learned judge erred in not considering the evidence adduced and arguments submitted by the Appellants relating to the Respondents' chances of success in the main suit. Unrebutted documentary evidence adduced by the 1st Appellant in response to the Application showed that the Respondent had never existed as a legal person and as such has

> absolutely no chance of succeeding in the main suit.

[8] Mr Georges stated to us that if his appearance before the trial Court in the case had been prospective, his appearance in the present appeal relating to the same case was acquired.

[9] The appellants have combined grounds 1 and 2 together as well as grounds 3, 4 and 5. They have argued ground 6 on its own. We have gone through the written submissions of counsel for the parties, followed their oral submissions and obtained the answers we required of them in the exchanges that took place at the hearing before us.

Grounds 1 and 2

[10] On ground 1 and 2, the contention of the appellants is that the application was bad in law and incompetent and, in any event, made out of time; and that the equitable jurisdiction of the court could not be invoked as the law already provided for remedies in the case of non-appearance of parties. We agree with those submissions. The application entered was anything but known to our law of procedure. It was also incompetent and out of time. There is also merit in their argument that by invoking the equity jurisdiction of the court, the Judge erred inasmuch as there was always a legal remedy available to the respondent whose partly heard case was dismissed on the day of mention.

[11] The manner in which our procedural law provides for starting an action “en revendication” is by way of plaint with summons. It is not by way of motion. Once the day of hearing ie 19 November 2007 was past, the Court was incompetent to be seized of

that case, either on 4 February or thereafter, on a mere motion which was objected to. We have to say that the Registry of the Supreme Court should ensure that once a case has been disposed of, it should not be picked up from its archive route at the bidding of anyone and placed back on the original running court roll through the cause list or otherwise. In a number of cases which have ended up on appeal, we have noted the laxity with which cases have been brought back to some form of life from their grave by way of mere motions, with the indulgence of the court. We have noted that cases have been built upon cases built upon cases carrying the same cause number by a singular use of the procedure for motions. We would like to draw this to the attention of the Honourable Chief Justice so that this problem at the Registry, which is the nerve centre and the entry gate of the court system, be properly addressed so that no one crashes the gate to seize the jurisdiction of the Supreme Court using a procedure which is not provided for in our rules of procedure. Courts and counsel are also under a duty to ensure that the procedure for motions is properly used and not abused.

[12] To come back to this case, the Judge took the view that the plaintiff was without a legal remedy in the case. That cannot be true. Where a part-heard case has been dismissed for want of prosecution and there is no common agreement between the parties reached on the same day for it to be restored to the list of cases, it is trite law that the plaintiff may re-lodge the case, subject to the plaintiff paying the costs of the case that has been dismissed. It cannot be said, therefore, that the plaintiff in this case was without a legal remedy for the Judge to invoke the equity jurisdiction of the Supreme Court, especially where the law is clear and the interpretation is also quite clear on the matter. The argument that the respondent would have been out of time would not hold because time would have stopped

on the date of the lodging of the first case and not that of the fresh case.

[13] Sections 133 and 67 provide in no uncertain terms that the court shall dismiss the case if on the day to which the hearing of the suit has been adjourned by the court, the parties or any of them fail to appear. Section 133 reads:

> If on the day to which the hearing of the suit has been adjourned by the court, … the parties or any of them fail to appear, the court may proceed to dispose of the suit in one of the manners directed in that behalf by sections 64, 65 and 67 or make such order as it thinks fit.

Section 67 reads:

> If on the day fixed in the summons, when the case is called, the defendant appears and the plaintiff does not appear or sufficiently excuse his absence, the plaintiff's suit shall be dismissed.

[14] A plaintiff comes willingly to court but a defendant is literally "dragged" to court by the coercive order of a summons issued at the request of the plaintiff. The defendant does not come to court leaving his home or business out of joy or out of choice unlike a plaintiff. What a court should do or not do, when a plaintiff has used the Court's summons to secure the attendance of a defendant in court and he himself has the temerity of not showing up on the day without good cause, is laid down in mandatory terms in our procedural law. Law provides in no uncertain terms that "the plaintiff's suit shall be dismissed." These provisions were interpreted

by a 3-Judge bench in the case of *Petit v Bonte* SCA 9/1999. In that case, just as in the case in hand, both counsel and the plaintiff failed to appear on the day of the hearing. An application was made to set aside the judgment dismissing the plaint. The Judge granted the application. On appeal, the appeal was allowed and the order of the Judge to set aside the judgment was quashed with costs against the losing party.

[15] Nothing has changed since the decision of *Petit v Bonte* SCA 9/1999 and we find no reason to depart from that decision. The rationale behind the mandatory provision in the law and its strict interpretation lies in the court's responsibility to assume control of the judicial process under the rule of law and introduce the degree of certainty required for the courts, the profession and the litigating public.

[16] The indulgence given by the Court to Mr Lucas, both as representative of the respondent and as counsel for the respondent, was manifestly excessive and unwarranted. The respondent had literally turned the court into a circus, taken control over the pace of the case with the court being led by the nose from the very beginning. The protest on the part of appellants had been regular but unheeded. The Court was unmindful of its own responsibility in assuming effective and complete control over the process for the purpose of ensuring that court fixtures are respected and the judicial time allocated to its proper use.

[17] When the time for deciding on the motion, it does not appear to us that the Court took all the above factors into account. The Judge, instead, considered, in his ruling, various provisions of the law which the respondent could invoke in the circumstances. Of s 69 of the Seychelles Code of Civil Procedure, he decided that this

section deals with non-appearance of the plaintiff and this was a case of late appearance. On s 194(c) of the Seychelles Code of Civil Procedure, he decided that this section provided for the procedure for a new trial and in this case there was no trial as such. He mentioned ss 63–69 of Seychelles Code of Civil Procedure and ss 194–198 of the Seychelles Code of Civil Procedure without confronting the issue. Finally, he decided that he should invoke the equitable jurisdiction of the court and grant the reinstatement, commenting upon the fact that the history of the case, the repeated change of counsel, the delay and the chances of success were not matters which should influence his decision for reinstatement. We are not of this view on the facts and circumstances of this case. There were essential aspects of the proceedings which he should have taken into account, the more so in equity.

[18] We note that the Judge made a distinction between non-appearance and delayed appearance of the respondent. In actual fact, the respondent never showed up in the case so that one may hardly speak of delayed appearance. Delayed representation of prospective counsel could not be equated with the non-appearance on call of a case by the respondent. The Judge also did not deal with the interrogation mark as regards the propriety of the appearance of Mr Georges before the actual withdrawal of Mr Lucas. Yet he had been so clear in his decision on the matter on 19 November 2007. To be fair to him, he was clearer in his law on 19 November 2007 than he was in his decision on 6 July 2009.

[19] Equity will kick in only where the law is silent. In this case the law is not silent. We have shown that s 133 coupled with s 67 of the Code of Civil Procedure as interpreted in the cases of *Biancardi v. Electronic Alarm SA* (1975) SLR 193 and *Petit v Bonte* SCA

9/1999 represents the law as it stands. Interestingly, these two cases were referred to by the Judge but without proper consideration.

[20] In fact, the law as it stands can be gauged in the exchange between Mr Georges and the Court when the Court invited him to file a proper application. His reply was:

> I do not know if I can do that because the case has been dismissed so there is no case. I have to re-file and I am out of time that is the consequences of this case. It's not as if it has been adjourned sine die. It's been dismissed and my only recourse is to ask the court to reconsider its order which the court can do. Once the court rises, I am dead.

[21] The only explanation we can give to ourselves for Court and counsel to have changed their minds on the original legal and judicial position is their desire to be charitable. Mr Georges was bothering about a litigant who was little bothered about his own case and about counsel who was little bothered about his client. Likewise, the Court. We have to say that it did not help them to be "plus royaliste que le roi." They should not have bothered overly about parties who were not bothered about themselves and their own cases, unless court and counsel were minded to turn the judicial and legal practice into a charitable practice. A court of law is a court of law and justice is to be administered according to law.

[22] We accordingly hold that, on the existing case law, the Judge erred in his appreciation of the facts and the interpretation of the law. Grounds 1 and 2 succeed.

Grounds 3 and 4

[23] On grounds 3 and 4, counsel for the appellants argue that even on equitable principles, the Judge should have found that the case did not deserve a reinstatement. Again, we agree with counsel.

[24] The reinstatement was not a decision which could have been sustained. All the well-known principles of equity were confused on the facts of the case. Equity follows the law. Equity serves the diligent and not the indolent. Those who come to equity should do equity. The case is characterized by a lack of diligence, a chronic failure to secure the attendance of witnesses and counsel, scant regard to law, procedure and propriety and an abusive use of court process. The respondent has been guilty of laches. This case had been called 41 times since it was lodged in 2000. In 2009, it was still part-heard, with a couple of short hearings. Until the case was dismissed, it had already been called 32 times. The main reasons for postponement had been the respondent and counsel for the respondent. They were the cause of delay for postponements as many as 13 times.

Ground 6

[25] Counsel submitted on Ground 6 on its own. His argument has been that the chance of success in the case was an important factor because the plaintiff never existed as a legal person. Procedure is only the handmaid of justice. It should not be made to become the mistress. That is true. But, if the analogy is to be pursued, there is no handmaid if there is no mistress. In a number of cases, the courts will not look at the merits of a case for the purposes of deciding whether a mere procedural lapse should be condoned or not. The idea is not to lock the court door to a litigant but to allow him his chance, at his expense and at his risk and peril.

[26] In this sense, the Judge was right in considering recalling this principle in his decision making: see *Brisbane City Council v Attorney-General* [1979] AC 411. The rule to close the door of the court to a litigant:

> … ought only to be applied when the facts are such as to amount to an abuse; otherwise there is a danger of a party being shut out from bringing forward a genuine subject of litigation.

[27] However, where he erred was where he failed to investigate further for the purposes of ensuring that the case fell, considering its particular nature, on one side of the line or the other. The court becomes a vehicle of unjust outcomes in the hands of those who advertently or inadvertently abuse the justice system. Organized society in a democratic set-up needs a minimum of discipline which, for all the rights and liberties guaranteed, goes to secure the rule of law on sure foundations. Abuse of process was developed by the courts to protect the judicial process from abuse and misuse. Courts have a duty to intervene to put a stop to such misuse of legal and judicial process: see *Bradford & Bingley Building Society v Seddon* [1999] 1 WLR 1482; *House of Spring Gardens v Waite* [1990] 2 All ER 990; and *In Re Norris* [2001] 1 WLR 1388; *Gomme v Morel* SCR 06/2010**.** There was a duty on the Judge to look beyond.

[28] Another of the up-front issues he should have considered is the very legal personality of the respondent. That threshold issue had been raised from the very beginning of the case. Serious doubts lingered on without the respondent having adduced evidence in the case. Was the respondent Film Ansalt? Film Prod Ansalt? Croninvest Establishment? As at 4 October 2006, there was no firm Film Ansalt by name registered in the Liechtenstein Public Register;

nor, as at 13 June 2007, Film Ansalt Company or Ansalt Film. An amendment had been proposed to set the record right on 7 November 2007. No motion had yet been made. The applicant was a foreign company. It was registered in Liechtenstein and its legal personality was still in grave doubt without the respondent having yet clarified it.

[29] Counsel also argues imaginatively that the decision on the day when he appeared to move for reinstatement amounted to a mere suspension of the order for dismissal so that the Court gave him a lifeline to pursue his motion for restoration. He relied on s 150 of the Seychelles Code of Civil Procedure. We have dealt with this aspect above. We do not consider this to be a valid argument inasmuch as s 150 provides for an alteration, variation or suspension of its judgment or order "after hearing both parties" and "during the sitting of the court at which such judgment or order has been given." Neither of these conditions was satisfied in the case.

[30] In the light of the above, we reverse the decision of the Supreme Court. To allow the decision to stand in the name of justice of the case would be to do injustice to the very idea of justice. It would be tantamount to a court:

a) condoning levity on the part of a litigant and his counsel in the conduct of their case;

b) encouraging them to assume control over legal and judicial process;

c) abdicating and surrendering its responsibility over court process to parties and counsel, any of whom could thereby hold everyone else to ransom by a strategic use.

This is not a comment on the conduct of Mr Georges who even if not briefed put up a brave fight in trying to flog a dead horse before the trial court and before us on the lifeline as he stated afforded to him by the mention date given to him by the Court on 19 November 2007.

[31] This appeal is allowed. We set aside the decision of the Judge to reinstate the case and we substitute thereof the following order. The case subject-matter of the present appeal stands irrevocably dismissed as at the date of 19 November 2007. With costs.

Hoareau v Hoareau

MacGregor PCA, Fernando, Msoffe JJA

3 May 2013 SCA 37/2011

Matrimonial property – Quantum

After the parties' marriage broke up, the Supreme Court made an order for the settlement of the matrimonial property acquired and held during marriage. The wife appealed the amount awarded.

JUDGMENT Appeal allowed in part – wife's share raised from 15 percent to 30 percent.

HELD

1 In deciding on the share to which each party is entitled, the court must not only look at the financial contributions of the parties but at all the circumstances surrounding the acquisition, development, and maintenance of the property as well as other indirect contributions which the family explicitly or impliedly intended during the subsistence of the marriage.

2 The court should seek an award that will ensure that one party is not put at an unfair advantage in relation to the other and to enable the maintenance of a fair and reasonable standard of living which is commensurate with or near to the standard the parties had before the dissolution of the marriage.

Legislation
Matrimonial Causes Act ss 20, 21, 24

Cases
Chetty v Emile SCA 11/2008
Renaud v Gaetan SCA 48/1998

Counsel L Pool for the appellant
N Gabriel for the respondent

The judgment was delivered by
MSOFFE JA

[1] The parties were wife and husband, respectively, having married at the Civil Status Office in Seychelles on 26 December 1996. The marriage was blessed with one issue, Darius Joseph Hoareau who was born on 11 April 1997. In the course of the marriage they acquired a plot of land Title S6693 whereon a house was built presumably with the intention of making it their matrimonial home. Unfortunately the marriage did not last long. On 21 November 2007 a decree nisi was issued. The marriage was eventually dissolved by a decree absolute issued on 5 March 2010. Following the decree of divorce the petitioner filed an application in the Supreme Court for settlement of matrimonial property acquired and held during the subsistence of the marriage. In a carefully written, properly analyzed and well thought-out judgment, the Supreme Court (Dodin J) looked at the evidence, addressed itself to the applicable law thereby citing a number of authorities, and finally held, inter alia, as follows:

> In the final analysis therefore I conclude that the petitioner should not be entitled to more than a 15 percent share in the matrimonial property based on its value which I calculate to be Rs 276,000 being the cost of the land at Rs 63,000 plus the loan of Rs 225,000 taken and after deducting Rs 12, 000 which the respondent still has to pay. The respondent is entitled to 85 per cent share and should complete payment of the outstanding balance of the loan.

> I therefore calculate the Petitioner's share in the property to be Rs 41,400 which she has earned by her very minimal contribution to the maintenance of the family by her presence during the period of the marriage to date. I calculate the Respondent's share at Rs 234,600 reflecting his overwhelming contribution to all aspects of construction and maintaining the property and the family for the duration of the marriage to date.
>
> As both parties wish to purchase the share of the other party, I also find that the investment of the Respondent in the property is such that it would be unfair to accede to the petitioner's prayer to purchase the Respondent's share. Instead I would grant the Respondent's prayer to purchase the share of the Petitioner by making full payment thereof within 6 months of today failing which the Petitioner shall then have the option to purchase the Respondent's share within the next 6 months. Upon payments of the full share of the Petitioner the Petitioner shall move out of the house not later than 6 months from today. The same condition shall apply to the Respondent in the event of payment by the Petitioner at the expiration of 1 year from today. If neither party has fully paid for the shares of the other at the expiration of the period given, the property shall be sold by auction by the Court and the proceeds shall be apportioned according to this judgment.

[2] In the notice of appeal there are four grounds which read as follows:

> 1) Having correctly set out the law and principle governing the division of matrimonial property, the

Learned Judge misapplied the law and principle to the facts of the appellants' case.

2) The finding of the Judge that the petitioner's claim for a share in the matrimonial property based solely on the fact that she was married to the respondent at the time the property was acquired is contrary to the evidence adduced and a failure on the part of the said Learned Judge to take into consideration all the circumstances of the case.

3) The Judge was wrong to hold that there was a lack of will on the part of the appellant to contribute to the matrimonial home when there was overwhelming evidence of the appellant's contribution both in monetary terms and kind.

4) The Judge's decision refusing the appellant's prayer to purchase the respondent's share within six months from the date of judgment was biased and unfair in all the circumstances of the case.

[3] In essence this is an appeal against the quantum awarded to the appellant by the Supreme Court. Indeed, all the above grounds of appeal crystallize on this major ground of complaint. It is the appellant's general view that the relief granted to her is on the low side. It is for this reason that she is asking this Court to make an order that she is entitled to a half share in the matrimonial property, that she be allowed to buy the respondent's share in the property, and the respondent be ordered to vacate the matrimonial house.

[4] The crucial question in this appeal is whether there is basis for us to interfere with the decision of the Supreme Court.

[5] As conceded by the appellant in the first ground of appeal, the Judge properly addressed himself to the law and principle governing division of matrimonial property.

[6] In Seychelles the law relating to a case of this nature is governed by ss 20 and 21 of the Matrimonial Causes Act 1992. Section 20(1) of this Act is the key provision on the division of matrimonial property and it reads:

> Subject to section 24, on the granting of a conditional order of divorce or nullity or an order of separation, or at any time thereafter, the Court may, *after making such inquiries as the Court thinks fit and having regard to all the circumstances of the case, including the ability and financial means of the parties to the marriage-*
>
> a) order a party to a marriage to pay to the other party … such periodical payments for such period, not exceeding the joint lives of the parties, as may be specified in the order;
>
> b) pay to the other party or to any person for the benefit of the other party such lump sum in such manner as may be specified in the order;
>
> c) secure to the satisfaction of the Court a payment referred to in paragraph (a) or paragraph (b);
>
> d) order a party to a marriage to pay to any person for the benefit of a relevant child such periodical payments for such period as may be specified in the order;

e) order a party to a marriage to pay to any person for the benefit of a relevant child such lump sum as may be specified in the order;
f) order a party to a marriage to secure to the satisfaction of the Court a payment referred to in paragraph (d) or paragraph (e);
g) make such order, as the Court thinks fit, in respect of any property of a party to a marriage or any interest or right of a party in any property for the benefit of the other party or a relevant child. [Emphasis added]

[7] In our view, the words "and having regard to all the circumstances of the case" in the above provision are very important. We say so because ultimately each case has to be decided on the basis of its own facts. This is so because all cases are not the same. The facts and circumstances surrounding one case may not necessarily be the same as the other.

[8] The law is settled that in deciding on the share that each party is entitled to, the court must not only look at the financial contributions of the parties but all the circumstances surrounding the acquisition, development and maintenance of the property as well as other indirect contributions which the family explicitly or impliedly intended during the subsistence of the marriage. This is the view which was also expressed by this Court in *Chetty v Emile* SCA 11/2008 − a case which was also cited by the Judge in his judgment which is the subject of this appeal.

[9] Of equal importance is the principle discerned from this Court's decision in *Renaud v Gaetan* SCA 48/1998 – a case which was also cited by the Judge where the following passage is relevant:

> The purpose of the provisions of the subsections is to ensure that upon dissolution of the marriage, *a party to a marriage is not put at an unfair advantage in relation to the other*, by reason of the breakdown of the marriage and as far as possible, *to enable the party applying to maintain a fair and reasonable standard of living, commensurate or near the standard the parties have maintained before dissolution.*
>
> [Emphasis added]

[10] The case of *Renaud v Gaetan* (supra) contains an aspect which is sometimes forgotten by courts when dealing with a case of this nature. Sometimes the tendency is to look at the contributions made in monetary terms only. It is important not to forget to ensure that a party is not put at an unfair advantage. In the process, the court should try, as far as possible, to come up with an award that will enable the other party to maintain a fair reasonable living which is "commensurate or near the standard" the parties were maintaining before the dissolution of the marriage. We know and appreciate that this is not an easy task but courts should keep on trying so that the wider goal of ensuring that one party is not put at an unfair advantage in relation to the other is achieved.

[11] In this case, the Judge made the necessary inquiries. In the process, he addressed himself to the evidence that the appellant was instrumental in the purchase of the land parcel S6693. All the monetary contributions towards the purchase and construction of the

house were made by the respondent. That as far as the running of the household was concerned the evidence shows that the respondent contributed far more than the appellant mainly because of the large disparity in the incomes of the parties and the erratic employment record of the appellant. Then he opined that the appellant's claim for a share in the property is based solely on the fact that she was married to the respondent and her presence in the matrimonial household as mother and wife, respectively.

[12] In principle, we have no serious quarrel with the findings and conclusions by the Judge in the matter before him. He did the best he could in arriving at a fair decision. However, in the circumstances of the case we still think that the appellant was entitled to something slightly more than what she got. We say so in view of certain facts in the case which were not seriously disputed. In terms of exhibit P2 the property is in the names of both parties. Further, under exhibit P3 the loan of R 225,000 towards the construction of the property was given in the names of both parties. It is not easy to believe that during the construction of the house, which took three years or so, and the eventual upkeep of the same, her contribution was almost nil. There is at least some evidence that she bought furniture including curtains and other stuff for the house. She also did some domestic chores that a wife would normally do like cooking, cleaning, looking after the house and taking care of the child, etc.

[13] At the hearing the respondent told us that he is willing to increase the respondent's share in the matrimonial property from 15 percent to 25 percent. This was no doubt an important gesture in the advancement of justice in the matter for which the respondent should be commended. We also learnt that the respondent has so far been

paid a sum of R 41,400 ordered by the Supreme Court towards the appellant's share in the property. We were also told that the appellant is currently employed as a personal secretary in the Ministry of Health where she is earning a net salary of R 3,800 per month.

[14] In the end, given the facts and the overall circumstances of the case, we are of the considered opinion, and accordingly so order, that the appellant is entitled to 30 percent as her share in the matrimonial property which we calculate at R 82,800. Since the appellant has already paid R 41,400 the remaining sum should be paid to the respondent within a period of three months from the date of this judgment. We hope that the total sum of R 82,800 will somehow help her in maintaining a fair and reasonable living commensurate or near the standard she was maintaining before the dissolution of the marriage. Thus, we allow the appeal to the above extent only. The appellant shall have the costs of this appeal.

Mancienne v Ah-Time

Domah, Fernando and Msoffe JJA

3 May 2013 SCA 9/2009

Encroachment − Illegal construction

The Supreme Court ordered the appellants to quit the respondents' property that the appellants had encroached upon. The appellants argued that the Court erred in failing to recognise the respondent's evidence which proved that the structures were built prior to the purchase of the property by the respondents and also that the respondents had given the appellants the consent to build.

JUDGMENT Appeal dismissed.

HELD

1 The only limitation on the right of private ownership of property is that it can be compulsorily acquired by specific law, through a specific procedure and for a public purpose. This is the rationale behind the rule that demolition of an encroachment is the proper order to be made.

2 When owners are carrying out new works along or near the boundary of their properties, they are under the duty to ensure that they comply with building regulations and with boundary lines.

3 A breach of contract may be remedied by specific performance, but the remedy for a breach of promise of sale is damages.

4 Specific performance is a discretionary equitable remedy in equity. Anybody who seeks equity should do equity.

5 The burden of demolition lies with the author of the illegality not the victim of the illegality.

6 When the facts reveal that a demolition order would be oppressive in the sense that a grave injustice would occur if the order was made, taking into account the negligible extent of the encroachment compared to the gravity of the hardship to the encroacher, the court should as an exception mitigate the consequences by an award of damages instead of demolition.

7 The statement of principle in *Nanon v Thyroomooldy* is affirmed.

Legislation
Civil Code arts 545, 555, 1382–3
Commercial Code art 54
Land Registration Act

Cases
Herminie v Francois SCA 21/2009
Nanon v Thyroomooldy SCA 41/2009
Seychelles Housing Development Corp v Vadivello SCA 13/1999
Captain and others of various Fishing Vessels, Moscow Narodny Bank (Intervener) SCA 23/1997
Akbar v R SCA 5/1998

Foreign legislation
Mauritius Civil Code arts 16, 17

Counsel D Sabino for the appellants

S Rouillon for the respondents

The judgment was delivered by
DOMAH JA

[1] This appeal is against a decision of the Supreme Court which, in an action where the respondents (the Ah-Times) sued the appellants (the Manciennes) for encroachment and illegal constructions on their land, gave judgment in favour of the respondents. The Judge ordered the appellants to quit, leave and vacate that part of the property which he found the appellants had encroached upon: namely, part of the driveway and dwelling house of Yola Ah-Time comprising also the laundry and the brick wall; part of the dwelling house of Antoine Ah-Time comprising sewage pipe, septic tank, flight of steps, retaining wall and part of the carport with pillars supporting part of the storey of his house. The Court gave the appellants three months from the date of judgment to comply with the removal of the structures at their expense. The Court also ordered the appellants to pay damages to the respondents in the sum of R 150,000 as prejudice suffered by the latter in the circumstances.

[2] The appellants had also, in a counter-claim against the respondents, moved for the specific performance of two agreements they had entered into as regards the sale of the respective subdivisions of the properties which comprised the abovementioned structures which the respondents had agreed to sell and the appellants had agreed to buy from the respondents. The Judge had found the counter-claim based on a promise to sell the respective properties proved, the breach of which entitled appellants to R 50,000 damages which he ordered the respondents to pay.

[3] The Manciennes have appealed against the judgment on the following 8 grounds:

1) The Judge erred in failing to recognize evidence from the respondents which proves that the structures of the appellants were constructed prior to the purchase of Title V8279 by the respondents. This would show that the respondents had notice of the structures and are not bona fide purchasers of the title.

2) The Judge failed to recognize evidence from the respondents themselves that illustrate that they gave the appellants consent to build. This is further proved by the respondents admitting to entering into a promise for sale agreement with the second appellant, which the Judge found was a valid agreement; and negotiations to enter into a promise for sale agreement with the first appellant, which although the Judge found this was not a valid agreement, he found that negotiations did take place, which prove consent to build.

3) The Judge erred in awarding damages to the second appellant against the respondents for breach of the promise for sale agreement. As specific performance is still possible, he should have ordered for such.

4) The Judge erred in awarding moral damages to the respondents. The Judge stated that the respondents were inconvenienced by being unable to construct a building project due to the encroachments, but the first respondent admitted in court that her planned

project was made only after this suit was filed before the Supreme Court and that the project had not been granted planning permission.

5) The Judge erred in stating that the appellants should pay for the demolition costs. If such structures have to be demolished it is the respondents who should pay given that they had allowed the appellants to build on the land.

6) The Judge erred in failing to consider the appellants defence of promissory estoppel in his judgment.

7) The Judge erred in ignoring the evidence of the respondents' land surveyor who stated that the road to the second defendant's land is a road reserve. As such, it cannot be an unlawful encroachment.

8) The Judge erred in failing to recognize that the road leading to the first defendant's land has been in use by the inhabitants of the area for over 20 years and as such, the respondents are prescribed from praying for its demolition.

[4] The Ah-Times have cross-appealed against the judgment on the following 5 grounds:

The Judge erred in accepting the counter-claim of the appellants –

a) in finding that the cross-appellants had breached the agreement with the "first defendant" then finding that the "second defendant" was entitled to be repaid

Seychelles Rupees Twenty Five Thousand and moral damages.

b) in not taking into account that the respondents had used the deposit as agreed to have a survey of the property carried out to have it subdivided and the evidence that the survey could not be completed purely because of the illegal encroachments by the appellants.

c) in not accepting that the second appellant was the one who breached the parties' agreement by approaching the Ministry to have land taken away from the respondents rather than putting the respondents on notice to perform the parties' agreement.

d) in not taking into consideration the fact that the second appellant made no attempt whatsoever to complete the sale and the evidence and the pleadings reveal (especially the very late attempted counter-claim) that he had no intention of going ahead with the parties agreement.

e) in not having the agreement of the parties registered under the Land Registration Act CAP 107 and failing to finalize the sale when he knew exactly the portion of the land he was to purchase from the survey carried out for that purpose the second appellant clearly showed he had no intention of going ahead with the parties' agreement or to attempt to obtain any interest in the land of the respondents.

[5] The respondents, therefore, move that the order made for payment by the respondents of damages in the sum of R 50,000 to the appellant or the appellants (we address this discrepancy later) be set aside and that the order for costs be amended to read "costs in favour of the plaintiffs."

[6] Parties were given time to resolve their differences amiably, to no avail. It is our sincere hope that the proposed law relating to mediation will provide the conditions, incentive and logistics necessary so that parties in a civil action make good use of this alternative dispute resolution system to settle their dispute swiftly, cheaply and to the satisfaction of all the stake holders involved. We would wish to sound a note of caution, though. It is our considered view that the system will deliver effectively only if the legal profession is properly trained in mediation practice. The Bar Council should ensure that this is so because the concepts, the rules, the methods, the approach and the skills required are way apart from those in litigation. Litigation practitioners are ill-formed and equipped, unless properly exposed, to undertake mediation. The new learning in this specialist legal discipline now widely used in commercial practice may be acquired easily within a day by the legal fraternity.

[7] We shall now proceed to deal with the issues that this appeal raises. As we see the grounds of appeal (grounds 1, 2, 3, 4 and 5) and those of cross-appeal (grounds a, b, c, d, and e) have to do with facts. We have gone through the proceedings, in the light of the pleadings and the submissions of counsel both before the court below and in the skeleton arguments before us. Subject to what we say in the cross-appeal, we are unable to say that the conclusions reached by the Judge on the facts are flawed. Indeed, the Judge made it a point

to effect a "descente de lieu" for a real life appreciation of the facts as presented in evidence before he made his findings and his orders. He heard the witnesses. We did not. He observed their demeanour. We can only read the transcript in a dispute where the parties are mutually blaming one another for their contentions: *Captain and others of Various Fishing Vessels, Moscow Narodny Bank (Intervenor)* SCA 23/1997; *Akbar v R* SCA 5/1998.

a) We, accordingly, endorse the following findings of fact by the Judge: that there is encroachment:

b) by the first appellant who has built part of his driveway, part of his dwelling house, a laundry and raised a brick wall on the property of the respondents;

c) by the second appellant who has constructed part of his dwelling house, laid the sewage pipe and the septic tank on the property of the respondents;

d) by the second appellant who has constructed a flight of steps, part of a retaining wall and part of a car port with pillars supporting part of the storey of his house, on the property of the respondents.

[8] Counsel for the appellants main contentions in this appeal are two: That the order of demolition should be reversed and specific performance should be ordered for the purpose of giving effect to the promise of sale which the Court found had been breached. While the respondents blame the appellants for the project of subdivision and sale that aborted, the appellants are blaming the respondents. The crucial issue before this Court is whether there may be exceptions to

the principle enshrined in art 545 of the Seychelles Civil Code that demolitions should be ordered for boundary encroachments.

[9] In fact, this Court dealt at some length with this aspect of the question in the case of *Nanon v Thyroomooldy* SCA 41/2009. We hardly find any need to add to what Hodoul JA, stated there, except perhaps by way of further elaboration. The Court of Appeal gave judicial endorsement to the authoritative pronouncement of ex-Judge Sauzier, reputed jurist of long experience on Seychelles law, more particularly civil law, in an address to the Bar Council.

[10] We reproduce the position of our law post-*Nanon* on encroachments, more particularly boundary encroachments as between neighbours:

1) If one builds on someone else's property a structure which *entirely* stands within the boundaries of that property, it will be art 555 of the Civil Code of Seychelles under which the fate of the structure and the indemnity, if any, to be paid will depend.

2) However if one builds *partly* on one's property and the structure goes over the neighbour's boundary encroaching on his land, art 555 finds no application.

3) In such a case, the neighbour can *insist* on *demolition* of that part of the construction which goes over the boundary and the Court must accede to such request and cannot force the neighbour to accept damages or compensation for the encroachment.

4) The fact that the encroachment was done in good faith or brought about by mistake as to the correctness

of the boundary would have no effect on the Court's duty to order demolition: see Cour de Cassation, D1970.426 (Civ 3º, 21 no. 1969); "Grands Arrêts de la Jurisprudence Civile" by Henri Capitant for French law; *Tulsidas & Cie v Cheekhooree* 1976 MR 121; *Boodhna v Mrs R R Ramdewar* 2001 MR 116; *Lowtun v Lowtun* 2001 Int Court 1; *Thumiah Naraindass v Thumiah Avinash Chandra* 2009 Int Court 82, for Mauritian law; article 992 of the Civil Code of Quebec and *Micheline Pinsonnault v Maurice Labrechque* [1999] R.D.1 113 (C.S.) cited in *Boodhna v Mrs R R Ramdewar* [supra] for the law of Quebec.

5) But where grave injustice may result in certain exceptional cases: for instance, for a small area of land encroached upon, part of a huge building would have to be demolished causing damage out of proportion to the value of the land encroached upon, the justice of the demolition will have to be tempered with mercy.

6) In such a case, the encroacher would need to show additionally that he acted in good faith, within the rules of construction, did not otherwise break any law and the demolition would cause great hardship.

7) In such a case, the Court would not order demolition and would allow damages and compensation commensurate with the extent of the encroachment.

> 8) Where the owner of the land insists on a demolition order in such a case of grave injustice, the encroacher may plead abus de droit as against the owner and insist on compensating him in compensatory damages for the encroachment.

[11] The decision of *Nanon* goes on to explain the reason why demolition is the rule. Any lesser sanction would fly in the face of art 545 of the Civil Code which provides:

> No one may be forced to part with his property except for a public purpose and in return for fair compensation.

[12] The adoption of a rule awarding damages in place of ordering demolition for boundary encroachments would at once be contrary to the provision of art 545 of the Civil Code and violate the constitutional principle of private ownership of property in a democratic society. It would also set in motion a law of unintended consequences. Article 545 would become a charter of mischief in the hands of persons who may be tempted to make an abuse of it. For then, an adjoining land owner by design would be able to force his unwilling next-door neighbour to part with a strip of land along the boundary line against the payment of mere damages. The only limitation to the right of private ownership of property is that it can be compulsorily acquired by a specific law, through a specific procedure and for a public purpose. That is the rationale behind a rule that demolition should be the order of the day. Not even good faith or mistake on the correctness of the boundary would constitute a bar to the law's diktat to require demolition in boundary encroachments and the Court's duty to order same.

[13] However, if pushed to the extreme, there may be cases where for a small area of land encroached upon, part of a high rise would have to be demolished with consequences out of proportion to the value of the land encroached upon, if such an encroachment has come about in good faith and the encroacher is otherwise compliant with the law. It was to mitigate the rigours of an indiscriminate application of the rule that a number of foreign jurisdictions have developed the concept of abus de droit. Some have done it by judicial creation and some by legislative intervention.

[14] The doctrine of abus de droit in Mauritius is not of judicial creation as in some other jurisdictions but based on arts 16 and 17 of its Civil Code, imported from the "Projet de Code Civil du Québec.". Article 17 reads as follows:

> Nul ne peut exercer un droit en vue de nuire à autrui ou de manière à causer un prejudice hors de proportion avec l'avantage qu'il peut en retirer.

[15] In Seychelles, the serious need to temper justice with mercy in this area of the law was long felt. The dire need arises out of grass root realities in the exiguity of its land mass as an island and its antiquated and historical system of land use, ownership and occupation. While it is true that a lot of effort is being deployed to demarcate properties properly, a lot is yet to be done with respect to families who have lived in communities and bothered little about land demarcations any more than they had hitherto bothered about their social and family demarcations. When official documents are drawn up ex post facto and from offices to excise and demarcate properties, they pay scant regard to historical realities on site which only family and community memories can vouch for. As Hodoul JA, stated in *Nanon v Thyroomooldy* many land surveys are carried out

without reference to established base lines. He repeated the example given by ex-Judge Sauzier: namely, if art 545 were applied in all its rigour, it is not inconceivable that one side of Victoria House may have to be pulled down on account of a few inches of encroachment on the boundary of Temooljee's complex. The only consolation we may have in this matter is that, after 20 years, any action will be time-barred by acquisitive prescription. But there are many lesser examples in day-to-day life, not less dramatic, which comes to court and which have bedevilled owners and practitioners alike as in *Herminie v Francois* SCA 21/2009.

[16] This Court in *Nanon* has attempted to bridge a gap in our law so as to bring our jurisprudence in line with what obtains in this area in comparable jurisdictions. It has done so by developing further - to art 545 of the Civil Code - a doctrine of abus de droit which already exists in our law: namely, art 1382-3 of the Seychelles Civil Code and art 54 of the Commercial Code, labour law etc, largely influenced by the dire need of the particularities of our social and historical set up and the insight of Sauzier, ex-Judge.

[17] Post-*Nanon*, the exception to the rule that demolition should be ordered in all neighbour boundary encroachments may be stated to be as follows:

> where the facts reveal that a demolition order would be oppressive in the sense that a grave injustice would occur if the order was made, account taken of the negligible extent of the encroachment compared to the gravity of the hardship to the encroacher, the Court should, as an exception mitigate the consequences by an award of damages instead of a demolition. Nothing short of that would suffice. For

> the encroacher to escape the guillotine of article 545, he should show that, in refusing a compensation for the negligible encroachment and insisting on a demolition order in all the circumstances of the case, the owner is making an abus de droit.

[18] Now that we have formulated the law, we may look at the facts of this case. The extent of the encroachments is not negligible in either case. Most of the constructions may be conveniently de-constructed and restored to the position of *status quo ante*. Counsel for the appellants argue that there is a column which if removed, the whole structure of the house would collapse. As a lawyer, he is entitled to assume so. But it takes a civil engineer to prove the contrary in this small structure of a building which is not a big complex. It is possible to move, replace and substitute columns today more easily than before. There would be a lot of inconvenience, admittedly. But no hardship to the appellants would ensue other than that which they have brought upon themselves. Above all, there is evidence that the authorities have not given their green light for the proposed subdivisions on account of the encroachments. Their compliance with the law is in serious issue. For these reasons, therefore, art 545 is applicable and a demolition order is justified. Accordingly, Grounds 1-5 in the action brought by appellants against the respondents should only relate to the question of damages.

Grounds of appeal on the claim of the appellants v the respondents

Ground 1

[19] On ground 1, the appellants claim that the structures existed before the respondents purchased title V8279 and that the

respondents had notice of the structures. That may be true but the Judge visited the site and found the constructions to be new. We have looked at the photographs as well. We take the view that the appellants failed to ensure that whatever new works were undertaken with respect to their building did not extend beyond the boundaries of their properties. This is not a case of an ex post facto discovery that property A encroaches on property B. That the respondents only came later is not an answer to the rule laid in art 545 of the Civil Code. When owners are carrying new works along or near the boundary line of their properties, they are under a duty to ensure that they comply with building regulations and with boundary lines.

Ground 2

[20] Under Ground 2, the appellants claim that they had the consent to build. They argue that this can be inferred from the promise of the sale agreement and the fact that a number of concrete steps had been taken by the respondents in favour of the transfer of the property. That did not stop the appellants from obtaining a written consent to build beyond the boundary line. As rightly remarked by the Judge, negotiation for the sale of the property did not include a consent to construct. Whatever the appellants did, they did at their risk and peril.

Ground 3

[21] On Ground 3, the question is whether the Judge was ultra petita in awarding damages which had not been claimed in the counter-claim. The appellants in their cross-petition had moved for specific performance of the contractual obligations entered into. The Judge awarded the sum of R 25,000 for breach of contract instead.

[22] It is the case of the appellants that they did not ask for damages and the Court did state that the agreement was a valid agreement so that they should have been entitled to specific performance. The appellants contest this argument. We sought the finding of the Court on this particular aspect of the case.

[23] The question we asked was:

> Whether this Court would conclude that, in the absence of a claim for damages by the Manciennes, which remedy was granted ultra petita, it would or it would not have granted specific performance of the contract as a remedy in the light of the fact that he found as a fact that there was a breach of the promise of sale.

The answer we obtained has been that:

> I would under no circumstances have granted, as a remedy, specific performance of the promise of sale even though I had found as a fact that there was a breach of that promise of sale.

[24] We agree with him for the reasons he gave, based on the facts of which he was the sovereign Judge. As regards the law, a breach of contract, in certain circumstances, may be remedied by a specific performance. But the rule with regard to a breach of promise of sale is damages.

[25] Besides as rightly pointed out by counsel for the respondents, specific performance is a discretionary remedy in equity. Anybody who seeks equity should do equity. The facts show that the appellants took reckless risks in carrying out their

constructions, without properly ascertaining their boundary line before raising the new structures. The activity of the appellants was not one of staying put on an existing encroachment but of raising new constructions without basic precautions of fact and law. The duty to ascertain the boundaries of one's property before one raises new constructions of the nature they have embarked upon is a minimum precaution.

[26] It was also argued by the respondents that the appellants were not entitled to damages. We disagree. The damages were granted for an act independent of the illegal construction. It was for a breach of promise of sale as the Judge explains. In the circumstances, it is our view that the damages were justified and R 50,000 is an adequate sum.

Ground 4

[27] This ground questions the award of moral damages. Whether the first respondent had plans or did not have plans for the construction is of no consequence. The fact remains that there was an encroachment by new constructions. The mere fact of a neighbour beginning new constructions extending beyond the boundary line of his property is inherently prejudicial. It saps the morale of the adjoining owner who suffers the physical interference on a continuing basis until demolition. He is entitled to moral damages.

Ground 5

[28] We have addressed the issue of who bears the brunt of the illegality above. We need not add more. The appellants had proceeded with the constructions at their risk and peril. The party on

whom the burden of demolition lies is the author of the illegality and not the victim of the illegality.

Ground 6

[29] Once again, we have stated the law with respect to art 545 of our Civil Code. The issue of promissory estoppel which is an equitable remedy would not apply for the same reasons that specific performance may not be ordered.

Grounds 7 and 8

[30] If it is the contention of the appellants that the encroachment is on a road reserve and for that reason it cannot be an encroachment, that is a contradiction in terms. It may not be an encroachment on the respondents' property, but it remains an encroachment nonetheless. And if it is the appellants who have done so, they have to remove the same. As regards whether the road has been in use for over 20 years by the inhabitants of the locality, that is a matter which only the authorities concerned may look into. It is not for the appellants to be concerned with this issue which concerns others.

The appeal on the counter-claim of the appellants v the respondents

Ground (a)

[31] In the award of damages to the appellants, the decision of the Judge was as follows:

> I find that the 1st Defendant had an agreement with the plaintiffs, which agreement I also find breached by the plaintiffs, and the 2nd defendant/counterclaimant is therefore entitled to judgment for the sum paid, that is SR25,000.00 and

> moral damages which I assess at SR25,000.00. I hereby award the 2nd defendant/counterclaimant the total sum of SR50,000.00 as against the plaintiffs jointly and severally.
>
> I award half of the taxed cost to the Plaintiffs against the 1st Defendant and a quarter of the taxed costs against the 2nd Defendant. The plaintiff shall forfeit a quarter of the taxed costs to the 2nd Defendant/Counter claimant.

[32] It is the contention of the cross-appellants that the Judge erred in accepting the counter-claim of the appellants in finding that the cross-appellants had breached the agreement with the "1st defendant" then finding that the "2nd Defendant" was entitled to be repaid R 25,000 and moral damages.

[33] Indeed, the Judge does not expatiate on the reasons for an order which, on the face of it, looks discrepant. But his mind can be read from the state of evidence and his earlier findings. We attempted to reconcile the tenor of the judgment and his reasoning with the facts of the case. Our reading is that in the first sentence he was referring to the second appellant when he erroneously mentioned "1st defendant." The mention of the first defendant is to us clearly a typing mistake. We, on appeal, are entitled to correct that: *Seychelles Housing Development Corp v Vadivello* SCA 13/1999. In any case, our own conclusion is that the first appellant was not entitled to any award in damages inasmuch as he had not deposited any sum, unlike the second appellant who had made a deposit of R 25,000. The first appellant had himself walked out of the agreement seemingly awaiting the second appellant's negotiation with government for a better deal. Accordingly, he was not entitled

either to the return of any deposit or to moral damages, unlike the second appellant.

[34] In view of the above, we amend the judgment to bring it in line with the evidence as found by the Judge as follows. We order the respondents jointly and *in solido* to pay to appellant no 2 the sum of R 50,000 comprising R 25,000 as the sum paid and R 25,000 as moral damages.

Grounds (b), (c), (d) and (e)

[35] Grounds b, c, d and e are primarily an appreciation of fact by the Judge. Our reading of the judgment is that the Judge did take into account the many factors which were to influence his decision. It was in evidence that the promise of sale was aborted because of the conduct of the appellant no 2 who began to negotiate on his own with government. If his argument is that the price he had agreed to pay was extortionate, he should have in good faith broached the matter with the respondents rather than sought a deal behind their back. The law is well settled that the appellate court will interfere with a lower court's decision on facts if the Judge of first instance (a) misdirected himself on matters of principles; or (b) failed to take into account important matters, or look into matters that he should not have; or (c) made a decision that was plainly wrong or wholly unreasonable: see *Captain and others of Various Fishing Vessels, Moscow Narodny Bank (Intervenor) SCA* (supra); *Akbar v R* (supra).

[36] The other grounds of challenge of the findings of the Judge are that the appellants were more credible, more honest and more truthful. We have looked at the instances identified in the written submissions. For example, the dispute on the cadastral plan whether it was P10 or D4. This was a collateral matter. The real issue was

what caused the respondents to put an end to the project of subdivision and sale.

[37] As correctly surmised by the respondents, the appellants could have shown their seriousness by putting the respondents on notice to perform the parties' agreement. The evidence does seem to suggest that the appellant no 2 made no attempt whatsoever to complete the sale. The evidence and the pleadings reveal (especially the very late attempted counter-claim) that he had no intention of going ahead with the parties' agreement. The submission of counsel for the respondents also makes sense that the appellants could have shown their seriousness by a timely registration of the agreement under the Land Registration Act.

[38] We are unable to say that the conclusion reached by the Judge on the real issue was not justified. The real issue was whether the appellants had authority to encroach. His finding was as follows:

> the Defendants did not have and do not have legal authority from the plaintiffs to carry any constructions on the property of the latter. There is no evidence, be it oral or in writing, impliedly or tacitly, that the Plaintiffs at any time authorized the Defendants to carry out any construction works, as they did, on their property.

[39] As regards the issue whether the encroachment was prior to the material date or after, the Court had this to say:

> I am satisfied on the basis of evidence before me, that none of the material works so carried out by the

> defendant were in existence before the Plaintiffs purchased their property.

[40] On this matter, it would be good to state that the encroachment the Court is referring to is not whatever previous encroachment might have occurred prior to the respondents' acquisition of the property but the recent encroachment by the "material works … carried out" on site.

[41] For the reasons given above, we hold that the respondents are entitled to their remedy when the Court ordered them to remove all buildings and constructions from the land title V8279, these being:

With respect to the first appellant, to the extent of the encroachment:

a) part of his driveway;

b) part of his dwelling house;

c) his laundry and the brick wall.

With respect to the second appellant, to the extent of the encroachment:

a) part of his dwelling house;

b) the sewage pipe, the septic tank, the flight of steps;

c) part of the retaining wall; and

d) part of his carport with pillars supporting part of the storey of his house.

[42] We allow three months from the present judgment for the appellants to comply with the above orders at their own expense.

[43] Account taken of the hassles that the respondents have undergone as found by the Judge, we do not find the award of damages for the fault committed excessive. He gave R 150,000 for same. We confirm this amount.

[45] We order the respondents to pay to respondent no 2 the sum of R 50,000 comprising R 25,000 as deposit and R 25,000 as moral damages. As regards, appellant no 1, we note that the Court made no finding on the breach of the agreement of sale as between the respondents and appellant no 1. In fact the evidence reveals that appellant no 1 had walked out of the agreement allowing appellant no 2 to negotiate with government. We make no order for damages in his case.

[46] We maintain the order as to costs in the circumstances, given the decision which is, in the main confirmed.

Zalazina v Zoobert Ltd

MacGregor PCA, Fernando, Twomey JJA

3 May 2013 SCA 28/2011

Third party opposition – International business companies

The appellant was declared to be the sole beneficial owner of a company registered under the International Business Companies Act. The respondent filed a successful third party opposition under the Code of Civil Procedure. The appellant appealed the decision and sought to be reinstated as the sole shareholder of the company.

JUDGMENT Appeal allowed.

HELD

1 The term "principal action" in s 173 of the Seychelles Code of Civil Procedure is similar to the French *titre principal* and is indicative of the fact that third party opposition hearings are like ordinary suits.

2 Three conditions must exist in order to sustain an opposition by a third party. These are that:

   a the judgment is of such nature that it causes prejudice to a third party;

   b the third party was not a party to the cause when it was heard; and

   c the third party was not represented at the hearing.

3 Possible forgeries that have been certified as originals do not make documents authentic.

Legislation
Companies Act 1972
Court of Appeal Rules
International Business Companies Act 1994 ss 28, 38, 39
International Business Act 1995 ss 3, 4(1)(b), 22
Interpretation and General Provisions Act s 21(1)
International Corporate Services Providers Act 2003
International Trusts Act s 3, 4, 22
Seychelles Code of Civil Procedure ss 172–175, 327

Foreign legislation
Civil Procedure arts 582–592 (France)
Code of Civil Procedure art 474 *et seq* (Mauritius)

Counsel F Elizabeth for the appellants
F Ally for the respondents

The judgment was delivered by
TWOMEY JA

[1] Who owns the shares in Med Enterprises Limited? That is the million dollar question lurking in the murky depths of this case, where alleged shareholders of a Seychellois international business company who initially took advantage of the benefits of such companies, namely minimum record keeping and comprehensive confidentiality, now want the Court to publicly ascertain the identity of the beneficial owners of the company by examining those very records and breaching the coveted confidentiality.

[2] Med Enterprises Limited was incorporated in Seychelles as an International Business Company on 25 November 2005 under the International Business Companies Act 1994. The services for its offshore business were provided by FIFCO (Offshore) Services

Limited, the second appellant. These included the provision of an agent and a registered office at Premier Building, Victoria. A Seychellois International Business Company is not required to disclose the identity of its shareholders without a court order; the directors may be elected at the first company board meeting; there is no minimum capital stipulation; only one director or shareholder is required and there is no need to file accounts with the Registrar of International Business Companies.

[3] The first appellant, Tatiana Zalazina, brought an application before the Supreme Court in December 2008 asking the Court to declare her the sole beneficial owner of Med Enterprises Limited. She supported her application by affidavit and several documents: inter alia, the resolution by the company appointing her as sole director and the issuing of 5,000 ordinary shares of $1.00 in her name. At the hearing, the registered agent of the company, the second appellant, appeared though its manager Paul Chow and confirmed that according to the share register held by FIFCO, the first appellant was the sole beneficial owner of the company, Med Enterprises Limited.

[4] He also gave evidence that his agent in Cyprus had informed him that several fraudulent and/or illegal share transactions had been conducted by a person or persons not authorised by the company and also without the knowledge, permission, authority or consent of the first appellant. The trial Judge, Justice Perera, hearing the application held that the Court was satisfied on a prima facie basis that the first appellant was the sole beneficial owner of the company and ordered that all transactions conducted for and on behalf of the company to date by any person other than the first appellant be null and void and that the second respondent not transfer, give, transmit, dispose of or

otherwise deal with the records and documents in his possession in a way prejudicial or contrary to the interest of the first appellant.

[5] Less than two months later, on 18 February 2009, the respondents filed a third party opposition under ss 172–175 of the Seychelles Code of Civil Procedure praying that the Court set aside the judgment of the Supreme Court. They alleged that they were the legitimate shareholders and directors of the company. The documents they attached to their application reveal what can only be described as an elaborate pass the parcel exercise involving the shares and directorship of Med Enterprises Limited. They averred that the first and sole director of the Company was one Stephen John Kelly who had by resolution of the company, dated 20 July 2007, resigned and appointed one Victoria Shevchuk as the sole director and that he had transferred all his shares to her. Victoria Shevchuk in turn had by resolution of the company on 3 April 2008 resigned and appointed Olga Perova as the sole director and transferred her shares onto her. In addition on 15 December 2008, by agreement of the company, Olga Perova had transferred her shares to Zoobert Limited, now the first respondent in the present appeal. The second respondent of this appeal, one Dimitry Podkilzin is the beneficial owner of Zoobert, the sole shareholder of Zoobert Limited and the third respondent, Roy Delcy the sole director of Zoobert Limited having been appointed after the resignation of Olga Perova.

[6] Both parties claimed that their derivation of title to the shares was made out by the documents they produced and each side alleged the other of fraud or illegality. It is certainly not possible that Med Enterprises Limited was incorporated on 25 November by two different persons and that its total shares issued to two different

persons who both claim to be the sole director and shareholder. Somebody is not telling the truth.

[7] None of the parties led evidence at the trial of the third party opposition, relying instead on their affidavits and attached documents. The trial Judge found that the case for a third party opposition had been made out and he went to order "a retraction" of the original judgment. The appellants have now appealed this decision on seven grounds but only the following grounds as summarised and reworded by this Court were substantially proceeded with:

1) That the trial Judge erred in law by finding that the respondents had satisfied the conditions under s 174 of the Code of Civil Procedure and had an interest in bringing a third party opposition to the original judgment.

2) That the trial Judge erred in law when he failed to consider whether the share transfer from Stephen John Kelly was valid as it was not properly registered.

3) That the trial Judge erred by failing to give proper consideration to the documentary evidence, namely to consider the effects of the trust document (I5) in favour of the first appellant.

4) That the trial Judge erred when he failed to consider the appellants' plea in limine litis namely that the respondents had locus standi to bring this case and that their supporting affidavits were proper under the provisions of the Civil Procedure Code.

5) That the trial Judge erred when he concluded that the respondents had discharged their burden of proof to justify the setting aside of the judgment of the original case.

Ground 1 – third party oppositions

[8] The trial Judge correctly identified the provenance of the law pertaining to the unusual procedure invoked in this case. He found that ss 172–175 of the Seychelles Code of Civil Procedure have their origins in French law and referred to the *Encyclopédie Dalloz* for guidance. He held, based on the French jurisprudence, that three conditions must exist in order to sustain an opposition by a third party namely:

1) That the judgment is of such nature that it causes prejudice to a third party.

2) That the third party was not party to the case when it was heard.

3) That the third party was not represented at the hearing.

He found that these conditions were satisfied and set aside the original judgment in the case. We are of the view that the Judge was correct in his consideration of the law in respect of the conditions to be met in order that third party oppositions to judgments be permitted. Where he erred was in his assumption that he was only seized with the duty of setting aside the judgment.

[9] As this is the first time that the ss 172–175 procedures have effectively been used in Seychelles we have taken some time to examine the rules relating to the provisions. The Seychelles Code of Civil Procedure, since 1920, is based almost entirely on provisions

of English civil procedure. However, certain sections which derive from the French Civil Procedure Code, of which ss 172–175 form part, continued to have the force of law and were incorporated in the 1920 Code which to this date remains largely unchanged. Section 327 of the Seychelles Code of Civil Procedure states that:

> Articles of the French Code of Civil Procedure repealed by any law which is repealed by this Code shall remain repealed.

Section 21(1) of the Interpretation and General Provisions Act, Cap 103 of the Laws of Seychelles stipulates:

> Where in an Act terms or expressions of French Law are used, they shall be interpreted in accordance with French Law.

The fact that ss 172–175 were not repealed and the effect of s 21(1) above is to guide us back to French law, currently arts 582–592 of the French Civil Procedure Code. The equivalent rules are contained in the Mauritian Code of Civil Procedure at art 474 et seq.

[10] It is useful to bring to light the French provisions. Article 582 of the Code de Procedure Civile states:

> La tierce opposition tend à faire rétracter ou réformer un jugement au profit du tiers qui l'attaque. Elle remet en question relativement à son auteur les points jugés qu'elle critique, pour qu'il soit à nouveau statué en fait et en droit.
>
> (Third-party proceedings aim at retracting or varying a judgment in favour of the third party who impugns it. Third party proceedings bring back into issue, with regard to its originator, the points decided which he

> challenges so that a new ruling may be given on the factual and legal grounds).
>
> (As translated by the official French government site *legifrance*).

And art 587:

> La tierce opposition formée à titre principal est portée devant la jurisdiction dont émane le jugement attaqué.
>
> La decision peut être rendue par les mêmes magistrats.
>
> Lorsque la tierce opposition est dirigée contre un jugement rendu en matière gracieuse, elle est formée, instruite et jugée selon les règles de la procedure contentieuse.
>
> (Third party proceedings made as the main issue will be brought before the court from which the impugned judgment emanated.
>
> The same judges may render the decision.
>
> Where third party proceedings are directed against a judgment rendered in a non-contentious matter, it will be brought, examined and determined in accordance with the rules governing contentious procedures.)

[11] Our provisions relating to a third party opposition are truncated but the gist of the French law is preserved in ss 172–173 of the Seychelles Code of Civil Procedure which state:

> Any person whose interests are affected by a judgment rendered in a suit in which neither he nor persons represented by him were made parties, may file an opposition to such judgment.

> Such opposition shall be *formed by means of a principal action* to which the parties to the suit, in which the judgment sought to be set aside was obtained, shall be made defendants.
>
> [Emphasis added]

Although the articles of the French Civil Procedure Code cited have no direct application, our provisions relating to third party oppositions originate from them and we are therefore guided by them in interpreting s 173. The use of the term "principal action" is similar to the French terminology *titre principal* and is indicative of the fact that third party opposition hearings are like ordinary suits. Hence, while we agree with the trial Judge insofar as his analysis of the *tierce opposition* is concerned and his finding that the respondents satisfied the conditions necessary to show that they had an interest in this case, we are of the view that his decision fell short of what is then required in proceedings for a *tierce opposition.*

[12] Having found that the respondents had an interest in the case it was incumbent on him to then weigh the evidence adduced to decide whether the respondents had satisfied the burden and standard of proof in order that the original judgment could be set aside. This ground therefore has merit.

[13] Given our finding in respect of Ground 1 we have considered whether under the Court of Appeal Rules we should remit the matter back to the trial Judge for the consideration of the evidence. In view of the fact that we are permitted by the Rules to exercise any power that the trial Court itself had and in further view of the fact that this matter was decided purely on affidavit and documentary evidence we have decided to weigh the evidence adduced on record ourselves. We do this as we find according to the Rules that the interest of justice may be best served in this way.

Grounds 2 and 3 – the share transfer from Stephen John Kelly and the trust document

[14] We therefore have to consider the next two grounds of appeal raised in respect of the validity of the share transfer by Stephen John Kelly and the trust document. With regard to the documentary evidence produced by the respondents, we begin by examining the issue of shares to Stephen John Kelly on 25 November 2005. Mr Elizabeth has drawn our attention in particular to the following provisions of the International Business Companies Act 1994 as amended:

> Section 28(1)
>
> A company incorporated under this Act shall cause to be kept one or more registers to be known as Share Registers containing–
>
> (a) the names and addresses of the persons who hold registered shares in the company…
>
> Section 28(3)
>
> A copy of the Share Register, commencing from the date of the registration of the company, shall be kept at the office of the company referred to in section 38 or such other place as the Directors determine and the company shall inform the Registrar of the address of the other place.
>
> Section 38(1)
>
> A company incorporated under this Act shall at all times have a registered office in Seychelles.

> Section 39(1)
>
> A company incorporated under this Act shall at all times have a registered agent in Seychelles who is licensed to provide international corporate services under the International Corporate Services Providers Act 2003.

It is clear that the Act provides for the disclosure of legal and beneficial ownership of issued and transferred shares to the registered agent. Since the authenticity of the resolution passed on the date of incorporation of Med Enterprise Limited issuing the shares to Stephen John Kelly and the share certificate in his name are challenged as are the shares in the name of Tatiana Zalazina, we have to consider the official share register kept by the agent of the company.

[15] Mr Paul Chow, the director of FIFCO who was the registered agent of Med Enterprises and the second appellant in this case testified in the original case and deponed by affidavit in the present case. He stated that the share register reveals the first appellant, Tatiana Zalazina, as the sole beneficial owner of the company. He also stated that the issue of shares or appointment of Stephen John Kelly is not matched by the entries in the register. Moreover, he raises a doubt as to the authenticity of the resolution and minutes of Med Enterprises appointing Stephen John Kelly as director as forwarded to him by an intermediary in Cyprus. These were only received by him by fax from Cyprus on 27 November 2007 two years after the incorporation of the company. He also deponed that the document is a scanned document and that despite his repeated requests he has never received the original. He also deponed that the stamp of one of his companies, Saks and Associates is used irregularly on the document in that the company normally

inserts its stamp on top of the letterings and not underneath them. We have no reason to disbelieve him. He has nothing to gain by these proceedings.

[16] We are strengthened in this view by another document produced in this case. This is a declaration of trust sent to Mr Chow which we partly reproduce below:

> Declaration of Trust
>
> Med Enterprises Limited
>
> I/We Stephen John Kelly
>
> Hereby Acknowledge and Declare that We hold Five Thousand Ordinary Shares (hereinafter called the Share) registered in our name as Nominee of and Trustee for
>
> Mrs. Tatiana Zalazina
>
> (hereinafter called the Owner) and
>
> We UNDERTAKE AND AGREE not to transfer deal with or dispose of the Share save as the owner may from time to time direct …
>
> Dated this 25th November 2005.

Its content is baffling. Why may we ask was it necessary for Stephen John Kelly to execute such a document when he claims he was both the legal and beneficial owner of the shares? Why was the trust document not lodged with the agent of the company as was required by law? In any case, the document contradicts the statements contained in the respondents' pleadings, their affidavits and other documentary evidence they have produced. Stephen John Kelly cannot assert on the one hand that he is the beneficial owner of the

shares and then on the other hand that he is only the bare trustee or nominee of those shares. If he was only the bare trustee how did he transfer the shares without the knowledge and authorisation of Tatiana Zalazina, the beneficial owner of these shares contrary to the terms of the trust? In any case there is no evidence that he was ever appointed trustee or nominee by Tatiana Zalazina apart from the trust document which is nothing but a self-serving document as it is neither acknowledged nor signed by the nominator or beneficial owner. Moreover, as we have already pointed out, anonymity of the owner of bearer shares is not permissible under the 2003 Act as they have to be registered with the agent.

[17] Other aspects of the trust document are disturbing. Section 3 of the International Trusts Act 1995 states:

> This Act applies to international trusts arising voluntarily or resulting by operation of law or by a decision of the court.

Seychelles is a civil law country in terms of its private law. This sets its Civil Code on a collision course with not only the International Trusts Act but also the International Business Companies Act and the International Corporate Services Providers Act 2003 as the civil law regime does not recognise anonymity in terms of ownership of property. Hence international trusts in Seychelles are only statutory creations of the 1995 Act and not common law trusts. Despite the wording of s 3 of the 1995 Act the only trusts permitted under the law are statutory. The Act lays down strict conditions for the creation of such statutory international trusts possibly to avoid their incompatibility with our civil law regime. The trust document in this case runs foul of numerous mandatory provisions of the Act: only one trustee is appointed (despite the provisions of s 22(1) which provides for limited circumstances in which one trustee is permitted), no settlor is identifiable and the only trustee is not a resident of Seychelles (see s 4(1)(b)).

[18] Mr Ally has urged us to rely on the certificates of incumbency and incorporation of the company produced by the respondents which according to him are evidence that Stephen John Kelly was the original director and shareholder of the company. These are two incumbency certificates allegedly signed by Jane Etienne and Lucy Chow on 29 August 2007 and 27 May 2008 respectively. The certificates are on FIFCO letter heads. Also attached to the respondents' affidavits are certificates issued by Lucy Pool and Alexia Amesbury acting as notaries certifying the certificates of incumbency as originals. The entries on these certificates of incumbency do not match the entries on the share register also held by FIFCO. They certainly fit the account of the respondents who derive ownership of the shares from Stephen John Kelly but it is clear to us that this is an attempt to retrospectively give legitimacy to an original share issue that is highly suspect. Getting notaries to certify possible forgeries as originals does not make these documents authentic. We are in any case bound by the International Business Act to accept only the entries of the share register. The lacunae in the Act are certainly obvious in this case. What are laid bare are the shortcomings of its provisions in permitting such a high level of secrecy in the formation of international business companies. By contrast companies incorporated locally under the Companies Act 1972 must file their Memorandum and Articles of Association at the Companies Registry. No tampering with shares can take place in this context. Further, it is certainly questionable whether the regime under the 1995 International Business Act as it stands serves Seychelles well especially in terms of its associate membership of the Financial Action Task Force (FATF) and the FATF 40 + 9 Recommendations. These concerns should certainly be borne in mind given proposed

legislation to unify and replace the existing dual company law system operating under the two Acts.

[19] For the reasons we have already outlined and for the fact that the trust document raises more doubts than provides answers, we have no hesitation in finding that the trust document and the certificates of incumbency are invalid documents and incapable of producing legal effects. We do not accept that Stephen John Kelly was either the legal or beneficial owner of the shares. As the transfers of his shares to subsequent transferees were fruit of the poisonous tree, these are also invalid, null and void.

Grounds 4 and 5 – pleadings, locus standi and burden of proof

[20] There are also serious shortcomings in relation to the plaint and affidavits of the respondents. One Victoria Valkovskaya, having produced a special power of attorney has sworn an affidavit in which she states that she is authorised to represent the first and second respondents. It would appear that this is the only statement she could truthfully and validly make under the laws of Seychelles in the affidavit. She is precluded from swearing an oath and making other statements regarding matters of which she has no personal knowledge and cannot prove. The Seychelles Code of Civil Procedure in no uncertain terms stipulates that:

> Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove….

On those grounds alone the pleadings of the first and second defendant should be struck out as they are not maintainable. The same applies to Roy Delcy, the third defendant. He also has no personal knowledge of what he depones in his affidavit.

[21] The issues of locus standi and whether the respondents have succeeded in meeting the burden of proof in this case, therefore also have merit but in view of our decision in relation to the more important grounds canvassed in this appeal which has found favour with this Court it would be purely academic to consider them. Accordingly, this appeal is allowed with costs.

[22] We wish to make a final observation. We are of the view that this case reveals serious issues involving a financial and possibly criminal scam to which our financial sector may become vulnerable unless properly checked. We therefore further order that copies of this judgment be served on both the Seychelles International Business Authority and the Financial Investigation Unit for whatever further action they may deem fit to discharge of their statutory duties in the light of our findings.

Jean v Felix

Karunakaran J

10 May 2013 SC CS 15/2008

Contract – Lease − Implied terms – Legitimate expectations

The plaintiff claimed damages as a result of the breach of an implied term of a lease agreement. The plaintiff argued that the implied term arose from the legitimate expectation that the defendants would renew the lease agreement and allow change of use or conversion of the building. The defendants denied and counterclaimed for loss of use.

JUDGMENT For the plaintiff.

HELD

1 The concept of legitimate expectations is generally applied in matters of judicial review. It is not traditionally applied in contracts.

2 The concept of legitimate expectation of a party to a contract and a breach thereof constitutes a valid cause of action in law provided that:

a the expectation is based on an implied term of the contract;

b the terms are implied on the grounds of fairness and reasonableness, or an implied consensus ad idem;

c the aggrieved party had relied and acted upon that implied term; and

d there has been a breach by the other party to the contract.

3 An agreement is binding not only in respect of what is expressed but also in respect of all consequences which fairness, practice or the law imply into the obligation in accordance with its nature.

Legislation
Civil Code arts 555, 1135, 1160
Control of Rent and Tenancy Agreements Act s 12
Land Registration Act s 84

Cases
Babema Company (Seychelles) v Green (1979) SLR 82
Samson v Mousbe (1977) SLR 158

Foreign cases
Davis Contractors Ltd v Fareham Urban District Council [1956] AC 696
Greaves & Co (Contractors) v Baynham Meikle & Partners [1975] 1 WLR 1095
Liverpool City Council v Irwin [1976] 1 QB 319
Packer v Packer [1954] P 15
R v North and East Devon Health Authority, ex parte Coughlan [2001] QB 213
Remon v City of London Real Property [1921] 1 KB 49
Schmidt v Secretary of State for Home Affairs [1969] 2 Ch 149
Reigate v Union Manufacturing (Ramsbottom) [1918] 1 KB 592

Counsel W Lucas for the plaintiffs
S Rouillon for the defendants

KARUNAKARAN J

[1] The plaintiffs in this action claims the sum of R 264,520.00 from the defendants for loss and damages they suffered as a result of an alleged breach by the defendants of an implied term of a lease agreement the parties had entered into, in respect of a commercial building on Title C1441 (hereinafter referred to as the "premises") situated at Anse Royale, Mahé. The defendants were at all material times, the owners/lessor of the "premises" and the plaintiffs were the lessee. The said implied term allegedly arose from a legitimate expectation of the plaintiffs that the defendants would renew the lease agreement for a further period on reasonable terms, following the expiry of its initial period of three years.

[2] The defendants, in their statement of defence, have not only denied the plaintiffs' claim but have also made a counterclaim against the plaintiffs in the total sum of R 270,000.00 as compensation for loss and damage, which they allegedly suffered partly due to:

i) loss of use in that, the plaintiffs caused loss and damage by overstaying in the premises after the expiry of the lease period; and

ii) a fault the plaintiffs committed by entering a restriction at the Land Registry against Title C1441, which prevented the defendants from effecting registration of any dealings in respect of the said title.

It is not in dispute that the plaintiffs were the owners of a commercial building situated at Anse Royale, Mahé. The building had originally been designed for and had been used in the past as a

supermarket. In September 2004, the defendants leased out the building to the plaintiffs, for commercial use, as a restaurant. The defendants also authorized the plaintiffs to effect the necessary alterations, additions and improvements/modifications to the building at the plaintiffs' own cost so as to make it suitable for restaurant-business. The lease agreement was reduced into writing (vide Exhibit P1).

[3] However, there was no expressed term in the said lease deed about the intended change of use or conversion of the building. It was a term of the said agreement inter alia, that the initial period of the lease would be three years, starting from 1 September 2004; but, thereafter renewable every three years on terms mutually agreed upon by the parties. The rent was also agreed at R 10,000 per month. The lease-agreement was thus concluded after a prolonged discussion between the parties on many issues including change of use. According to the plaintiffs (PW1), the defendants through their conduct, consent and approval, impliedly agreed that the plaintiffs would take the necessary measures to invest in the improvements and restructuring of the building, thereby converting its use from a supermarket to a restaurant.

[4] The defendants also signed the necessary documents for change of use and submitted them to the government authorities such as that of Licensing and Planning for approval. Consequently, the plaintiffs had *a legitimate expectation* that the defendants would renew the lease after the expiry of its initial period and the plaintiffs would carry on the restaurant-business in the premises for relatively a longer term since they were investing a large sum of money on improvements and alterations of the building and recovering the investments and reaching profitability would take time. The

plaintiffs accordingly took a loan of R 400,000 and an additional loan of R 200,000 from the Mauritius Commercial Bank - vide exhibit P6 - and spent the amount on the improvements and alteration of the building, solely relying on the implied terms as to renewal, which gave rise to the plaintiffs' *legitimate expectation*.

[5] The construction work on the improvement and alteration of the building took about one and a half years to complete. The plaintiffs also produced in evidence some photographs taken after the building was altered to accommodate a restaurant business vide exhibit P4. Mr. Nigel Antoine Roucou (PW2), a Quantity Surveyor, who inspected the building in 2008, also testified for the plaintiffs. This expert witness produced a report in exhibit P9 describing all the works done by the plaintiffs to convert the premises for the intended use. He also gave his estimate on the current market value of the works done by the plaintiffs. This report inter alia, reads thus:

> WORKS CARRIED OUT
>
> Restaurant Sitting area, Take Away Shop and Store; the works carried out in the area include general painting works and provision of air conditioning units. Painted stud walls and doors forms the Store. The Take Away Shop has had a door replaced and general repainting works.
>
> Bar and Store work is limited to stud partitions and doors including all painting unit.
>
> Kitchen, Preparation areas and Stores; works carried out include converting the existing shop stores into its intended use; new walls and door were provided;

ceramic floor and wall tiling throughout fixed worktops with, stainless steel sinks and oven hood.

WCs and Lobbies; painted/ceramic wall tiling stud partition walls forms the male and female WCs and lobbies, new toilet suites, urinal and hand wash basins have been fitted.

Electrical, plumbing and drainage installations have been adapted to serving activities including provision of an additional septic tank, a grease trap and a condition installation has been provided, solar water heating system and gas equipment.

Externally, a covered area attached to the existing building has been constructed water storage tank with associated steel support structure.

CURRENT MARKET VALUE OF WORKS

We would estimate the Current Market Value of the Works done to be in the region of SR245, 200. 00 (Two Hundred and Forty Five Thousand and Two Hundred Seychelles Rupees

TOTAL COST OF FIT-OUT WORKS: SR245, 200. 00

[6] Besides, the plaintiff – PW1 – testified that even for the period, when alteration and improvement works were carried out, the plaintiffs were regularly and punctually paying the monthly rents to the defendants. They were also making monthly repayments for the bank-loan throughout the period, though they were not actually

running the restaurant-business in the premises and making any profit.

[7] In fact, the plaintiffs were repaying the bank-loan by monthly installments and owed a balance on the interest alone in the sum of R 79,672.31 as at 7 April 2008 vide exhibit P6. Be that as it may, only during the third year of the lease-period could the plaintiffs complete the construction work and get the premises ready to start the restaurant-business. They also received the licence to operate the business only during the third year of the lease period.

[8] Before the expiry of the lease in September 2007, the business licence issued by the Seychelles Licensing Authority (SLA) for restaurant-business expired in March 2007. To renew the license, the plaintiffs requested the defendants (being the owners of the premises) to give their consent in writing for the renewal of the lease as it was so required by SLA. The defendants for reasons unclear, refused to give their consent. Hence SLA also refused to renew the business-license to the plaintiffs *vide exhibit P3*. Since all of the investments made by the plaintiffs in the premises were at stake, the plaintiffs started negotiations with the defendants to get the lease renewed for a further period. The defendants agreed to negotiate. However, the terms they imposed on the plaintiffs for renewal were very unreasonable and unjust.

[9] According to the plaintiffs, the terms defendants proposed were in fact, draconian and their investments were being held ransom. The plaintiffs – PW1 – testified that the defendant started negotiations on the condition that they would increase the rent from R 10,000 to R12,000 per month for the first six months of the renewed-period and thereafter an additional R 2, 000 every month. Then there would be an increase of R 2, 000 every month for six

years. These exorbitant monthly rents demanded by the defendants were being unreasonable and not financially viable for the business and the plaintiffs therefore, refused to accept the defendants' demands. The defendants again asked the plaintiffs to purchase the premises for R 3,500,000 vide exhibit P5. As the price demanded was too high compared to the market value for an area of 1460 square meters, the plaintiffs again declined the offer made by the defendants for sale.

[10] In the mean time since the licence for restaurant business was not renewed by SLA, and the plaintiffs had to close down the restaurant and were selling only takeaway food in the premises. This resulted in great loss and hardship to the plaintiffs. In the circumstances, the plaintiffs feared that the huge investment they made for the conversion of the building, was at stake; they felt there was a strong possibility that the defendants might sell the premises at any time to third parties and thereby deprive the plaintiffs not only from realizing the fruits of their investments but also lose the entire investment itself that they had made in the building. Because of the fear, which is obviously justified, the plaintiffs attempted to secure their interest in the premises by registering a restriction against parcel C1441 with the Land Registry. On 4 July 2007, at the request of the plaintiffs', the Land Registrar entered a restriction in terms of s 84(1) of the Land Registration Act prohibiting the defendants from dealing with the said property. However, the defendants subsequently came before the Supreme Court in Civil Side CS 259 of 2007 and sought an order to remove the said restriction entered by the Land Registrar. The Supreme Court in its ruling dated 27 December 2007 - vide exhibit D2 - removed the said restriction.

[11] What the plaintiffs feared and legally attempted to stop from happening, did in fact, happen. The defendants on 11 May 2009 sold the property to a third party for R 2,000,000 - vide exhibit P8 - which included the investments made by the plaintiffs in the premises. Although the plaintiffs were legally in possession of the premises by having the keys in their hands, the defendants took the law into their own hands. They forcefully took over possession from the plaintiffs and delivered to the third party.

[12] The plaintiffs, reposing their ultimate faith in the fairness of law, have now come before this Court claiming damages from the defendants to recover the investments they made in the premises during the tenure of the lease. According to the plaintiffs, the following are the loss and damage they suffered on account of their lease - episode with the defendants:

> **Breakdown on fit out works**
>
> Restaurant Sitting area, Take Away shop and store SR 13,800.00
>
> Bar and Store SR 27,100.00
>
> Kitchen, preparation areas and store SR 57.700.00
>
> WC's and Lobbies SR 31,800.00
>
> Electrical, Air-condition, Plumbing and Drainage installations SR 57,800.00
>
> Externals covered area, water tank and gas store SR 25,000.00
>
> Interest on bank loan SR 21,320.00
>
> Moral damage SR 30,000.00

Total Rs: 264,520.00

[13] Hence, the plaintiffs pray this Court to enter judgment in their favour and against the defendants in the sum of R 264,520.00 with interest and costs.

[14] On the defence side the second defendant Tahiri Felix (DW1) testified in essence that although the defendants agreed and consented for the modification of the building and change of use, the lease automatically expired after three years. Since the defendants were planning to migrate from Seychelles to the UK, they wanted to dispose of all their properties in Seychelles. Therefore, they made the first offer to sell the premises to the plaintiffs for the price of R 3,000,000; but, the plaintiffs did not accept it. So the defendants had no other choice but to sell the property to a third party. DW1 further testified that the defendants continued to occupy the premises for over a year after the expiry of the lease. As a result, the defendants suffered loss of use. Hence she claimed R 120,000 from the plaintiff for damages in this respect.

[15] Moreover, because of the restriction, which the plaintiff had entered with the Land Registry the defendants could not sell the property immediately, as and when they were in need of funds to provide medical treatment for the first defendant, who is none-else than the husband of the second defendant, who was then seriously ill in England. As a result, the defendants suffered inconvenience and hardship for which they claimed moral damages in the sum of R 150,000. In the circumstances, the defendants urged the Court to deny the plaintiffs' claim, dismiss the plaint and award the defendants' counterclaim and enter judgment for the defendants with costs.

[16] I meticulously perused the pleadings and the evidence on record including the documents adduced by the parties in this matter. I gave diligent thought to the submissions made by counsel on both sides; and I carefully examined the relevant provisions of law and the case-law applicable to the case on hand.

[17] At the outset, I note that the instant case breaks a new ground in our contract law. The Court is called upon to determine in this matter, whether a "*legitimate expectation"* of a party based on fairness/reasonableness and to an extent, based on an *implied consensus ad idem* would give rise to an *implied term* in a private contract and vice versa. This new question is an inevitable development in the evolution of contract law. This development though seemingly a new vista in contract law, is necessary for the advancement of justice in this time and age, especially when we are embarking on the voyage of revising our Civil Code and to meet the changing and challenging needs of time and society. Indeed, all social contracts governing the individual interactions in society eventually metamorphose into legal contracts or relationships such as marriage, family, trade unions, associations, government (vide *Rousseau's - 1712-1778 - social contract* theory), etc. Hence, contract law has to evolve as society progressively evolves more and more from Status to Contract as Henry Sumner Maine observed in his book *Ancient Law (*1861) thus "we may say that the movement of the progressive societies has hitherto been a movement from Status to Contract.

[18] The concept of *legitimate expectations* originally developed in English law. It is generally applied only in matters of Judicial Review and falls within the domain of public law. It is truism that this concept is not traditionally applied in matters of contracts, which

entirely falls within the domain of private contract law. This concept cannot on its own constitute a valid cause of action in contract; and the courts cannot directly apply this concept to do justice in contracts invoking the principle of fairness or reasonableness.

[19] However, now time has come to rethink, remold and extend its application to other branches of law such as contract, as it constantly evolves. In my considered view, a *legitimate expectation* of a party to a contract and a breach thereof shall constitute a valid cause of action in law provided that:

i) the said expectation is based on an implied term of the contract;

ii) such terms are implied on the ground of fairness or reasonableness; or an implied consensus ad idem;

iii) the aggrieved party to that contract had relied and acted upon that implied term (as has allegedly happened in this matter); and

iv) there had been a breach thereof, by the other party to the contract.

[20] The courts of the 21st Century cannot deny justice to anyone for lack of precedents or case law in a particular branch of jurisprudence due to stagnancy in adaptation and advancement. We cannot afford our civil law to remain stagnant in the statute-books; simply because our jurisprudence is not advancing with the rest of the legal world. As judges, we cannot simply fold our hands on the bench to say that no case has been found in which it has been done before on the ground of legitimate expectations in contract law.

[21] This reminds me of the great remark once Lord Denning LJ made in *Packer v Packer* [1954] P 15 at 22, which runs thus:

> What is the argument on the other side? Only this: that no case has been found in which it has been done before. That argument does not appeal to me in the least. If we never do anything which has not been done before, we shall never get anywhere. The law will stand still whilst the rest of the world goes on: and that will be bad for both.

[22] In English law, the concept of legitimate expectation undoubtedly arises from administrative law, a branch of public law. The phrase "legitimate expectation" first emerged in its modern public law context in the judgment of Lord Denning in *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149. The fundamental idea behind this concept - especially in matters of Judicial Review - is the application of the principles of *fairness and reasonableness* to the situation (vide *Wednesbury* Principles of Reasonableness) where a person has an expectation or interest in a public body retaining a long-standing practice or keeping a promise.

[23] It is well established that if a public body has led an individual to believe that he will have a particular procedural right, over and above that generally required by the principles of fairness and natural justice, then he is said to have *procedural legitimate expectations* that can be protected; in modern times, it appears that the courts in the UK do not hesitate to extend this concept further to protect the *substantive legitimate expectations* of the individuals vide *R v North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213.

[24] However, the concept of legitimate expectations in the private law of contract as claimed by the plaintiffs in the instant case, presents some difficulty in tailoring it to suit our needs, jurisprudence and to accord with our civil code. This concept as such is unknown to our jurisprudence. It is nowhere to be seen in the Civil Code of Seychelles. Our judges by and large do not apply or use the language of 'legitimate expectations' in the context of any private law of contract particularly, in breach of contracts.

[25] This is not, however, the end of the story. Once we have understood the purpose and the role played by the concept of *legitimate expectations* in other jurisdictions, where it was conceived and developed, we will be able to circumvent the difficulty in our jurisdiction and deliver justice by applying the underlying principles of fairness and reasonableness to the situation where a person had an expectation or interest in his or her dealings or interactions with others in pursuance of any contractual or other legal relationships. The underlying principles or ideas behind this concept can indeed be found as a *hidden treasure* in our law of contract, particularly, in our Civil Code though it appears in different names and forms and using a different language of description.

[26] In fact, art 1135 of the Civil Code articulates this principle that "terms in a contract may be implied inter alia, for fairness/reasonableness" and a party to that contract may legitimately expect, rely and act upon that implied term, in respect of all consequences and in accordance with its nature. The courts have unfettered jurisdiction to impute or imply a term which is reasonable and necessary - as suggested by Scrutton LJ in *Reigate v Union Manufacturing (Ramsbottom)* [1918] 1 KB 592 at 605 - in the

interest of justice and fairness and grant remedies accordingly. This article reads in clear terms 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

[27] It is also pertinent to note that art 1160 of the Civil Code reads thus:

> Usual clauses shall be implied in the contract even if they are not expressly stated.

[28] Therefore, it goes without saying that in our jurisdiction it is lawful for a party to have legitimate expectation that in the absence of expressed terms in a contract, fairness would come in rescue, in respect of all the consequences and give rise to the necessary implied terms in the contract in accordance with its nature, and so I hold.

[29] Coming back to the case on hand, I find on evidence that the defendants through their conduct, consent and approval impliedly agreed that the plaintiffs might take a bank-loan and invest on the improvement and restructuring of their building and thereby convert its use from that of a supermarket to a restaurant. The defendants also signed the necessary documents for change of use as required by the government authorities such as Licensing and Planning. Furthermore, I find it quite strange on part of the defendants that the property which they offered to sell for R 3,500,000 to the plaintiffs, was sold to a third party for R 2,000,000, which is an improbably generous discount. All these swing the balance of probabilities in one clear direction.

[30] I completely accept the plaintiffs' evidence in every respect including the fact that the defendants were imposing draconian terms for the intended renewal of the lease. They did so with the intention of closing all the doors so as to prevent the plaintiffs from renewing the lease. In the circumstances, I find that the plaintiffs rightly and genuinely had *a legitimate expectation* that the defendants would renew the lease on reasonable terms after the expiry of the initial period and the plaintiffs might continue the restaurant business for relatively a longer term in the premises to protect their interest since they had invested a large sum of money on improvements and alteration of the building.

[31] At the time, when the parties entered into the lease agreement, if they had given a thought for a moment to the possibility of non-renewal of the lease after the expiry of the first tenure for some reason or the other (as has happened now) they would have certainly inserted a term in fairness to secure or recover the investment made by the plaintiffs in the premises. However, this did not happen. They did not give a thought to provide for such contingency. There is no expressed term in the lease agreement to save such contingency. Hence, fairness dictates that the Court should *imply into the contractual obligation and read* an implied term in the lease agreement (exhibit P1) to the effect that at the expiry of the lease, in case the renewal was not possible, the defendants shall compensate the plaintiffs for the investments made on improvements and alterations of the building. Having regards to all the circumstances of the case, it is reasonable and necessary for the Court to impute or imply the said term - in order to do what is fair and just between the parties. This is the view, which Lord Denning also put forward in *Greaves & Co (Contractors) v Baynham Meikle & Partners* [1975] 1

WLR 1095 and expressed more fully in *Liverpool City Council v Irwin* [1976] 1 QB 319.

[32] Now, one may query "what is the extent of the implied term a court may impute?" This cannot be solved by simply speculating what term both parties would have agreed upon, had they foreseen the contingency at the time they entered into the agreement or simply ascertaining what was necessary in the circumstances; but, the Court indeed, has to decide "what is reasonable having regard to all the circumstances of the case under consideration?". This is to be decided as a matter of law, not as matter of fact. As the Right Hon Lord Wright of Durley put it lucidly in his book *Legal Essays and Addresses* (Cambridge University Press, 1939) 259:

> the truth is the Court … decides this question in accordance with what seems to be just or reasonable in its eyes. The judge finds in himself the criterion of what is reasonable. The court is in this sense making a contract for the parties - though it is almost blasphemy to say so.

[33] It is also pertinent herein to note what Lord Radcliff stated so elegantly in *Davis Contractors v Fareham Urban District Council* [1956] AC 696, 728, when he said of the parties to an implied term thus:

> their actual person should be allowed to rest in peace. In their place there rises the figure of the fair and reasonable man. And the spokesman of the fair and reasonable man, who represents after all no more than the anthropomorphic conception of justice, is and must be the court itself.

This is the approach the Court has also pursued in this matter in order to meet the changing needs of time in the evolving domain of contract law, and to accord with reasoning and justice.

[34] I shall now turn to the defendants' counterclaim against the plaintiffs for damages. In fact, I do not find on the evidence any reasonable cause of action to sustain the counterclaim in law against the plaintiffs. The first limb of the defendants' claim is that the plaintiffs continued to occupy their premises over a year after the expiry of the lease, which overstay according to them was illegal. Consequently, the defendants claim that they suffered loss of use. Obviously, it is not illegal for any tenant to continue occupy the demised premises after the expiry of the written lease agreement.

[35] Upon expiry of the lease, the tenant becomes a statutory tenant by operation of law and retains possession in terms of s 12(1) of the Control of Rent and Tenancy Agreements Act - vide: *Babema Company (Seychelles) v Green* (1979) SLR 82 following *Remon v City of London Real Property* [1921] 1 KB 49, 54. As a statutory tenant, the occupant is entitled to the benefits of all the terms contained in the lease agreement as long as he observes all the terms expressed or implied in it. He is deemed to be in lawful occupation in the eye of law unless and until evicted by due process of law. In any event, the plaintiffs in this matter had substantive rights to legally retain possession of the premises even after the expiry of the lease, since they had invested in the superstructure of the premises - *droit de superficie* - vide art 555 of the Civil Code and *Samson v. Mousbe* (1977) SLR 158.

[36] The second limb of the defendants' claim is that the plaintiffs committed a fault and caused hardship and inconvenience by entering a restriction against land Title C1441 with the Land

Registry. This prevented the defendants from effecting registration of any dealing in respect of the said title. According to the defendants, they could not sell the property immediately. This caused them loss and damages.

[37] As I see it, the plaintiffs evidently had a legal right and justification to enter a restriction with Land Registry against the said title, since they had a right of retention and a substantive interest in the property until they were compensated by the defendants for the investments they had made therein. Hence, I hold that the defendants' counterclaim against the plaintiffs in this respect is also not maintainable in law. Accordingly, I dismiss the defendants' counterclaim in its entirety.

[38] In the final analysis and for the reasons stated hereinbefore, I enter judgment for the plaintiffs and against the defendants in the total sum of R 264,520.00 with interest on the said sum at 4% per annum (the legal rate) as from the date of plaint and with costs of this action.

Platte Island Resort v EME Management Services

Egonda-Ntende CJ

13 May 2013 CS 3/2013

Abuse of process – Multiple proceedings

The plaintiff pursued multiple proceedings for the same cause. In the first case the plaintiff presumed the existence and the enforceability of the contract and sought judicial amendment of a particular provision. In the second case the plaintiff argued that the whole contract was null and void and incapable of enforcement. The defendant raised a plea in limine litis and asked that the second case to be dismissed on the ground that the claim disclosed no cause of action and that it was an abuse of process.

JUDGMENT For the defendant.

HELD

1 Courts cannot be unconcerned where their processes are abused by litigants.

2 The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

3 Abuse of process will apply where it is manifest on the facts before the court that advisers are indulging in

various strategies to perpetuate litigation either at the expense of their clients who may be hardly aware or at the instance of their clients who have some ulterior motive such as of harassing parties against whom they have brought actions or others who may not be parties.

4 The plea of res judicata applies, except in special cases, not only to points on which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

Legislation
Civil Code arts 1108, 1351,
Code of Civil Procedure s 92
Courts Act ss 5, 17

Cases
Gomme v Maurel [2012] SCCA 28
Jacobs v Devoud (1978) SLR 164
Lotus Holding Co Ltd v Seychelles International Business Authority [2010] SCSC 19

Foreign cases
Dow Jones & Co Inc v Jameel [2005] EWCA Civ 75
Henderson v Henderson (1843) 3 Hare 100

Counsel F Elizabeth for the plaintiff
B Hoareau for the defendant

EGONDA-NTENDE CJ

[1] This is a ruling on a plea in *limine litis*. I have already given a judgment on the contract between these parties. That judgment was given in an earlier case, Commercial Cause No 25 of 2012, filed by the same plaintiff. In that case the plaintiff's argument presumed the existence and enforceability of the contract. It was seeking judicial amendment of a particular provision. In this second case the plaintiff seeks to argue that the whole contract is null and void and incapable of enforcement. Can this conduct be tolerated by the Court?

[2] The timeline of events leaves no doubt that this plaintiff made a deliberate choice to pursue multiple proceedings. The first case was filed on 10 October 2012. The second case (this case) was filed on 22 January 2013, only three months later. The first case was heard on the morning of 18 February 2013. The second case came up for first appearance that afternoon. Mr Elizabeth, counsel for the plaintiff in both cases, freely conceded that the subject-matter was the same. He suggested orally that the cases could be consolidated and heard together. It was, literally, too late in the day for such a suggestion. Mr Elizabeth was then prompted by the Court to seek leave to withdraw the second case. But he had clear instructions to pursue it.

[3] Mr Hoareau, counsel for the defendant, had understandably raised a plea in *limine litis*, asking for the second case to be dismissed on three preliminary grounds. Mr Elizabeth submitted during the hearing of the plea that it should be deferred until the case is heard on its merits. Mr Elizabeth had however already accepted on 18 February that the plea should be heard first. That is clearly the correct course.

[4] The three grounds raised by Mr Hoareau are as follows. First, the claim discloses no reasonable cause of action, because it relies on a legal concept that no longer exists in Seychelles law (the requirement of "cause" in a contract). Secondly, the claim is frivolous and vexatious; and/or thirdly, the claim is an abuse of process because of the pre-existing case between the same parties in respect of the same contract. Mr Hoareau's client is so clearly entitled to succeed on the second and third grounds that it is unnecessary to consider the first. I do so briefly only in view of a possible appeal.

[5] Section 92 of the Seychelles Code of Civil Procedure empowers the Court to dismiss a claim which discloses no reasonable cause of action or is frivolous or vexatious. The sole basis of the claim in this case is that the contract between the parties is "unenforceable and not valid in law for it is without 'cause'". Mr Hoareau correctly submitted that "cause" is no longer among the essential conditions for validity of contracts in Seychelles (as stipulated in art 1108 of the Civil Code). The 1978 decision of Sauzier J in *Jacobs v Devoud* (1978) SLR 164 explains how this came to be. In any event, as Mr Hoareau pointed out, there is no basis on the pleaded facts for contending that the obligations entered into by the plaintiff in this case were without "cause", in the sense of reciprocity of obligation by the defendant. This was an orthodox, bilateral, onerous agreement with clearly defined mutual obligations. As such, there was no difficulty with the first and third conditions of validity in art 1108 (consent to be bound, and certainty of the object which formed the subject-matter of the undertaking). Nor did Mr Elizabeth attempt to pursue the absence of "cause" in the sense of a proper or legitimate reason for the relevant obligations. Sauzier J, as he then was, clarified in *Jacobs v Devoud* that where "cause" in this

sense offends against law or public policy, the contract may be invalid under the final limb of art 1108. No such argument was raised in this case. The plaint accordingly does not disclose a reasonable cause of action.

[6] Mr Hoareau then submitted that the plaint should be regarded as frivolous and vexatious, for the same reason that it constitutes an abuse of the Court's process: because the plaintiff has elected to file two inconsistent claims regarding the same subject-matter, conduct amounting to "clear harassment, nothing more and nothing less".

[7] Mr Hoareau did not cite s 92 of the Code of Civil Procedure in argument, electing to rely on the pre-1976 edition of the English White Book in conjunction with ss 5 and 17 of the Courts Act. Section 92 clearly governs the position where a claim is said to be frivolous or vexatious. However, as Mr Hoareau pointed out, there is no reference in that section to the broader doctrine of abuse of process.

[8] The doctrine of abuse of process is in fact comprehensively discussed in the recent decision of the Seychelles Court of Appeal in *Gomme v Maurel* [2012] SCCA 28, in which both counsel in this case were involved, and which I commend particularly to any practitioner who receives instructions to file a claim like the present one. The Court's authority to strike out abusive claims has been reflected in English rules of Court since well before the enactment of our Civil Code, but it is not dependent on the application of those rules. It is a paradigm example of the exercise of inherent jurisdiction, sourced in the responsibility of the Court to control its own processes.

[9] While related to the rule of res judicata (as now expressed in art 1351 of the Civil Code), abuse of process is not so strictly confined. Courts may, and indeed must, recognize and respond to abuse of process in any situation which threatens the fundamental principle of finality in litigation. As Lord Phillips MR put it in *Dow Jones & Co Inc v Jameel* [2005] EWCA Civ 75 at [54]:

> An abuse of process is of concern not merely to the parties but to the court. It is no longer the role of the court simply to provide a level playing-field and to referee whatever game the parties choose to play upon it. The court is concerned to ensure that judicial and court resources are appropriately and proportionately used in accordance with the requirements of justice.

[10] I have had occasion to cite this observation in another case involving multiple concurrent proceedings, *Lotus Holding Co Ltd v Seychelles International Business Authority* [2010] SCSC 19. In that case I adopted an English definition of a "vexatious" proceeding as one involving:

> two or more sets of proceedings in respect of the same subject matter which amount to harassment of the defendant in order to make him fight the same battle more than once with the attendant multiplication of costs, time and stress.

[11] In *Gomme v Maurel*, the Court of Appeal has drawn particular attention to the responsibility of legal practitioners in this regard (at [15]):

> Courts cannot stay unconcerned where their own processes are abused by parties and litigants. There is a time when they have to decide that enough is enough where the lawyers have not advised their clients. Abuse of process will also apply where it is manifest on the facts before the court that advisers are indulging in various strategies to perpetuate litigation either at the expense of their clients who may be hardly aware or at the instance of their clients who have some ulterior motive such as of harassing parties against whom they have brought actions or others who may not be parties.

[12] Those words could hardly be more apt in the present case. Mr Elizabeth was instructed to file a case which sought the Court's assistance with regard to a particular provision of a contract. There was an agreed statement of facts. It could not have been clearer that Mr Elizabeth's client accepted the validity and enforceability of the contract (save for the disputed interest provision). Yet, before that case was even heard, Mr Elizabeth acted on instructions to file a second case in which his client took a different and irreconcilable stance on the status of the same contract. It is immaterial that the validity of the contract was not specifically ruled upon the first time around, given that it is the plaintiff's own actions which brought about that state of affairs. Multiple judicial observations to this effect are collected in *Gomme v Maurel*. It suffices here to cite the famous dictum of Sir James Wigram V-C in *Henderson v Henderson* **(**1843), 3 Hare 100 at 115:

> [W]here a given matter becomes the subject of litigation in, and of adjudication by, a court of

> competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest; but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

[13] No possible justification has been presented for this plaintiff's change of strategy over the short period between October 2012 and February 2013. In the circumstances it is difficult to resist Mr Hoareau's submission that the new claim is "clear harassment, nothing more and nothing less". It is certainly vexatious and an abuse of the Court's process.

[14] For the foregoing reasons I dismiss the plaintiff's claim with costs to the defendant.

Nourrice v European Hotel Resort

Karunakaran ACJ

20 May 2013 Civ App 18/2012

Employment termination date

The appellant's employment was terminated and she lodged a grievance with the Employment Tribunal. The Tribunal held the termination was unlawful and the appellant should be paid up to the date the employment contract was terminated. The appellant claimed that payments should be made till the date of the Tribunal decision.

JUDGMENT Appeal allowed.

HELD

The date of lawful termination of employment is the date of judgment by the Tribunal and not the date that the employer terminated the employment.

Legislation
Employment Act ss 46, 61

Cases
Cap Lazare v Ministry of Employment and Social Affairs CS 18/2008
Sam's Catering v Ministry of Employment CS 312/2006

Counsel M Vidot for the appellant
A Amesbury for the respondent

KARUNAKARAN ACJ

[1] This is an appeal from a decision of the Employment Tribunal hereinafter called "the Tribunal" dated 28 May 2012. The appellant herein is a former employee of the respondent, European Hotel Resort of Mahé, Seychelles.

[2] The respondent was duly represented by counsel Mrs Amesbury. However, despite repeated adjournments granted at her request, she defaulted appearance. Hence, the Court granted leave for the appellant to proceed with an ex parte hearing in this matter. Be that as it may, the appellant was at all material times in the employment of the respondent European Hotel Resort. On 3 November 2011 the appellant had her employment terminated, by the respondent. Being aggrieved by the said termination, the appellant lodged a grievance with the Ministry of Employment pursuant to the Employment Act 1995, hereinafter called the "Act".

[3] Mediation between the parties was not successful. Therefore, the appellant proceeded to register a case with the Employment Tribunal. After hearing both parties the Tribunal, by a judgment dated 28 May 2012, declared that the said termination was unlawful and the appellant was entitled to such awards as provided by law. Before the Tribunal the appellant had claimed the following benefits which sums should be calculated and paid until the time of lawful termination:

i) One month's salary in leave of notice;

ii) Annual leave (up to date of lawful termination);

iii) Compensation for length of service (up to the date of lawful termination); and

iv) Salary from 3rd November 2011 to the date of lawful termination.

[4] The Tribunal in its judgment awarded (i), (ii) and (iii) above but awards in respect of (iv) above were calculated only up to 12 November 2011, which is the date of termination by the respondent. Hence the appellant has now come before this Court on appeal seeking an order that the salary should be paid until the lawful termination pronounced by the Tribunal. The gist of the grounds as per the memorandum of appeal is that the calculation was in contravention of ss 46(1) and 61(2)(a)(iii) of the Act. The awards should have been calculated up to the date of lawful termination, which the appellant submitted, should be the date of the judgment by the Tribunal.

[5] However, the Tribunal did not make any award in respect of claim under (iv) mentioned hereinbefore. I quite agree with the submissions of Mr Vidot, counsel for the appellant in this respect. In my considered view the date of the judgment by the Tribunal is the actual date of lawful termination. Therefore, I find that the appellant is entitled to a salary up to that date, namely up to 28 May 2012. Hence, I hold the respondent European Hotel Resort liable to pay salary and other terminal benefits to the appellant up to 28 May 2012.

[6] Moreover I note, in the case of *Cap Lazare v Ministry of Employment and Social Affairs* CS 18/2008 and *Sams Catering (Pty) Ltd v Ministry of Employment* CS 312/2006, the Court has reiterated that the calculation of salary should be made until the lawful termination pronounced by the Tribunal. In fact, in the case of *Sams Catering (Pty) Ltd*, Perera CJ, as he then was, agreed that if it is ruled that termination was unjustified then the position is that there

has been no termination. Therefore, the termination will be construed as per s 61(2)(a)(iii) of the Act.

[7] In the case of *Cap Lazare v Ministry of Employment and Social Affairs*, this Court presided over by myself held that the Minister was right in holding that compensation should be paid up to the date of lawful termination pronounced by the Tribunal and not up to the time that the employer terminated the employment.

[8] In the present case it is obvious that the termination was declared unjustified only on 28 May 2012 and the Tribunal lawfully terminated the employment on that day. Therefore, the date of lawful termination cannot be 3 November 2011, the date the appellant's employment was terminated by the employer, as on that date there was no lawful termination. For all legal intents and purposes, lawful termination was only on 28 May 2012 when the Tribunal delivered its judgment.

[9] For these reasons, I hold that the appellant is legally entitled to the following terminal benefits over and above what had already been awarded by the Tribunal. They are:

i) Annual leave from 3 November 2011 to 28 May 2012;

ii) Compensation from the 3 November 2011 to 28 May 2012; and

iii) Salary from 3 November 2011 to 28 May 2012.

[10] In the circumstances, I order the respondent to pay the above benefits to the appellant for the period specified in (i), (ii) and (iii) supra. The appeal is allowed accordingly. I make no order as to cost.

Folette v R

Dodin J

23 May 2013 Crim App 17/2011

Sentencing – Consecutive/concurrent

The appellant was convicted of housebreaking and stealing from a dwelling-house. The appellant argued the Magistrate erred in law by applying the minimum mandatory term to the first count and adding an additional year for the second.

JUDGMENT Sentence reduced.

HELD

1 A court cannot consider imposing a mandatory minimum sentence for an offence for which there was no mandatory minimum sentence when it was committed.

2 A court must, before it imposes a prescribed sentence, assess, upon a consideration of all the circumstances of the particular case, whether the prescribed sentence is proportionate to the particular offence. The essence is that disproportionate sentences are not to be imposed and that courts are not vehicles for injustice.

3 Where two or more offences are committed in the course of a single transaction, all sentences in respect of these offences should be concurrent rather than consecutive.

Legislation
Constitution art 19(4)

Penal Code ss 27A(1), 260, 264, 289
Children Act s 11(2)

Cases
Vital v R (1981) SLR 35

Foreign cases
R v Newsome (1970) 54 Cr App R 485
S v Vilakazi 2009 (1) SACR 552 (SCA)
R v White [2002] WASCA 112

Counsel N Gabriel for the appellant
E Gonthier for the respondent

DODIN J

The appellant Ricky Folette was charged with two counts being:

1) Housebreaking contrary to and punishable under s 289(a) of the Penal Code; and

2) Stealing from a dwelling house contrary to s 260 and punishable under s 264 of the Penal Code.

[1] The brief facts of the offence are that the appellant on 18 October 2006 at Amitie, Praslin broke and entered the dwelling house of Gerry Uranie with intent to commit a felony namely stealing therein and that he did steal from the dwelling house of Gerry Uranie one silver digital camera make Eura Cyber, DVD 777 x together with its headphone, one silver ring and one set of binoculars all amounting to the total value of R 7,000 being the property of Gerry Uranie.

[2] The appellant was convicted on his own guilty plea to both counts and was sentenced to a period of six years imprisonment for the offence of breaking and entering the dwelling house and to a period of one year imprisonment for the offence of stealing from the dwelling house. The sentences were to run consecutive to each other and consecutive to any sentence the appellant was then serving.

[3] The appellant now appeals to this Court against the whole of the decision of the Magistrate on the following grounds contained in the Memorandum of Appeal:

a) On Count 1 that the Magistrate erred in law by applying the minimum mandatory term of five years and adding an additional one year totaling six years, a sentence that would normally be reserved for a non-first offender as per s 27A(1) (b) of the Penal Code.

b) On Count 2 the sentence of one year for stealing from dwelling house imposed to run consecutively with the six years was manifestly harsh and excessive.

c) The Magistrate erred in law by failing to take into account a material particular before sentencing that is the age of the appellant who was a minor at the material time.

[4] I must observe from the outset that I find this procedure of appeal used by the appellant to be most unusually formulated as no ground of appeal against conviction was raised in the Memorandum of Appeal despite the appellant claiming to be appealing against the

whole decision of the Magistrate and concluding with the prayer to quash the sentences rather than claiming that the cumulative effect of the sentences was harsh and excessive. I would urge counsel to file clearer reasons and grounds of appeal in future and to separate any ground of appeal against conviction from the grounds of appeal against sentence so as to prevent the summary dismissal of appeal grounds that have not been clearly set out in accordance with set procedures to the detriment of the appellants. Be that as it may it is obvious that all the three grounds of appeal are against sentence only and I shall treat this appeal as such.

[5] Counsel for the appellant submitted that the offence of housebreaking under s 289(a) of Chapter XXIX of the Code which states that any person who breaks and enters a building, tent or vessel used as a human dwelling with intent to commit a felony therein or having committed a felony in any such building, tent or vessel breaks out thereof, is guilty of a felony termed 'housebreaking'. By virtue of s 27A(1)(b) of the Penal Code Amendment Act 16 of 1995, in the case of conviction, the offender is liable to 10 years imprisonment.

[6] Counsel further submitted that the Magistrate did not address his mind to s 27A(1)(b) either before or after the taking of the guilty pleas and the passing the sentence. He erred on the section of law dealing with sentences and did not treat the appellant as a first offender. He admitted that the prosecution disclosed the record of previous convictions to the Court but maintained that such disclosure is not on record to show that the appellant had indeed any previous convictions or of what nature.

[7] Counsel submitted that a similar offence has been defined under s 27A(2) as 'an offence falling within the same Chapter as the

offence for which the person is being sentenced.' He submitted that there is no evidence in the proceedings that this was the case prior to passing sentence and further, the appellant was not given the opportunity to view the prosecution's list of previous convictions and to contest its contents. Counsel concluded that in the circumstances the appellant should be treated as a first offender and a non-mandatory sentence should be imposed.

[8] On the second ground of appeal counsel submitted as the appellant had pleaded guilty at the beginning of his trial, this mitigating factor should have been treated in his favour. He had not wasted the Court's time and had saved resources considerably in view that he had been transported from prison to Praslin and may well have to be brought back again for continuation of trial. He submitted that the Magistrate should have considered concurrent sentences as an option particularly in view that the appellant was young, a first offender and unrepresented.

[9] On the third ground of appeal counsel submitted that the Magistrate ought to have adjourned the proceedings and sought more particulars on the age and status of the appellant prior to passing sentence. He submitted that in the instant case, the Magistrate has overlooked a material factor in that the appellant was young and may have been a juvenile at the time the offence was committed.

[10] Counsel further submitted that under the Children Act, a young person should not be sentenced to imprisonment if he can be suitably dealt with in any other way provided for under the Act. He referred the Court to the case of *Vital v R* (1981) SLR 35, which stated that a Magistrate should, before passing sentence of imprisonment on a young person, state in open court and place on record the reasons for passing a sentence of imprisonment instead of

dealing with the young person in some other way. He argued that at that time, the Children Act s 11(2) was applicable and a young person described in the Act as a person who is 14 years of age or upwards and under the age of 18 years.

[11] Counsel submitted that the Magistrate could have alternatively sought a probation report, which, although it is not a statutory requirement, might have offered some guidance on the facts and character of the offence and the antecedents of the offender, his age and family background.

[12] Counsel submitted that the Court can only alter a sentence imposed by the trial court if it is evident that the trial court has acted on a wrong principle or overlooked some material factor or if the sentence is manifestly excessive in view of the circumstances of the case. He referred the Court to the case of *R v Newsome* (1970) 54 Cr App R 485 in support of his submission.

[13] Counsel submitted that in the circumstances the appellant's sentences were manifestly harsh and excessive and wrong in law, especially for a young first offender. He moved the Court to quash the sentences imposed by the Magistrate in this case.

[14] Counsel for the respondent submitted on ground 1 that at pages 2 to 3 of the record of proceedings the Magistrate inquired as to whether the accused had any previous criminal conviction and the prosecution stated that he did and the same was produced to the Court. The appellant was not a first-time offender. Counsel submitted that even if it had been the case that the appellant was a first offender, there is no evidence that the Magistrate considered the minimum mandatory term when imposing the sentence, as the Court made no mention of such when imposing the sentence. Counsel

submitted that the sentence imposed by the Magistrate falls well within the provision of s 289 of the Penal Code. Counsel concluded that the Magistrate had correctly applied the power of sentencing and used his discretion to apply a sentence below the prescribed 10 years.

[15] On the second ground of appeal counsel submitted that the Magistrate rightly ordered the sentences to run consecutively as per the amended section of the Penal Code which mandates that it shall not be lawful for a court to direct that any sentence under Chapter XXVI, Chapter XXVIII and Chapter XXIX be executed or made to run concurrently with one another; and the offence in this case does fall under Chapter XXIX.

[16] On ground 3 of the appeal counsel submitted that the appellant's age at the time was not on record and no evidence of his being a juvenile was submitted by the appellant. Counsel submitted that the fact that the appellant was not represented at the trial is not in issue as the appellant was informed of his constitutional right to legal representation and chose to defend the case himself and he was further given adequate advice before he pleaded guilty.

[17] Counsel hence moved the Court to dismiss the appeal and uphold the sentences imposed by the Magistrate.

[18] This appeal raises three issues which need to be addressed. First whether the Magistrate imposed a mandatory minimum sentence for the offence which was committed in 2006 and if so was that sentence unlawful. Second, whether the cumulative effect of the consecutive sentences make the same harsh and excessive and third whether the Magistrate took into account all the mitigating factors including the young age of the appellant before passing sentence.

[19] It cannot be disputed that the Magistrate advised the appellant and it is so recorded in the proceedings of the Magistrates' Court that the first count the appellant was charged with carried a mandatory minimum sentence of five years and the Magistrate clearly stated that to the appellant prior to the appellant pleading guilty to the charges. I therefore find the submission of the respondent that the Magistrate did not consider the mandatory minimum sentence when imposing sentence on the appellant to be incorrect.

[20] However, counsel for the respondent maintained that even if the Magistrate had indeed considered imposing the mandatory minimum sentence since the maximum sentence that the Magistrate could impose was 10 years, the sentence imposed by the Magistrate was well within the prescribed sentence. That may be so but the issue is whether having so decided that he could not impose a sentence lower that five years for the first count the Magistrate unduly restricted himself to imposing a sentence of between 5 and 10 years instead of the full range of 0 to 10 years.

[21] Article 19(4) of the Constitution states that:

> Except for the offence of genocide or an offence against humanity, a person shall not be held to be guilty of an offence on account of any act or omission that did not, at the time it took place, constitute an offence, and a penalty shall not be imposed for any offence that is more severe in degree or description than the maximum penalty that might have been imposed for the offence at the time when it was committed.

[22] This principle implies also that a court cannot consider imposing a mandatory minimum sentence for an offence for which, when it was committed, the mandatory minimum sentence was not the law in force. Secondly, courts must always be mindful in imposing sentence that it is not doing an injustice by imposing a sentence that did not exist at the time of the commission of the offence.

[23] Consequently I accept the appellant's contention that the Magistrate limited his discretion in sentence by the belief that the Court must impose a mandatory minimum sentence for an offence which was committed when the law did not require a mandatory minimum sentence.

[24] The second limb of this issue is whether the sentence imposed by the Magistrate was unlawful taking into account that the maximum sentence that could be imposed was 10 years. On the face of it, the Magistrate imposed a sentence that was well within the limit of the Court's sentencing power. However one should always keep in mind when imposing sentence that a sentence must be proportionate to the offence.

[25] In the case of *S v Vilakazi* 2009 (1) SACR 552 (SCA) the South African Court made this most pertinent point that may be well applicable to our courts when imposing sentence:

> It is incumbent upon a court in every case, before it imposes a prescribed sentence, to assess, upon a consideration of all the circumstances of the particular case, whether the prescribed sentence is indeed proportionate to the particular offence and that the essence of the inquiry is that disproportionate

> sentences are not to be imposed and that courts are not vehicles for injustice.

[26] Considering the above, imposing 60% of the maximum sentence on a young offender who has pleaded guilty is very much disproportionate to the offence considering all the circumstances of the case and I therefore find that the sentence of six years imprisonment imposed by the Magistrate although not per se unlawful, is harsh and excessive in the circumstances.

[27] With regards to the second ground of appeal the issue is whether the sentence of one year imprisonment which was to run consecutive to the six years imposed for the first count is harsh and excessive. Since the two offences occurred during a single transaction the principle known as the single transaction rule should generally apply.

[28] In his text entitled *Principles of Sentencing* (2nd ed, 1979) 53 DA Thomas states:

> The one-transaction rule can be stated simply: where two or more offences are committed in the course of a single transaction, all sentences in respect of these offences should be concurrent rather than consecutive.

[29] The rule against double punishment should also generally be observed when the court is determining an appropriate sentence for each offence. The one transaction rule may assist in determining whether the sentences should be cumulative or concurrent but the Court must look at the aggregate sentence and consider whether the

aggregate is just and appropriate or whether the total sentence is crushing and not in accordance with the totality principle.

[30] In *R v White* [2002] WASCA 112, [26] McKechnie J remarked on the above principles:

> There is no hard and fast rule. In the end a judgment must be made to balance the principle that one transaction generally attracts concurrent sentences with the principle that the overall criminal conduct must be appropriately recognized and that distinct acts may in the circumstances attract distinct penalties. Proper weight must therefore be given to the exercise of the sentencing Judge's discretion.

[31] It is true that current legislation has attempted to remove that discretion from the courts. Whatever may be one's view on this, the fact remains that the Magistrate should have applied the principles that were applicable at the time the offences were committed. Since art 19(4) of the Constitution gives retroactive force only to the offence of genocide or an offence against humanity and not any other crime, the same principle considered in the first ground of appeal should apply to this ground of appeal provided always that the Magistrate could have used his discretion if he had found it appropriate and necessary to consider the two offences as sufficiently distinct and separate to imposed a consecutive sentence and if considering the totality of all the sentences it would not have made the consecutive sentence of one year imprisonment harsh and excessive.

[32] On the third ground of appeal, I find that the issue of the appellant's age was considered by the Magistrate to the extent

allowed by law. In fact there is no evidence to show that the appellant was actually a juvenile at the time of the commission of the offence, a fact that could have been easily established by producing the appellant's birth certificate even on appeal. The records show that the Magistrate considered the mitigating factors before passing sentence which included the youthfulness of the appellant. Without more to go on, I find thus ground of appeal to be wanting in substance and I would dismiss that ground outright.

[33] Consequently, the appeal is allowed against sentence and only to the extent that the sentence of six years imposed by the Magistrate was misconceived, harsh and excessive considering all the circumstances of this case. I therefore set aside the sentence of six years imprisonment and impose a sentence of three years imprisonment in its place. I also find that the sentence of one year imprisonment for the second count was reasonable but that it should not have added to the sentence already imposed as the two offences were part of a single transaction. I hereby order that the sentence of one year's imprisonment imposed for the second count run concurrently with the three years imprisonment imposed for the first count.

[34] Judgment is entered accordingly.

Pillay v R

Dodin J

24 May 2013 Criminal Appeal 12/2011

Fair trial − Duty of the judge to the accused – Absence of counsel

The appellant was convicted on two counts of stealing and stealing and assault. The sentences were to run consecutively. The appellant appealed both conviction and sentence on the ground that he was not properly informed of the nature of the offences and the punishments.

JUDGMENT Appeal dismissed.

HELD

1 A fair trial cannot be realised where an accused person does not understand the import of the criminal proceedings nor have a rudimentary idea as to how to present and conduct a defence by way of putting the essential elements of the defence to the prosecution witnesses.

2 When an accused person is unrepresented, it is the court's duty to offer the accused a certain amount of guidance in order to help the accused not to miss important opportunities to challenge the evidence of the prosecution or to present the defence.

3 The court cannot act as an advisor to the accused as to various tactical possibilities open at every stage and which might have been adopted by counsel assisting the accused.

4 When the accused is unrepresented by counsel, the role of the judge is to advise the unrepresented accused person:

a at the onset, of the constitutional and legal rights to legal representation at the accused person's own expense or from state funds;

b the right, purpose and meaning of cross-examination;

c of any special statutory defence available;

d of the right to address the court at the close of the trial or in mitigation if necessary;

e about exceptional circumstances in the case of compulsory sentences; and

f for an accused who wishes to plead guilty to a charge, the consequences of such plea, the range of sentences that the law provides, and if the facts known to the court already allow, an idea of the sentence likely to be imposed in the particular circumstances.

Legislation
Constitution art 19(2)
Penal Code s 264(a)

Foreign cases
Dietrich v The Queen (1992) 177 CLR 292 (Australia)
Rabonko v The State [2006] 2 BLR 166 (Botswana)
Sunassee v State [1998] MLR 84

Counsel R Durup for the appellant
H Kumar for the respondent

DODIN J

[1] The appellant was convicted of the offence of stealing from the person in case number 866 of 2010 on his own plea of guilty and

was sentenced to four years imprisonment and a fine of R 25,000 out of which a sum of R 10,000 is to be deducted to be paid to the victim as compensation. In another case number 868 of 2010 the appellant, on his own guilty pleas on one count of stealing from the person and one count of assault occasioning actually bodily harm, was convicted to five years imprisonment and a fine of R 10,000 on the first count and six months imprisonment on the other count. The sentences in case number 868 of 2010 are to run consecutive to the sentence in case 866 of 2010 and also consecutive to other sentences the appellant was then serving.

[2] The appellant now appeals against the conviction and sentence on the ground that in both cases, that is 866 of 2010 and 868 of 2010, he was not properly informed in detail of the nature of the offences and the full aspects of the punishments he was faced with and moved the Court to quash the convictions and sentences imposed by the Senior Magistrate.

[3] Counsel for the appellant submitted that art 19(2) of the Constitution of Seychelles was not complied with by the Senior Magistrate in that the Senior Magistrate did not satisfy herself that the appellant understood the nature of the offences and the full extent of the punishments he would face if he pleaded guilty particularly in view of the fact that the appellant was not legally represented at the time. Counsel submitted that the Senior Magistrate ought to have informed the appellant at the time that he faced maximum sentences of 10 years for offences under s 264(a) of the Penal Code and that it was not sufficient to inform the appellant only that he faced prison sentences for such offences.

[4] Counsel concluded that such omission by the Senior Magistrate amounted to a breach of the appellant's constitutional

right, particularly art 19(2) and therefore the convictions and sentences in the above cases should be quashed.

[5] Counsel for the Republic submitted that the appellant was represented throughout the initial stages of the case but failed to appear on the date of the trial and that it was the appellant who on that day decided to change his plea to guilty. Counsel further submitted that the Senior Magistrate did inform the appellant of the nature of the punishments he was likely to get which would be sentences of imprisonment but that the appellant subsequently maintained his decision to plead guilty. Counsel submitted that in the circumstances the pleas taken by the appellant were not taken as a result of misapprehension of the law or the facts or the nature of the charges against him.

[6] Counsel submitted that the sentences imposed by the Senior Magistrate were safe and satisfactory in the circumstances and hence moved the Court to dismiss the appeal.

[7] I have studied the record of proceedings before the Senior Magistrate particularly those dated 30 August 2011 to which this appeal refers. In both cases, the appellant informed the Court that he intended to change his plea to guilty and in both cases, the Senior Magistrate advised the appellant that she would consider prison sentences for the offences should he plead guilty and in both instances the appellant maintained his decision to change his plea to guilty.

[8] This appeal raises two issues which this Court has to determine. First, whether the appellant was sufficiently advised of the consequences of his guilty pleas, and second whether in the

absence of his attorney, it was proper for the Senior Magistrate to proceed with the trial.

[9] In the case of *Dietrich v The Queen* (1992) 177 CLR 292, the High Court of Australia noted the inherent unfairness characteristic of trials wherein accused persons are unrepresented. The Court recognised the fact that lack of legal representation places the accused at a disadvantage. The Court reiterated that a proper defence of the accused requires a proper knowledge of the rules of evidence and procedure. Highlighting the legal complexities faced by the unrepresented accused and the need for professional guide, the Court had this to say:

> Skill is required in both the examination in chief and the cross-examination of witnesses if the evidence is to emerge in the best light for the defence. The evidence to be called on behalf of the accused, if any, must be marshalled so as to avoid raising issues which will be damaging to the case for the Defence. A decision must be made whether the accused is to give evidence on oath, is to make an unsworn statement or is to remain mute. Competence in dealing with these matters depends to a large extent upon training and experience.

[10] In the Botswana case of *Rabonko v The State* [2006] 2 BLR 166 Lesetedi J stated at p 168C–D:

> An accused person has in terms of s 10(1) of the Constitution an entitlement to a fair trial. In my view, a fair trial cannot be realised where an accused person does not understand the import of the criminal proceedings which he is facing nor have a

> rudimentary idea as to how not only to present his case but to conduct his defence by way of putting the essential elements of his defence to the prosecution witnesses. That there is a duty upon a presiding judicial officer to assist an accused person who is unrepresented and seems not to understand the court procedures, in the conduct of his defence has been expressed in a number of cases.

[11] No hard and fast rules can be laid down as to when or to what extent a court should intervene on behalf of accused persons. Each case depends upon its own circumstances. Judicial enabling is a settled practice especially in the Magistrates' Court. In this regard, a Magistrate would ask the unrepresented accused pertinent questions and also give the accused an opportunity to speak. However one should keep in mind that the Magistrate cannot act in a different capacity such as advisor to an accused as stated in the case of *Sunassee v State* [1998] MLR 84. The Court rightly stated thus:

> The accused in a criminal case certainly has a number of rights and is entitled to take several courses of action as the trial proceeds. When an accused person is inops consilii, it is the court's duty to offer him a certain amount of guidance in order to help him not to miss important opportunities which are open to him, under the existing procedure, to challenge the evidence of the prosecution or to present his own defence.

The Court however continued as follows:

> It stands to reason, however, that whilst the essential stages of the procedure are to be brought home to an accused who is unrepresented by counsel, the Court cannot act as an advisor to the accused as to various tactical possibilities open to him as the trial unfolds, nor can the Court indicate to him all possible moves open to him at every stage and which could have been adopted by counsel if there was one assisting the accused.

[12] Hence a Magistrate should as much as practicable follow the following simple rules to ensure that an accused person who is unrepresented receives as fair a trial as possible:

a) advise an unrepresented accused person at the onset of the constitutional and legal rights to legal representation at the accused person's own expense or available from state funds;

b) advise an unrepresented accused person of the right, purpose and meaning of cross-examination;

c) advise an unrepresented accused person of any special statutory defence available to him or her;

d) advise an unrepresented accused person of the right to address the Court at the close of the trial or in mitigation if necessary;

e) advise an unrepresented accused person about exceptional circumstances in the case of compulsory sentences; and

f) advise an unrepresented accused who wishes to plead guilty to a charge, the consequences of such plea, the range of

sentences that the law provide and if the facts known to the Court already allows, an idea of the sentence likely to be imposed in the particular accused person's circumstances.

[13] This list is by no means exhaustive as each case may require the presiding Magistrate to advise the unrepresented accused according to the perceived abilities and understanding of that particular accused person at different stages of the proceedings.

[14] The records show that in this case the appellant had been represented by an attorney who was present at the previous sitting when the trial date was set in his presence. There is no evidence or indication that the said counsel was unable to be physically present at the trial for a valid reason that the Court should have considered. It is bad practice by counsel to fail to appear when they know that they have a duty to the Court and to their clients to be present in Court and discharge their duties in accordance with the law. Should the Court condone such practice it would open the door to undue delay and it would be virtually impossible for cases to be dealt with and completed expeditiously or at all. In this case I find that it was proper for the Senior Magistrate to proceed with the trial in the unwarranted absence of the appellant's counsel.

[15] On the first issue, I am satisfied that the only thing needed to be done by the Senior Magistrate was to advise the appellant on the range of sentences provided for by the law and possibly an indication of the sentences likely to be imposed in the circumstances if sufficient evidence had been led by that stage. From my study of the record I am satisfied that the Senior Magistrate sufficiently advised the appellant of the sentences likely to be imposed were he to plead guilty and indeed advised him clearly that in each case he was likely to face a sentence of imprisonment. The Senior Magistrate need not

have done more than give an indication of the possible sentence that can be imposed for each particular charge and could not have stated the specific sentences to be imposed because the facts of each offence which could influence the sentences to be imposed had not been led at that time and were only stated in full after the plea had been taken and the facts were admitted by the appellant. Having considered the records of the Magistrates' Court and the relevant submissions, I am satisfied that the Senior Magistrate did the necessary to guide the appellant on the likely outcome of his plea if he pleaded guilty to the charges in question. On that account I do not find any fatal defect in the Senior Magistrate's explanation to the appellant on the likely sentence and I do not find the explanation wanting in any further detail. The submission of the appellant that the Magistrate has failed to satisfy art 19(2) of the Constitution is therefore not properly founded and is rejected accordingly.

[16] With regards to the absence of the appellant's counsel, I find that the Senior Magistrate was correct to proceed with the trial since the record shows that the appellant's counsel was present when the trial date was set with his agreement and no reasonable explanation was given at the time nor has since been forthcoming to explain his non-appearance.

[17] Consequently, I find no merit in this appeal and since I find the sentences imposed by the Senior Magistrate were well within her powers, this appeal is hereby dismissed in its entirety.

Durup v Brassel

Egonda-Ntende CJ, Burhan, Robinson JJ

28 May 2013 CC 05/2012

Succession – Testamentary freedom − Reserved heirs – Constitution

After a deceased left all his estate to his wife and a donee, an action was brought by the children of the deceased to determine whether art 913 of the Civil Code with regard to testate succession contravenes art 26 of the Constitution by inhibiting a testator from freely disposing of property and a donee from receiving a bequest.

JUDGMENT For the plaintiff.

HELD

1 The Constitution is not to be treated as a legislative text. It is a living document and has to be interpreted *sui generis.*

2 Inasmuch as the Constitution enshrines the freedom of the people, the Constitution has to be interpreted in a purposive sense.

3 The words "as may be prescribed by law" in art 26 of the Constitution are designed to serve a purpose which includes any law, either statutory or common law.

4 The term "law" or "lawful" relates to the quality of the law, requiring it to be compatible with the rule of law.

5 A "norm" cannot be regarded as a law unless it is formulated with sufficient precision to enable citizens to regulate their conduct.

6 There is a pressing social need to protect the reserved heirs from total and unjust disinheritance to the benefit of third parties. The law of reserved heirs contained in art 913 of the Civil Code is a

limitation necessary in a democratic society guaranteeing the family economic and social protection.

Legislation
Constitution arts 22, 26, 32, 46(7), 47, 130(7)
Civil Code arts 45, 205, 727, 745, 760, 913, 916, 918, 921, Book III Title II
Civil Code of Seychelles Act s 5

Cases
Clothilde v Clothilde (1976) SLR 245
Elizabeth v The Speaker SCA 002/2009
Mancienne v Government of Seychelles SCA 10(2) 2004, LC 262
Pillay v Pillay (1976) SLR 249
Robert v Robert (1974) SLR 197
SNP v Michel SCA 4/09

Foreign cases
Bowman v United Kingdom (1998) 26 EHRR 1
James v United Kingdom (1986) 8 EHRR 123
Silver v United Kingdom (1983) 5 EHRR 347
Steel and Morris v United Kingdom (2005) 41 EHRR 403

Foreign legislation
Civil Code (France) art 913-1
Inheritance (Provision for Family and Dependants) Act 1975 (England and Wales)
European Convention on Human Rights

Counsel B Hoareau for the plaintiffs
P Pardiwalla for the first defendant
A Madeleine for the Attorney-General

The judgment of the Court was delivered by
ROBINSON J

[1] The Supreme Court exercising its jurisdiction under art 46(7) of the Constitution of the Republic of Seychelles (the Constitution) in Civil Suit No 113/2011, referred for the determination of the Constitutional Court the question of:

> Does article 913 of the Civil Code of Seychelles, and the resultant statutory scheme for succession with regard to testate succession, contravene Article 26 of the Constitution of Seychelles by inhibiting a testator from freely disposing of his property and a donee from receiving and enjoying such bequest?

[2] The facts that give rise to these proceedings are substantially not in dispute.

[3] The plaintiffs and defendants and others who are not before the Supreme Court are siblings, the children of the deceased Mr Henri Emmanuel Ange Savy.

[4] The deceased is the testator in this matter. The testator was the owner of the land comprised in Title V373 with a house situated thereon. The testator bequeathed the bare ownership of the land comprised in Title V373 to Josepha Brassel and the usufructuary interest in the said land to his wife. He also bequeathed to his wife all the monies he may have left behind.

[5] The testator was predeceased by his wife, leaving Josepha Brassel the sole heir to his estate, by testamentary disposition.

[6] The plaintiffs filed a plaint to reduce the testamentary disposition of the testator to the disposable portion of one fourth (¼), and for the reserved portion to be shared equally among the plaintiffs, defendants and other descendants, pursuant to the rules of succession.

Submissions of Counsel

[7] At the hearing of this reference Mr Pardiwalla for the first defendant relied on written submissions filed in the Court earlier on pursuant to the order of this Court and submitted orally for the defendants. Mr Hoareau submitted orally for the plaintiffs, in addition to relying on the written submissions filed prior to the hearing of this reference. Ms Madeleine for the Attorney-General relied on the written submissions filed in the Court earlier on and submitted orally.

[8] It is contended for the first defendant that the limitation contained in art 913 of the Civil Code of Seychelles Act (Civil Code) is not a permitted limitation under art 26(2)(a) of the Constitution and does not amount to a law necessary in a democratic society, neither is it in the public interest. It is contended for the defendants that:

> … limitations that are necessary in a democratic society are such that are necessary to regulate the procedure and method of, in our case the disposal of property, so that it creates certainty and order in a society. … These limitations should only be aimed at providing formal prerequisites for carrying out a legal transaction in accordance with law.

[9] Mr Pardiwalla further submitted that art 205(2) of the Civil Code is a limitation, which is justifiable and necessary in a democratic society and in the public interest under art 26(2)(a) of the Constitution. He submitted that a court has the discretion under art 205(2) of the Civil Code to order the provision of maintenance from the estate of the deceased spouse upon a claim made by the surviving spouse pursuant to that article. In support of this point he

referred this Court to the Inheritance (Provision for Family and Dependants) Act 1975 of England and Wales, which he claims contains provisions similar to art 205(2) of the Civil Code.

[10] Mr Hoareau for the plaintiffs submitted that art 913 of the Civil Code is a permitted limitation under art 26(2)(a) of the Constitution and amounts to a law necessary in a democratic society and is in the public interest. He cited the cases of *Silver v United Kingdom* (1983) 5 EHRR 347, *James v United Kingdom* (1986) 8 EHRR 123 insofar as they are relevant to this point.

[11] It is further contended for the plaintiffs that:

> … the limitation contained in Article 913 of the Civil Code is proportionate to the legitimate aim pursued in that: (i) It does not prohibit or limit the right of the parent to dispose his/her entire property for consideration;
>
> (ii) It also allows for the disposition by gifts inter vivos or by will of a certain portion of the property depending on the number of children;
>
> (iii) The limitation of Article 913, is moreover only in respect of a small class, namely the descendant of the donor (see Article 921 of the Civil Code).

[12] Ms Madeleine for the Attorney-General submitted that the scheme of art 913 of the Civil Code and the resultant provisions of Book III, Title II: Gifts Inter Vivos and Wills of the Civil Code consist of a justifiable limitation to the right to freely dispose of one's property by a law necessary in a democratic society.

[13] She further submitted that such limitations to the right to freely dispose of one's property under art 913 of the Civil Code

and the resultant provisions of Book III, Title II: Gifts Inter Vivos and Wills are primarily based on the administration of property of persons who have died, and also on the wider notion of public interest.

[14] She further made the point that the rights of the reserved heirs to the reserved portion of the succession of the deceased, who have died intestate under the Civil Code, is arguably an extension of the protection of the economic rights of the family as guaranteed by art 32(1) of the Constitution. She stated however, that the rights of the reserved heirs to the reserved portion of the succession of the deceased are not absolute rights.

Discussions and decisions

[15] Discussions of the matters in issue and findings and conclusions of this Court follow the same order as the submissions of counsel. We start with the burden of proof, standard of proof and principles of constitutional interpretation that guide this Court.

[16] The burden of proof in constitutional matters is governed by art 130(7) of the Constitution, which provides:

> Where in an application under clause (1) or where the matter is referred to the Constitutional Court under clause (6), the person alleging the contravention or risk of contravention establishes a prima facie case, the burden of proving that there has not been a contravention or risk of contravention shall, where the allegation is against the State, be on the State.

[17] With regard to the principles of interpretation art 47 provides:

> 47. Where a right or freedom contained in this Chapter is subject to any limitation, restriction or qualification, that limitation, restriction or qualification —
>
> (a) shall have no wider effect than is strictly necessary in the circumstances; and
> (b) shall not be applied for any purpose other than that for which it has been prescribed.

[18] Domah JA in *Elizabeth v The Speaker* SCA 002/2009, with the other members of the bench concurring, made the point that:

> 42. We have had a couple of occasions in the recent past to state the best guide to the interpretation of the Constitution of Seychelles is the Constitution itself: See *John Atkinson v Government of Seychelles and Attorney-General* SCA 1 of 2007. The Constitution is not to be treated as a legislative text. The Constitution is a living document. It has to be interpreted ´sui generis´. In the case of *Paul Chow v Gappy and ors* 2007 SCA, we also emphasized on the specific role of the Constitutional Court as well as the principles of interpretation that should obtain when it sits as such. In as much as the Constitution enshrines the freedoms of the people, the constitutional provisions have to be interpreted in a purposive sense. Foreign material on the same matter aid interpretation but it should be from jurisdictions which uphold the bill of rights which our Constitution enshrines.
>
> 43. We need, admittedly, to go to a foreign source for persuasive authority. At the same time, we need to recall that paragraph 8 of the Schedule 2 of the

> Constitution makes it eloquent as to the manner in which we should interpret our Constitutional provisions:
> For the purposes of interpretation —
> (a) the provisions of this Constitution shall be given their fair and liberal meaning;
> (b) this Constitution shall be read as a whole; and
> (c) this Constitution shall be treated as speaking from time to time.
>
> 44. We need not likewise, overlook the existence of Article 48 which requires that the rights enshrined in Chapter III shall be interpreted in such a way as not to be inconsistent with any international obligations of Seychelles relating to human rights and freedoms and a court shall, when interpreting the provisions of this Chapter, take judicial notice of the Constitutions of other democratic States or nations in respect of their Constitutions.

Right to Property and Protection of Families

[19] The right to property is constitutionally protected under art 26(1) of the Constitution. Article 26(1) is set out as well as cl 2(a) and 2(d) of it, which permit limitations therefrom as follows:

> 26.(1) Every person has a right to property and for the purpose of this article this right includes the right to acquire, own, peacefully enjoy and *dispose of property* either individually or in association with others.
>
> (2) The exercise of the right under clause (1) may be *subject to such limitations as may be prescribed by law and necessary in a democratic society –*

> *(a) in the public interest;*
>
> ....
>
> *(h) with regard to the administration of the property of persons adjudged bankrupt or of persons who have died or of persons under legal incapacity;* [Emphasis added]

[20] I agree, as rightly pointed out by counsel for the first defendant, that cl (2)(d) does not find application in these proceedings.

[21] The right to protection of families under art 32(1) of the Constitution is also set out:

> 32(1) The State recognises that the family is the natural and fundamental element of society and the right of everyone to form a family and undertakes to promote the legal, economic and social protection of the family.

[22] Book III of the Civil Code deals with the various ways of acquisition of ownership. Title I of this Book is devoted to the subject of succession and Title II to the subject of gifts inter vivos and wills. Chapter III of Title II is devoted to the subject of the disposable portion and reduction. Article 913 of the Civil Code features under Chapter III of Title II, and the said article is set out:

> 913 — Gift inter vivos or by will shall not exceed one half of the property of the donor, if he leaves at death one child; one third, if he leaves two children; one fourth, if he leaves three or more children; there shall be no distinction between legitimate and natural children except as provided by Article 915-1.

> Nothing in this Article shall be construed as preventing a person from making a gift inter vivos or by will in the terms of article 1048 of this Code.

[23] I note that at the heart of the submissions of counsel is the constitutionality of the law of reserved heirs, the essence of which is contained in arts 913–916 of the Civil Code. The law of reserved heirs of the Civil Code drew its articles from the Civil Code of the French extended to Seychelles by decree of Decaen on 21 April 1808. The 1808 decree was repealed by Act 13 of 1975, titled ″Civil Code of Seychelles Act″, which brought the Civil Code into operation on 1 January 1976.

[24] Section 5 of the Civil Code of Seychelles Act provides:

> 5(1) The text of the Civil Code of Seychelles as in this Act contained shall be deemed for all purposes to be an original text, and shall not be construed or interpreted as a translated text.
>
> (2) Nothing in this Act shall invalidate any principle of jurisprudence of civil law or inhibit the application thereof in Seychelles except to the extent that it is inconsistent with the Civil Code of Seychelles.

[25] I shall therefore, at the outset briefly state the juridical nature of the law of reserved heirs and the legal consequences flowing from the juridical nature.

[26] Article 913-1 of the French Civil Code (law of 3 January 1972) (it is noted that the article remained unchanged by the said law) provides:

> 913-1 Les libéralités, soit par actes entre vifs, soit par testament, ne pourront excéder la moitié des biens du disposant s'il ne laisse à son décés qu'un enfant; le tiers s'il laisse deux enfants; le quart s'il en laisse trois ou un plus grand nombre; sans qu'il y ait de distinguer entre les enfants légitimes et les enfants naturels, hormis le cas de l'article 915.

[27] The juridical nature of the ″réserve héréditaire″ is explained in *Juris-Classeur Civil* art 882 à 966 5, 1982 under the title: ″Quotité disponible et réduction″ at notes 15 and 16. I reproduce them in part:

> 15. − … La réserve héréditaire demeure une partie de la succession soumise au régime commun des biens successoraux *avec cette seule particularité qu'elle limite la liberté de disposer du de cujus et qu'elle 269rappes les réservataires contre les libéralités excessive de celui-ci.*
>
> 16.− … Le patrimoine successorale a été decoupé en deux parts … L'une qui est disponible et qui peut être entièrement absorbée par les libéralités (entre vifs ou à cause de mort) émanant du de cujus, c'est la quotité disponible, l'autre qui est 269rappes d'indisponibilité, c'est la réserve.
>
> Les réservataires sont donc des héritiers choisis par la loi en raison de leurs proche parenté avec le de cujus et le seul titre qui leur permet de prendre les biens frappés d'indisponibilités c'est leur qualité d'héritier. *Ils sont des héritiers comme les autres, appelés par la loi à prendre une part de la succession, mais ils ont simplement en plus une qualité, celle de réservataires, qui leur permet de s'insurger, éventuellement, contre les libéralités excessive faites*

> *par le défunt … ce que ne peuvent faire les héritiers non réservatires* (Planiol et Ripert op cit, n 24). [Emphasis added]

[28] One of the important consequences flowing from the juridical nature of the ″réserve héréditaire″, which is of relevance for the purposes of the proceedings before the Supreme Court, is explained in *Juris-Classeur Civil* Art. 882 à 966 5, 1982 op cit, at note 25:

> 25. — La cinquième consequence est que les biens qui constituent la réserve héréditaire sont dévolus selon les régles de la succession ab intestat. De telle sorte que, en presence d'un testament, il se produit une division de la succession les biens faisant partie de la quotité disponible obéissent aux règles des successions testamentaires et ceux constituant la réserve suivent les régles des successions ab intestat ...

[29] This is further explained in Planiol et Ripert, *Traité Pratique de Droit Civil Français*, Tome V "Donations et Testament" at note 24:

> 24 … La reserve est une partie de la succession ab intestat. Leur droit a son fondement dans les arts. 745, 746 et 758 à 760 rélatifs aux successions, sous le couvert des arts 913 et s relatives à la réserve et à la quotité disponible.

[30] It is not disputed that the law of reserved heirs is a limitation to the exercise of an owner of property of his or her rights to dispose of property by way of gifts *inter vivos* or by will, which is guaranteed under art 26(1) of the Constitution. Such a limitation entails a violation of art 26(1) if it does not fall within one of the

exceptions provided for in cl 2 of art 26. This Court therefore, has to examine whether the limitation is ″prescribed by law″ and the aim or aims is necessary in a democratic society.

Is the limitation prescribed by law?

[31] In *Mancienne v Government of Seychelles* (No 2) SCA 10/2004, LC 262 the President of the Court of Appeal Ramodibedi with Bwana JA concurring, interpreted the term ″as prescribed by law″ with respect to a restriction that may be imposed by law under art 22(2) of the Constitution. I reproduce paragraph 35 of the judgment in part:

> [35] In my opinion, the words ″as may be prescribed by a law″ … are clearly designed to serve a purpose which is this, namely, to include any law either statutory … or the common law that may be necessary in a democratic society for the protection of the values set out in sub-clauses (2)(a)(b)(c)(d)(e) and (f) of Article 22. … In this regard it is important to note that the word ″law″ is defined in section (1) of the principles on Interpretation in Schedule 2 of the Constitution to include ″any instrument that has the force of law and any unwritten rule of law.

[32] Furthermore, I observe that the law must contain certain qualitative characteristics and afford appropriate procedural safeguards so as to ensure protection against arbitrary action. In the case of *James v United Kingdom* the Chamber of the European Court of Human Rights reiterated that:

> …the term ″law″ or ″lawful″ in the Convention … also [relate] to the quality of the law, requiring it to be compatible with the rule of law.

[33] Accordingly the Chamber of the European Court of Human Rights in the case *of Silver v United Kingdom* interpreted the term ″prescribed by law″ with respect to a restriction that may be imposed by a law in terms of the European Convention on Human Rights as follows:

> A second principle is that ″the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances, of the legal rules applicable to a given case″ ….
>
> A third principle is that ″a norm cannot be regarded as a ´law´ unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail".

[34] It follows from the above interpretations that the limitation contained in art 913 of the Civil Code and the resultant provisions of Book III, Title II: Gifts Inter Vivos and Wills of the Civil Code is a limitation prescribed by law, which is adequately accessible to the citizen of this country and attains the level of certainty that is reasonable in the circumstances.

Is the limitation necessary in a democratic society and in the public interest?

[35] In the case of *Silver v United Kingdom*, the Chamber of the European Court of Human Rights summarised the principles of the phrase ″necessary in a democratic society″ as follows:

> (a) the adjective ″necessary″ is not synonymous with ″indispensable″, neither has it the flexibility of such expressions as ″admissible″, ″ordinary″, ″useful″, ″reasonable″ or desirable …″;
>
> (b) ….
>
> (c) the phrase ″necessary in a democratic society″ means that, to be compatible with the Convention, the interference must, inter alia, correspond to a ″pressing social need″ and be ″proportionate to the legitimate aim pursued″... ;
>
> (d) those paragraphs of Articles of the Convention which provide for an exception to a right guaranteed are to be narrowly interpreted ….

[36] I note that the principles enunciated in *Silver v United Kingdom* have been endorsed by our Courts. In the case of *Seychelles National Party v Michel* SCA 4/09, Hodoul JA with the other members of the bench concurring stated that:

> … what is necessary in a democratic society implies the existence of a ″pressing social need″: Lingens Vaustria, para 39; Steel Morris v United Kingdom, para 87; Malisiewicz-Gasior v Poland para 58; Steel and Morris v United Kingdom (2005) 41 EHRR 403, para 88 and Bowman v United Kingdom 26 EHRR 1 … ;

[37] It follows from the above interpretations that I am not inclined to agree with the argument of counsel for the first defendant that:

> limitations that are necessary in a democratic society are such that are necessary to regulate the procedure

> and method of, in our case, the disposal of property, so that it creates certainty and order in a society.

[38] In sum therefore, this Court has to assess this ″pressing social need″ bearing in mind that any such limitation to the right of an owner of property to freely dispose of his or her property is to be narrowly interpreted.

[39] Article 745 of the Civil Code provides:

> 745— Children or their descendants succeed to their father and mother, grandfathers and grandmothers or other ascendants without distinction of sex or primogeniture, even if they are born of different marriages.
>
> *They take in equal shares, and per head, if they are all of the first degree and inherit in their own right; they take per stirpes when all or some of them inherit by representation.* [Emphasis added]

[40] Article 913 of the Civil Code provides that no distinction shall be made between legitimate and natural children except as provided by art 915-1 of the Civil Code. We however, note that a distinction is made under art 760 of the Civil Code between legitimate children and natural children. Article 760 of the Civil Code makes it clear that natural children, whose father or mother, at the time of their conception, was married to another person, shall be entitled to succeed together with any legitimate children of that marriage; in that case, however, the share of such natural child shall be one half of what it would have been if all the children of the deceased had been legitimate.

[41] Be that as it may, I observe that the law of reserved heirs under the umbrella of art 913 of the Civil Code recognises the special link that exists between parent and child without regard to the age of the child and distinction of sex. It is grounded on the principle of equality among heirs, subject to art 760 of the Civil Code.

[42] It is also bound on the notion of support as rightly pointed out by Ms Madeleine for the Attorney-General. I repeat in part notes 622 of *Précis Dalloz, Droit Civil*, "Les Successions Les libéralités", François Terré, Yves Lequette, 1983 Titre II : Le Pouvoir de la volonté, Sous-Titre : Les limites du pouvoir de la volonté, Chapitre II : La Réserve Héréditaire:

> 622. – … La réserve apparait ainsi comme l'expression d'un devoir d'assistance familial. La procreation des enfants impose non seulement à leur auteur de les nourrir et de les élever, mais encore de leur donner les moyens de pousuivre leur existence, en assurant leur avenir ….

[43] I note that the State recognises that the family is the natural and fundamental element of society and undertakes to promote the legal, economic and social protection of the family under art 32(1) of the Constitution. This limitation contained in art 913 of the Civil Code affords the widest possible legal, economic and social protection to the family, which is the natural and fundamental group unit of society and is therefore, in the public interest under art 26(2)(a) of the Constitution.

[44] The first defendant has contended that the obligation to maintain a surviving spouse, which obligation arises out of marriage is a limitation that is justifiable and necessary in a

democratic society and is in the public interest. I observe that, under art 205-2 of the Civil Code, maintenance owed to the surviving spouse is a prior charge upon the estate of the deceased and takes precedence over the claims and rights of heirs.

[45] I further observe that the Inheritance (Provision for Family and Dependants) Act of England and Wales 1975 empowers the court under the said Act to award reasonable provision out of a deceased estate for the maintenance of certain dependants if the will or intestacy fails to make such provisions for them. Such provisions of the said Act clearly restrict the freedom of the testator under English law to dispose of his or her property in any way he or she chooses.

[46] In light of the above arguments, I have no difficulty to further hold that there is also a ″pressing social need″ to protect the reserved heirs from total and unjust disinheritance from a succession, in which they are entitled, to the benefit of third parties.

[47] Therefore, I have no difficulty to find that the law of reserved heirs contained in art 913 of the Civil Code is proportionate to the legitimate aim pursued in that:

i) the Civil Code provides for only two types of reserved heirs (parents and children including descendants of all degrees - doctrine of representation) in the absence of which, gifts *inter vivos* or by will may exhaust the entire property (arts 913–916 of the Civil Code);

ii) article 727 of the Civil Code provides for circumstances where a person shall not succeed to a succession as unworthy to do so;

iii) it does not prohibit or limit the right of an owner of property from disposing of his or her entire property for consideration, subject to art 918 of the Civil Code. Under the said article of the Civil Code there is an irrebutable presumption whereby a sale by a person to one of his or her heirs in direct line ″avec réserve d'usufruit″ is deemed to be a ″donation″: *Robert v Robert* (1974) SLR 197, *Clothilde v Clothilde* (1976) SLR 245, *Pillay v Pillay* (1976) SLR 249.

[48] In the result, I find that the law of reserved heirs contained in art 913 of the Civil Code is a limitation that is necessary in a democratic society guaranteeing the family, which is the fundamental group unit of society legal, economic and social protection.

Cinan v R

Domah, Twomey, Msoffe JJA

30 August 2013 SCA 26/27/2009

Murder − Common intention – Intoxication

Two accused were sentenced to life imprisonment for murder. They appealed on the ground that there was no evidence of a common intention to kill the deceased.

JUDGMENT Appeal dismissed.

HELD

1 Where two defendants participate together in one crime and in the course of it one commits a second crime which the other may or may not have foreseen, the test for the liability of the second party with regard to common intention is an objective one.

2 Common intention may be inferred by for instance the manner the accused arrived at the crime scene, mounted the attack, the manner in which an assault was conducted and the concerted conduct following the commission of the offence.

3 The particular wording of s 196 of the Penal Code of 'probable consequence' must be read within the context of the whole provision.

4 Probability can indicate different degrees of odds. The provision should not be construed as virtual certainty but rather as denoting a likely outcome which fits within the context of the whole of the provision.

5 A trial judge should leave an alternative verdict of manslaughter to a jury in cases where by reason of intoxication the persons charged at the time of the act or omission did not know that such act or omission was wrong and did not know what they were doing.

6 If the evidence is wholly incredible, or so tenuous or uncertain that no reasonable jury could reasonably accept it, the judge is entitled to put it aside.

Legislation
Penal Code ss 4, 14, 17, 23, 193, 194, 196
Evidence Act

Cases
Kilindo v R SCA 4/2010
Larue v R SCA 1 & 2/1989
R v Hoareau (1975) SLR 31
R v Vel (1978) SLR 124
Sanders v R (1992) SLR 206
Sopha v R SCA 11/2010
Xavier v The State SCA 59/1997

Foreign cases
Becke v Smith (1836) 2 M & W 191
Brennan v The King (1936) 55 CLR 253
Brown and Isaac v The State [2003] UKPC 10
Darkan v The Queen (2006) HCA 34
DPP v Beard [1920] AC 479
DPP v Douglas and Hayes [1985] ILRM 25
DPP v Majewski [1977] AC 443
DPP v Mudhoo [1986] SCJ 23

Furbert v The Queen [2000] 1 WLR 1716
Hunter and Moodie v The Queen (2003) UKPC 69
Mendez v R [2010] EWCA Crim 516; [2011] QB 876
Paniapen v The Queen (1981) MR 254
R v A [2010] EWCA Crim 1622
R v APP [2012] QCA 104
R v Coutts [2006] 1 WLR 2154
R v Gnango [2011] UKSC 59
R v Gush [1980] 2 NZLR 92
R v Hyde [1991] 1 QB 134
R v Keenan (2009) 236 CLR 397
R v Kingston [1993] 4 All ER 373
R v Lovesey and Peterson (1969) 53 Cr App R 461
R v Matthews and Alleyne (2003) 2 Cr App R 30
R v Pascoe [1997] QCA 452
R v Powell [1997] 4 All ER 545
R v Rahman [2008] UKHL 45; [2009] 1 AC 129
R v Sheehan and Moore (1975) 60 Cr App R 308
R v Swindall (1846) 2 Car & K 230
R v Woollin [1999] 1 AC 82
Stuart v The Queen (1974) 134 CLR 426
Von Starck v The Queen [2000] 1 WLR 1270

Foreign legislation

Criminal Code (Australia) s 8
Penal Code (Bermuda) s 28

Counsel J Camille for the first appellant
J Renaud for the second appellant
C Brown for the respondent

TWOMEY JA

[1] The appellants in this case were employed as security officers at United Concrete Products Services (UCPS), Anse des Genets, Mahé. They were convicted on 30 September 2009, pursuant to s 193 read with s 23 of the Penal Code, of the murder by common intention of a fellow employee, André Durup. At their trial each appellant blamed the other for the murder of the deceased. Both were convicted of murder and sentenced to life imprisonment. They have appealed against the verdict. I have had the benefit of reading my brother Domah J's judgment with which I concur.

[2] However, given the fact that the second appellant in his grounds of appeal raises issues of the law on common intention and intoxication I take the opportunity to further expand on the jurisprudence in these areas. The issues are:

1) Whether the test for common intention was satisfied in this case.

2) Whether the issue of manslaughter should have been left to the jury as an alternative verdict, given the fact that there was some evidence of intoxication of the second appellant.

Common intention

[3] The second appellant submits that there was insufficient evidence of common intention between the parties to commit the murder of the deceased. We have had the opportunity in the cases of *Kilindo v R* SCA 4/2010 and *Sopha v R* SCA 11/2010 to elaborate on the law of common intention in Seychelles. Counsel for the second appellant takes issue with the decided cases and our view that our law on common intention differs from that of English common law.

The test in terms of the secondary offence committed in pursuance of the agreed first offence is an objective one. He relies on s 4 of the Penal Code which states that:

> This Code shall be interpreted in accordance with the principles of legal interpretation obtaining in England, and *expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English criminal law and shall be construed in accordance therewith.*
>
> [Emphasis added]

[4] We do not see the relevance of s 4 to the provision on common intention as contained in s 23 of the Penal Code which provides:

> When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.

Our law as stated in this statutory provision is different to the law of common intention as has developed in the common law of England. Section 4 of the Code clearly cautions the court to interpret the provisions within their context. In *Darkan v The Queen* (2006) HCA 34, the High Court of Australia held (at paragraph 30):

> One of the objectives of codification of the criminal law was to avoid unnecessary elaboration of the law. Such elaboration may be prone to confuse rather than to assist juries. Especially where the law has been restated in a code, so as to make a fresh start, it would ordinarily be wrong to gloss the language with notions inherited from the common law or with words that merely represent a judicial attempt, in different language, to restate Parliament's purpose.

[5] Common law jurisdictions generally recognise three main possibilities where common intention or joint criminal enterprise may arise: first, where the two defendants joined in committing a single crime; in these circumstances they are in effect joint principals in what is sometimes referred to as the "plain vanilla joint enterprise," (Lord Hoffmann in *Brown and Isaac v The State* [2003] UKPC 10 at para 13)*;* second, where D2 aids and abets D1 to commit a single crime, for example where D2 provides D1 with a weapon to commit a murder; third where D1 and D2 participate together in one crime and in the course of it D1 commits a second crime which D2 may or may not have foreseen.

[6] It is the third category which has proved challenging in terms of finding a test to assess whether the secondary party had the necessary intent to be charged with the secondary offence. In this respect English law on joint enterprise liability is at best unclear and has led to irrational decisions as is evidenced by the recent case of *R v Gnango* [2011] UKSC 59. The difficulties in English law are compounded by the lack of clarity as to whether there should be a distinction between secondary liability and joint enterprise liability. It is however generally true that in England and most other common

law jurisdictions such as Australia (but only in states where the common law approach is applied), New Zealand and Canada, the test for liability of the secondary party in joint enterprise offences is subject to an evaluation of what the secondary party could have reasonably foreseen the primary offender might do insofar as the secondary offence is concerned. It is therefore a subjective test.

[7] The test for liability of the secondary party in the third scenario common intention offences in Seychelles is an objective one. In *Kilindo* (supra) we made the distinction based on the particular wording of s 23 the Seychelles Penal Code (supra). We are strengthened in our views by the recent case of *R v AAP* [2012] QCA 104 which reaffirmed *Stuart v The Queen* (1974) 134 CLR 426 and *R v Keenan* (2009) 236 CLR 397.

[8] In *Keenan,* Kiefel J quoted *Stuart* with approval at page 428:

> The question posed by the section is whether in fact the nature of the offence was such that its commission was a probable consequence of the prosecution of the common unlawful purpose and not whether the accused was aware that its commission was a probable consequence.

[9] In *AAP,* Dalton J agreed, holding at paragraph 26:

> … in deciding whether or not the offence actually committed was a probable consequence of the unlawful purpose, there is no resort to the views of any person, ordinary, reasonable or otherwise. The matter is simply to be determined as a matter of fact, objectively.

[10] The three cases cited are from the state of Queensland, Australia; s 8(1) of its Criminal Code being identical to s 23 of our Penal Code.

[11] Similarly the Privy Council, in the appeal from Bermuda in the case of *Furbert v The Queen* [2000] 1 WLR 1716 on the interpretation of s 28 of the Bermudan Penal Code which is also identical to that of Seychelles on common intention, followed the Queensland authorities and also applied an objective test.

[12] In any event, the present case involves two persons, who as counsel for the respondent submits, set out to confront the deceased verbally. It can be inferred from the circumstances of the case that although this may have been their original intention, the situation escalated and that a physical assault ensued. The fact that the appellant appreciated the seriousness of the injuries that had been inflicted on the deceased is borne out in his own testimony where he states that he helped the first appellant transfer the body of the deceased into the boot of the jeep and saw the deceased "was still breathing and had not yet died." His knowledge that the state of affairs he had participated in had become life threatening is also evident when he states at page 777 of the transcript of proceedings:

> I saw that he was still alive and he was still breathing and I felt that he would have remained alive if we had brought him to hospital.

This together with his failure to call for medical assistance or to bring the deceased to hospital or to report the matter to the police is evidence that he knew that he had created or contributed to the creation of a state of affairs endangering the life of the deceased.

[13] This evidence places this current case in the first scenario of joint enterprise crime - in other words the defendants joined in committing a single crime; they were in these circumstances joint principals. There is no question of an objective test being triggered in the circumstances. The applicable principles are those as contained in the provisions of s 196 of the Penal Code relating to malice aforethought:

> Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:
>
> (a) an intention to cause the death of or to do grievous harm to any person, whether such person is the person actually killed or not;
>
> (b) *knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.* [Emphasis added]

[14] There is no doubt that knowledge can be inferred from the evidence adduced. In his summing up the trial judge explained the law on common intention to the jury and went on to state:

> … common intention envisages a sharing of similar intention entertained by the accused persons ... common intention could be proved by showing the conduct of the two accused, that the two accused by

> reason of actually participating in the crime, some overt or obvious act, active presence ... as well as immediate conduct after the offence was committed ... The inference of common intention could be gathered by the manner that the accused arrived at the scene, mounted the attack and the manner in which the beating was given, the concerted conduct succeeding the commission of the offence are all matters to be taken into consideration as determining common intention….

[15] We find that this direction was sufficient and correct and in the circumstances reject counsel's submission that the trial Judge's direction to the jury regarding common intention was lacking.

The alternative verdict of manslaughter for intoxication in murder indictments

[16] Counsel for the appellant also contends that the trial Judge's summing up was wrong since it did not leave the issue of intoxication and the possibility of an alternative verdict to the jury.

[17] Section 14 of the Penal Code contains the following provisions on the subject of intoxication:

> (1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.
>
> (2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and -

(a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or

(b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.

(3) Where the defence under subsection (2) is established, then in a case falling under paragraph (a) thereof the accused person shall be discharged, and in a case falling under paragraph (b) the provisions of section 13 shall apply.

(4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.

[18] From the above provisions it is clear that intoxication can be a defence to a charge of murder in limited instances. The law distinguishes between involuntary and voluntary intoxication. Section 14(2) of our Penal Code reflects the English common law generally on involuntary or innocent intoxication save for the exception provided by *R v Kingston* [1993] 4 All ER 373 which is authority that even in such cases the jury should be left to consider whether the accused's intent to commit the criminal act was induced by involuntary intoxication and thereby negated.

[19] Voluntary intoxication provides a bigger challenge. Criminal law seeks to punish those who have the requisite mens rea for an offence committed and intoxication clearly affects the mind and its ability to form intention. Yet many crimes are clearly alcohol or drug related and the state has a duty to protect its citizens from such harm. The laws on intoxication and crime try to do both and rarely succeed. The difficulty lies in not knowing whether the person who was intoxicated would have formed the same intent had he been sober.

[20] The law on intoxication distinguishes between crimes of specific intent and those of basic intent (*DPP v Beard* [1920] AC 479; *DPP v Majewski* [1977] AC 443). Murder is regarded as a crime of specific intent (*R v Sheehan and Moore* (1975) 60 Cr App R 308) and as such the issue of whether intoxication resulted in the lack of mens rea is left to the jury. Lord Birkenhead in *Beard* (supra at 499) put it thus:

> In a charge of murder based upon intention to kill or to do grievous bodily harm, if the jury are satisfied that the accused was, by reason of his drunken condition, incapable of forming the intent to kill or to do grievous bodily harm ... he cannot be convicted of murder. But nevertheless unlawful homicide has been committed by the accused, and consequently he is guilty of unlawful homicide without malice aforethought, and that is manslaughter.

[21] As has been pointed out, s 14(4) of the Seychelles Penal Code also provides that intoxication shall be taken into account to determine whether the person charged could form the necessary intention to commit an offence. Malice aforethought as defined in s 196 of the Penal Code (supra) deems the mens rea of murder proved

by either evidence of intention or knowledge that the act or omission causing death would probably cause death or grievous bodily harm to the person although the knowledge is accompanied by indifference whether death or grievous bodily harm is caused. Hence, as in English common law, the mens rea of murder can be proved either by direct intention or by oblique intention.

[22] In *Sopha* (supra) we found that there was no reason to leave the issue of voluntary intoxication to the jury as "liability for murder under ss 196(b) and 23 of the Penal Code can arise even on the basis of knowledge". In that particular case, as in this case, the evidence clearly pointed to the fact that the appellant had knowledge that his acts and omissions could lead to death or the grievous bodily harm to the deceased. Having read s 14(4) and s 196 together we are of the view that a narrow interpretation to the point of restricting s 14(4) to "intention" only could not have been intended by the legislator. The use of the word "intention" in s 14(4) must be given its ordinary, general and synonymous meaning with mens rea and not the narrow meaning of only the highest degree of fault. Such an interpretation would be consistent with the golden rule of statutory interpretation which seeks "in the construction of a statute to adhere to the ordinary meaning of the words used" (*Becke v Smith* (1836) 2 M & W 191, at page 195). Similarly, such an interpretation would also be in accordance with another rule of statutory construction, namely *ut res magis valeat quam pereat* (it is better for a thing to have effect than to be made void) which requires a court to construe the statute to give effect to its provisions.

[23] In England, the courts in respect of oblique intention (or what we refer to as knowledge of probable consequence in Seychelles) have tried on various occasions to define 'probable

consequence'. We outlined this challenge in *Kilindo* (supra). Although the term 'probable consequence' seems to be now defined as 'virtual certainty' in England (*R v Woollin* [1999] AC 82) the definition is still not watertight as the Court has since held that "the law has not yet reached a definition of intent in murder in terms of appreciation of a virtual certainty" (*R v Matthews and Alleyne* (2003) 2 Cr App R 30, paragraph 43).

[24] Other common law jurisdictions have also struggled with the definition. In *Darkan* (supra), the High Court of Australia held (at 78–79) that the expression:

> 'a probable consequence' meant that the occurrence of the consequence need not be more probable than not, but must be probable as distinct from possible. It must be probable in the sense that it could well happen.

[25] In *R v Gush* [1980] 2 NZLR 92 the New Zealand Court of Appeal stated at [94]:

> The two most common meanings are 'more probable than not' and what Lord Reid described as 'likely but not very likely'. We prefer, for present purposes, to say that a probable event, in this second sense of the word, means an event that could well happen. These two most common meanings are both descriptive of a stronger prospect of the occurrence of an event than is conveyed by the word 'possible'.

[26] In *DPP v Douglas and Hayes* [1985] ILRM 25, the Irish Criminal Court of Appeal used elements of recklessness,

indifference or natural and probable consequence to define oblique intention.

[27] As we have explained in paragraph [3] (supra) this is yet another instance where it would be dangerous to ascribe to a codal provision a notion inherited from common law. As the High Court of Australia stated in *Darkan* (supra):

> The expression "a probable consequence" consists of ordinary English words, but they have no single meaning common to lay speakers.

[28] We are of the view that the particular wording of s 196 of 'probable consequence' must be read within the context of the whole provision. Probability can indicate different degrees of odds. It is not our view that the provision should be construed as 'virtual certainty' which we see as too high a probability but rather that it denotes a 'likely outcome' which fits within the context of the whole of the codal provision.

[29] Hence, in our view a trial judge should leave an alternative verdict of manslaughter to a jury in cases where by reason of intoxication the persons charged at the time of the act or omission did not know that such act or omission was wrong and did not know what he/she was doing (see s 14(2) Penal Code).

[30] No such direction was given to the jury in this case because no such evidence was available. The rule is that in murder cases, the trial judge's duty is to sum up the evidence of both the prosecution and the defence and to leave to the jury the decision on a verdict. By evidence I mean all evidence that warrants an assessment to be made in order to arrive at a conclusion. When evidence of factors that

impinge on the mens rea of the parties is clearly obvious in the evidence, it is the judge's duty to bring this to the attention of the jury and to direct their minds to the possibility of an alternative verdict.

[31] This is so even when such evidence is not relied on by the defence. (See *Von Starck v The Queen* [2000] 1 WLR 1270*; Hunter and Moodie v The Queen* [2003] UKPC 69; *R v Coutts* [2006] 1 WLR 2154; and *Larue and anor v R* SCA 1 & 2/1989). However it has also been established that manslaughter cannot be left for the determination of the jury as an alternative verdict in a murder trial unless there is evidence to support such a verdict. In *Coutts* (supra, para 23) Lord Bingham stated:

> The public interest in the administration of justice is, in my opinion, best served if in any trial on indictment the trial judge leaves to the jury, subject to any appropriate caution or warning, but irrespective of the wishes of trial counsel, any obvious alternative offence which there is evidence to support. I would not extend the rule to summary proceedings since, for all their potential importance to individuals; they do not engage the public interest to the same degree. I would also confine the rule to alternative verdicts obviously raised by the evidence: by that I refer to alternatives which should suggest themselves to the mind of any ordinarily knowledgeable and alert criminal judge, excluding alternatives which ingenious counsel may identify through diligent research after the trial.

[32] Both appellants at the trial ran cut-throat defences and counsel did not raise the issue of intoxication as a defence, nor did

he mention it in his closing speech. It appears for the first time in the skeleton heads of argument of the second appellant.

[33] Admittedly, there was some evidence that both appellants had partaken of some drinks before they assumed duty. However, neither drunkenness nor intoxication was an issue at the trial. For example Morel in his testimony said:

> I had drank a little but not that it caused any problems.

Georges Adrienne stated of Morel for example:

> I could smell alcohol on him. He was not drunk to fall down, he had control of himself.

[34] Evidence adduced also points to the fact that intoxication was not a factor since both appellants went about their activities in full control of their faculties. They drove the jeep to the various sites to be patrolled, they caused log books to be filled, they carried the body to the jeep, disposed of it some distance away, went home and washed their clothes. This is not evidence of intoxication.

[35] The Privy Council in the case of *Von Starck v The Queen* [2000] 1 WLR 1270 stated at [72]:

> If the evidence is wholly incredible, or so tenuous or uncertain that no reasonable jury could reasonably accept it, then of course the judge is entitled to put it aside.

[36] In *Xavier v The State* SCA 59/1997 the Court of Appeal were of the view that where the evidence is tenuous or uncertain it

would be wrong to leave it to a jury as it would cause unnecessary confusion.

[37] Similarly, we are of the view that the trial Judge was correct in the circumstances not to leave the issue of intoxication and an alternative verdict of manslaughter to the jury.

[38] In the circumstances this appeal is dismissed.

DOMAH JA

[39] The two appellants stood trial for murder under s 193 read with s 23 of the Penal Code before a judge and a jury who returned a verdict of guilty against both. They were each sentenced to life imprisonment. They have appealed against the verdict. The appeals were heard together. We shall consider both appeals as such and deliver one judgment, a copy of which will be filed in each case.

[40] The deceased, in this case, Joseph Georges Andre Durup, 47 years of age, was a security guard, a recent recruit of the UCPS Company which provides security services in the island. On Friday 28 November 2008, he was posted at the premises of Creole Holidays at Gondwana Granite. The two appellants, Jean Cinan, then 38 years old, and Albert Morel, then 52 years old, were two other employees. Cinan was one of its longest employees and very efficient. They were under the supervision of Mr Benediste Hoareau, the Human Resource Manager. The company had newly introduced a system of regular and periodic checks at the various security posts. Entries against signature of the posts checked were entered in a log book. Cinan was given a driver, Albert Morel, and on that day a Terios jeep to carry out the checks. Morel carried the log book and secured the signatures of the officers checked.

[41] The prosecution had adduced evidence that Cinan and Morel had some drinks before starting their rounds and Hoareau had received complaints against the two - principally Cinan - of harassment from two of the security guards being checked: Durup and Vital. Both had contacted the boss to complain. Hoareau had checked on Cinan to know more and wanted to see them on Monday. That obviously did not please Cinan and Morel. When they returned to the site of Durup, it did not go well between them. The place was the next morning found littered: a copper rod with mud marks, a brick, the two mobile phones of Durup, crushed watercress and Durup's broken spectacles, and Durup nowhere to be seen.

[42] Mr Hoareau's phone rings at around 7 pm the next morning. One of his workers is concerned that the gate is still locked and Durup has not opened the gate for her to have access. Hoareau checks with Morel and Cinan and wants them to report to him at Creole Holidays where he proceeds. Morel picks up Cinan who finds in the vehicle traces of blood, the gory shorts of Durup, blood stained breadfruit and watercress. Cinan reproaches Morel for his levity: these should have been cleaned. They proceed to a dumping site and dispose of these items before they show up at the premises of Creole Holidays. They find Mr Hoareau already there, the police alerted and the site already cordoned off. Mr Hoareau is assisting the police with whatever information and access he can provide for investigation.

[43] Where is Durup or his body? His wife tried to call him but his mobile number has been ringing without an answer until someone who has picked it up from the littered place gives a discreet answer. Both Durup's personal phone and the office mobile were picked up on site, with blood on them. Cinan and Morel feign

ignorance of the fate of Durup. Morel's sandals have blood on them. Cinan gives a witness statement at 10.42 am denying any knowledge of what happened. As far as he was concerned, he stated, he was dropped at his place for the night at 9.00 pm by Morel. They had had one check at the post of Durup and all was well. It was Morel who had gone to secure the signature of Durup in the log book while he, Cinan, had waited in the Terios jeep parked outside. Later, Mr Hoareau called him to find out whether Morel was under the influence of alcohol and he had replied in the negative. In the morning, he was informed of the absent worker at Gondwana Granite. He called Morel and they together reached the site only to find that the police were in charge. That is found in his first statement.

[44] Morel also gives a first statement, at 11.10 am. He also denies any knowledge of what had happened to Durup. He explains that the blood on his slippers comes from some fish he was cleaning which his wife had bought.

[45] As prime suspects, their houses are searched subsequently. The clothes which Cinan had worn on the eve have been washed and are hanging out to dry. He is arrested. Morel's house searched reveals that his shirt is found in a bucket of water. These items are seized for forensic examination. The log book is seized. Entries in the log book contradict the account they have given in their first statements. They are taken in custody while the search for Durup is on.

[46] Some time later Morel decides to speak. His statement under caution starts at 5.09 pm. In course of it, at 5.35 pm, he decides to show the enquiring officers where the body is lying. On his way out, he tells Cinan that they had better show the place. Cinan joins in.

The deposition is suspended and police accompany him for the purpose. His statement would resume at 6.35 pm after they are back and is completed at 7.35 pm.

[47] For the search, Cinan and Morel are in separate police cars, with Cinan showing the direction to the place: some casuarina trees at Anse Etoile. Back from there, Cinan would give his second statement to the police which started at 6.33 pm. Therein, he shifts the blame for the fatal attack heavily on Morel's shoulders. But he admits, though, that he helped Morel beat Durup by bending down and with fisticuff blows everywhere in the face, make him stop in case other people hear as he had started to scream. He explains how, at a certain time Durup stopped moving but he could not tell whether he was dead. It is then that the two of them picked him up, put them in the jeep and left the body at Anse Etoile among the casuarina trees.

[48] At the trial below, Cinan challenged his confession on the ground of violence and duress. He deposed under oath and called witnesses in support. Morel did not challenge his confession shifting most of the blame, in turn, on Cinan. In his court deposition, he added that police did not write everything that he wanted written down.

The appeal of Jean Cinan

[49] Cinan has put up the following grounds of appeal:

1) The Learned Judge erred in admitting an alleged confession of the Appellant before the jury and in finding the same alleged confession has been made voluntarily in the face of the evidence

tendered by Appellant in the voire dire proceedings.

2) Alternatively, the learned trial Judge failed to have evaluated the evidence tendered by the Appellant in the voire dire proceedings in the ruling given by the learned judge for admission of said alleged confession.

3) In all circumstances of the case, the Appellant's conviction is unsafe and unsatisfactory.

Grounds 1 and 2 of Jean Cinan

[50] The skeleton arguments do not make a distinction between grounds 1 and 2. Submissions have been made on them together. We shall deal with them as such.

[51] Counsel for Cinan has urged before us that the Judge's decision to admit the confession was flawed in that it did not take into account the defence evidence, more particularly the repeated assaults which Cinan had received in the hands of the police; the duress which Cinan was subjected to by them; and the evidence which was adduced by witness Syra Antah, his girlfriend.

[52] On the other hand, counsel for the respondent supported the Judge's findings and conclusions. Counsel pointed out that the seven page ruling sets out the reasons for which he accepted the evidence of the prosecution that the confession was proved to have been made voluntarily and beyond reasonable doubt. Those, he submitted, are sound reasoning relating to the appreciation of facts of the matter which is the sovereign domain of the trial Judge.

[53] We have gone through the transcript. Our reading of the ruling shows that the Judge made clear mention of all those aspects of the evidence which defence counsel has referred to. After reciting what the allegation of Cinan had been: namely, that he "was hit on the face and stomach, electrocuted, water poured down his nose and mouth or that his face was immersed in a pail of water," the Judge commented that the wife of the accused who was present in the said police station at the material time never heard nor saw Cinan being assaulted. The Judge also mentions the fact that Cinan never complained about his ill-treatment to any of the authorities. He noted that Cinan was not a person who would not know what to do if anyone ruffled him. He was a man of brain and brawn. He had had some quasi-military training and exercised control and supervision over other persons. He had been bosun on a ship. The Judge also mentioned that the supposed duress exerted upon him by the police for locking up his wife and his two month old child is another fabrication of his.

[54] We would not say that the conclusion of the Judge on the issue of admissibility of the statement of Cinan stemmed from inadequate consideration, defective appreciation of evidence and incorrect findings.

[55] We would add our own reason for which we think that the story of police brutality, ill-treatment by water, use of an electric device and telescopic rod and duress to bear upon his will is pure confabulation on the part of Cinan. To test whether someone is speaking the truth or telling lies in life or in court, the natural lie detector test is to start with establishing the known from which to ascertain the unknown.

[56] On the known side, there is no challenge to the fact that Cinan started giving his account of the previous night's events at 6.33 pm the next day. The appellants were brought to the station after arrest and search of their houses only around 2 pm at which time, they were examined for bodily injuries. It is not challenged that the police squad set out at around 5.30 pm for the recovery of the body at Anse Etoile. There is evidence that the enquiring officers were busy trying to tie the loose ends of the case. They had yet to know whether Durup was alive or not. That leaves the busy police with barely any time or opportunity to exert pressure on anyone, let alone on Cinan. It is simply impossible that so many activities which the defence very imaginatively conjures up could have taken place within the tight time available to them. It is a matter of common sense that to get someone to admit by force, threat or oppression to something he has not done does not happen by touch of button. It takes time to bear upon someone's will as a result of which he breaks down. Each of the allegations made by the defence such as slapping the soles of the feet, water logging, using a telescopic rod, pipe or electric apparatus demands logistics and involves longish preparations and operations. On the facts of this case, the police had neither the time nor the place nor the means nor the motive nor the opportunity to engage in the alleged practices. The police was already making headway in the enquiry. The clues were everywhere. They were progressively getting the results scientifically: the log book, the lies in the first statements, the results of the search of the houses, the data on the mobile phones. The decision of Morel that they had better tell where the body lies looks to be a natural outcome of the steady progress the police were making in the enquiry.

[57] The inconsistencies which Cinan adds to his story when he comes to give evidence are other indications of his untruthfulness.

His account of assault, threat, oppression and duress is so different from what his counsel had put to the prosecution witnesses. In his testimony in court, he speaks of fainting and falling, of being dragged, of water being poured down his nose, of something hard being twisted around his handcuffs etc. One wonders where did all these fit in the order of the day.

[58] Counsel for appellant stated that the Judge overlooked the evidence of Syra Antah. Our reading of his ruling is that he did not. In fact, her evidence confirms that the concoction complained of has been by the defence rather than by the police. Her account is that she was picked up by the police at around 5.30 pm and she was needed because her boyfriend was not willing to sign a statement. First, the statement had not yet started. It would not start until 6.33 pm soon after the party had returned from the Anse Etoile. Second, she was supposed to relate about the supposed pressure exerted on Cinan to sign his statement. She speaks about the pressure exerted upon her with respect to her own statement. Counsel should have been wary not to become the mouthpiece of his client in the circumstances. The Judge would have failed if he had concluded differently than he did.

[59] We find no merit in grounds 1 and 2.

Ground 3 of Jean Cinan

[60] We have to straightaway state that ground 3 is no ground at all. It is a general proposition of law unsupported in the skeleton arguments.

Conclusion in the appeal of Jean Cinan

[61] In the light of what we have stated above, we find no merits in the grounds of appeal raised by appellant Cinan. We dismiss his appeal.

The appeal of Albert Morel

[62] The appeal of Morel demands our addressing some issues particular to his case.

[63] Appellant Albert Morel has appealed against both his conviction and his sentence. Against his conviction, his grounds of appeal are:

a) That the Learned trial judge erred in that he did not put to the jury sufficiently or at all the case for the Appellant.

b) The Learned trial Judge did not put to the jury the fact that the Appellant could have been convicted of the lesser offence of manslaughter by the evidence on record.

c) That the evidence on record leads to the conclusion that the Appellant did not kill deceased.

d) That there was no evidence or not sufficient evidence that there was a common intention involving the Appellant in the killing of the deceased.

e) That the learned trial judge did not consider adequately or at all the discrepancies of the evidence of the prosecution in matters that cast sufficient doubt on the amount of proof that was required to satisfy the jury beyond any reasonable doubt of the guilt of the Appellant.

f) That in any event, the conviction is unsafe.

Against his sentence, his ground is that:

g) The sentence recorded against the prisoner reflects a breach of his fundamental rights.

Grounds (a) and (b) of Albert Morel

[64] Counsel merged grounds (a) and (b) in his written and oral submissions. We remarked from the Bench that one could not say that the Judge did not put to the jury the case of the appellant at all. We showed that he had put the case of the appellant. We are prepared, however, to consider whether his direction to the jury was sufficient.

[65] His submissions rely heavily on what we may discern in the CCTV footage. We are grateful to him for having provided us with a digital copy of the CCTV recording for chamber viewing since the quality of the public viewing in course of hearing of the appeal left a lot to be desired. We have to say that the pictures were no better than what we saw in open court. But to those who mattered the most, the Judge and the jury, it would appear from the comments in the transcript that they were clearer. The Judge made reference to the salient features.

[66] There is no gainsaying the fact that what the CCTV shows is but a slice of the film of events of Friday night which film could but have lasted for just some eight minutes. The CCTV record shows only a part of the incident: from 1.29 am to 1.37 am. It does not show the beginning of the fight, nor the progress, nor the manner in which it ended. It is but an epilogue from which not much of what took place outside its capture may be deduced. A person is walking out, a vehicle like a Terios jeep is driving in, a couple of persons are moving, following which the jeep drives out. From such slim and blurred facts, counsel submitted to us that Morel was walking away from the aggression by Cinan upon Durup rather than participating in it. That simply does not follow.

[67] That conclusion of defence counsel is certainly not borne out by the rest of the evidence. One may not divine what took place before and after from the larger picture which comprises the oral and scientific evidence. If it is the contention of counsel that in the CCTV footage, Morel is seen leaving the scene of crime. That is also consistent with the prosecution version that he is only leaving the scene of crime to drive in the jeep to take the body away. If the argument is that he is driving in the Terios vehicle to take the injured to the hospital, this is exactly what Morel did not do. He had the keys of the car. He was in the driver's seat. It cannot be said that he was within the scope of his employment so that he had to follow doggedly the instruction of a 38 year old when he was a more mature person of 52. There is, therefore, more to the case than what the CCTV camera shows.

[68] In his second statement, Morel's version is that he had participated in the beating. This statement of Morel, subject to a ruling on admissibility, has not been challenged on appeal. When

Morel came into the witness box, however, his version of things was not one but many. His account is incoherent, incomprehensible and implausible. When pertinent parts of his story were put to him, he came up with a standard phrase that he spoke the truth to the police but that the police did not write down what he stated. He also blamed the police and his lawyer.

[69] The number of times they had come to Creole Holidays that night was a crucial question. He was caught prevaricating. He could not reconcile his contradictions on whether there were one, two or three visits. When told that he had been seen three times in the camera, his answer was that the camera lies. One cannot blame the Judge for not taking his court version seriously nor the jury for returning a unanimous verdict against him.

Duress

[70] Counsel also raised the question of duress under which, in his argument, Morel was labouring. Section 17 of the Penal Code does give a person acting under duress a defence but under limited circumstances. It reads:

> A person is not criminally responsible for an offence if it is committed by two or more offenders, and if the act is done or omitted only because during the whole of the time in which it is being done or omitted the person is compelled to do the act by threats on the part of the other offender or offenders instantly to kill him or do him grievous bodily harm if he refuses; but threat of future injury do not excuse any offence.

[71] We are prepared to go along with counsel to decide that, even if not raised at the trial below, where the facts suggest that duress was available as a defence, the matter may be considered at

the appellate stage, in an appropriate case. We have to state, however, that this was hardly an appropriate case. Section 17 envisages a situation way away from what happened in this case.

[72] One is certainly seduced by the thought that Morel was only a driver and Cinan his boss; that when Morel saw the manner in which Cinan had dealt with Durup, he was himself scared of Cinan who on the evidence has displayed a character of a no nonsense person in settling scores; that Morel tried to ring Mr Hoareau while Cinan and Durup were having their altercation etc. However, a closer reading of the transcript shows that such a submission is not supported by the facts and that Morel was not labouring under any real or unreal threat of Cinan. The facts show that he was *participes criminis* in his own right.

[73] Morel speaks of a knife threat which Cinan used to overpower him. But that was after the aggression which does not fit the conditions of s 17 above. Now, assuming that this version of his is true, there was no knife hanging over him after he dropped Cinan at his place. There is evidence that Mr Hoareau talked to him that night. The exchanges were job related. Morel did not appear by his words to be his usual self, in the words of Mr Hoareau so that the latter had to advise him not to go back to the site as he wanted to but to go back home and to come to see him the next day. His first statement to the police was given when he was away from Cinan. If he were innocent, this was the time to say it all. One does not conceal innocence. One conceals guilt. This is what he did in his first statement. Duress does not apply in law or on the facts.

The issue of alternative verdict

[74] Counsel submitted that there arose a duty on the presiding Judge to give the jury direction an alternative verdict. Our reading of the proceedings shows that such a duty did not arise on the facts for lack of credible evidence in that regard.

[75] If Morel was not *participes criminis* in the fatal aggression, he would have given Mr Hoareau at least a hint of what had taken place at work of which he had been an unwilling witness. Instead, he kept it as a secret to himself and continued with this secret down to the time he gave his second statement the next day. He put his clothes in the bucket. He and Cinan proceeded on a trip to conceal clues in the casuarina bushes: the breadfruit, the crushed watercress and the shorts of Durup which had blood on them before they found their way to the site where Mr Hoareau had asked them to report to him.

[76] But there is more. One may not lose sight of the injuries Morel had sustained on his body. They are consistent with a physical struggle. His knowledge of his injury to his ear came – according to his own evidence when a prisoner pointed out to him that he had a blue mark on his ear. This is consistent with a physical struggle when people are aware of their injuries long after the struggle.

[77] His deposition under oath, even in the transcript, is characterized by evasiveness, and defensiveness. It cannot be said that they were not co-authors in the killing. They had a closer relationship than driver and supervisor. They had partaken of drinks together. In fact, at one stage, Morel showed by his answers how strongly bonded they were. At one stage in cross-examination he let out that since he had had a rough time with the police – which he had not - he did not want Cinan to have the same. That was a Freudian

slip from his part. It cannot be said that the life sentence of Morel is an over-conviction as counsel submitted to us.

[78] The duty of a trial judge sitting with a jury over a murder charge against a defendant is normally to direct the jury on alternative verdicts unless the facts are so clear that such a need does not arise. In this case, the facts show that the need did not arise. There should be credible evidence at the hearing of a case before the judge may address the jury on the issue of an alternative verdict: see *Xavier v The State* SCA 59/1997; *R v Coutts* [2006] 1 WLR 2154; *Sanders v The Republic* (1992) SLR 206**.** Morel's story, therefore, that he did not participate in the killing but only in the removal of a dead body does not hold. We have stated enough to show that the facts and circumstances did not warrant the raising of any issue of alternative verdict by the Judge for the determination of the jury: *R v Hoareau* (1975) SLR 31; *R v Vel* (1978) SLR 124; *Paniapen v The Queen* (1981) MR 254 cited in Venchard, *Law of Seychelles Through the Cases* (Best Graphics, Mauritius, 1977).

[79] The above remarks are confined to the issue of an alternative verdict as regards the lesser intention involved with lack of intention to kill. However, there is also the issue of lack of intention arising out of intoxication. Both Cinan and Morel had partaken of drinks before they assumed duty. On this point, I would leave it to Twomey JA to expatiate on the law as we see it. I agree with her, for the reasons given by her, that the facts of the case do not attract the application of diminished responsibility on ground of intoxication.

Grounds (c) and (d) of appeal of Albert Morel

[80] Under grounds (c) and (d), defence counsel submitted that there never was a common intention in the murder of the deceased; that it was all orchestrated by Cinan; and all that Morel had done was to dispose of a dead body or a life that would have expired anyway. We have stated enough above to show that it was a "folie a deux." They wanted to teach Durup, the new recruit, a lesson to the effect that one does not as a new entrant in the company teach other senior officers how to do their work.

[81] The following proposition of *Paniapen v The Queen* (1981) MR 254 bears repetition:

> To constitute a common purpose, it is not necessary that there should be a prearranged plan. The common purpose may be formed on the spur of the moment, and even after the offence has already commenced. Thus, if A assaults B, and C, who passes by and had no previous intention of assaulting B, rushes in to join in overpowering B, he becomes a co-author in the assault.

See also *DPP v Mudhoo & Anor* [1986] SCJ 23.

[82] Defence counsel also submitted that the decision of objective cum subjective liability in the interpretation of common intention needs to be revisited. However, apart from adumbrating the issue and inviting the court to pronounce on it, he did not enlighten us further. Jurisdictions the world over have wrestled with that issue. The common law system of the United Kingdom has a subjective approach to common intention: *R v Swindall* (1846) 2 Car & K 230; *R v Lovesey and Peterson* (1969) 53 Cr App R 461; *R v Hyde* [1991] 1 QB 134; *R v Rahman* [2008] UKHL 45, [2009] 1 AC 129; *R v Powell* [1997] 4 All ER 545; *Mendez v R* [2010] EWCA Crim 516,

[2011] QB 876; *R v A* [2010] EWCA Crim 1622; *R v Gnango* [2011] UKSC 59 and others. Other jurisdictions have different approaches: for example, the common intention in Queensland's law is construed with some elements of objectivity: see *Stuart v The Queen* (1974) 134 CLR 426; *Brennan v The King* (1936) 55 CLR 253; *R v Pascoe* [1997] QCA 452; *R v Keenan* (2009) 236 CLR 397; *R v AAP* [2012] QCA 104. The American system has adopted a different approach. So has the Continental system. Counsel is welcome to contribute to the developing Seychelles jurisprudence on the matter, with materials in support.

[83] Speaking only for the law as we received them in Seychelles, it is a treacherous assumption to make that what the British gave to its colonies is a law of lesser quality. Some of the professionals who undertook the task were so dedicated that they used the experience of English history to instill new insights into the colonial laws to which our then judges added their own, harmonizing the old with the new. In fact, those of us who are exposed to comparative law know that England in many areas rues the fact that the ex-colonies were given better laws by those who went out. That is why it is oftentimes remarked that Britain has a knack of keeping its best for export. To assume that there was no enhanced wisdom in the formulation of the many offences of our Penal Code would be hasty. At the same time, to assume that s 4 is authority for interpreting our Code in accordance with English law would be equally hasty. Section 4 speaks not of interpretation but of the principles of legal interpretation obtaining in England. It also speaks of presumptions in the use of expressions which should be consistent with their context. We would have been pleased if counsel had come up with material which would have enabled us to probe these fine

points of law further. General statements will not suffice. Until such time, the decisions of this Court on the matter remain good law.

Grounds (e) and (f) of appeal of Albert Morel

[84] Counsel also merged grounds (e) and (f) in his submission that the presiding Judge failed to adequately address the discrepancies in the evidence of the prosecution which would have cast sufficient doubt on the quantum of proof required to satisfy the jury beyond the criminal onus of proof. Not much material has been given to us on this matter. But the two loopholes mentioned are that the police failed to take fingerprints from the copper bar and the brick. We have to say that the officers on finger printing explained in cross-examination why they did not. Those knowledgeable in this practical science know that fingerprints cannot be taken from all items found on the crime scene, especially when it is a place which is frequented by people. Nor can it be taken from all types of surfaces such as wet and uneven. These are the short answers that may be given to the points raised. Fingerprints on items are just one of the leads to the resolution of a crime. There were so many other leads in this case.

[85] Counsel has submitted that the police in this case have concocted evidence. It is much more a concoction by the defence rather than by the police in a straightforward case of murder. The submission that the conviction is unsafe is neither substantiated nor warranted on the facts as we have shown above. We find no merits in the grounds (e) and (f) raised by appellant Morel equally. We dismiss them.

Ground (g)

[86] Counsel abandoned ground (g) at the hearing of this appeal. His statement has been that he would raise the issue of constitutionality of the mandatory life sentence imposed by s 194 of the Penal Code at a more opportune time after he has examined a larger amount of material than he has at present on the matter. We agree that this matter requires a pronouncement of a Full Bench of the Constitutional Court before we may ourselves pronounce on the matter.

[87] All the grounds of appeals having failed to show merit, we dismiss them.

Outcome of the two appeals

[88] For the respective reasons given above, both appeals stand dismissed.

[89] I have read with great interest the added considerations of my sister Judge Twomey JA and my brother Judge Msoffe JA. I concur with them.

MSOFFE JA

[90] I have read in draft the judgment of my brother Domah, JA. I entirely agree with him in his findings and conclusions on the salient aspects of the case before us. I wish however to make one brief point purely for the purpose of developing the jurisprudence of Seychelles. I must admit that I have been prompted, or rather attracted, to make the point after hearing Mr Brown, state counsel, in his oral submission before us on the subject at the hearing of the appeal. I hope in the process I will put the point in its true and proper context and perspective in law.

[91] The point is in relation to a principle in the law of evidence obtaining in other jurisdictions whereby if a fact is deposed to as discovered in consequence of information received from an accused person, such fact is relevant in the determination of the case against him. The principle may loosely be referred to as "a confession leading to discovery."

[92] It is common ground that the appellants made cautioned statements to the police. In the statements, it was alleged, they confessed to having killed Mr Andre Durup (the deceased). Following the confessions they volunteered to show, and actually showed, the police the exact spot in which they had dumped the deceased. I am fully aware that at the trial they retracted these statements. It is not my intention to discuss the effect in law of retracted confessions because this aspect of the case has adequately been dealt with by Domah, JA. Nevertheless, going by the above principle the confessions, if true, were relevant factors in the determination of the case against the appellants because they led to the discovery of the deceased's body.

[93] It is in line with the above spirit that perhaps it will be a good idea that in future an amendment be introduced to the Evidence Act to provide for something to the following effect:

> When any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, is relevant.

[94] I understand and appreciate that the suggestion I am putting forward here is purely advisory in nature. The relevant authorities are free to or not to accept the advice.

Gangadoo v Cable and Wireless Seychelles Ltd

Domah, Fernando, Msoffe JJA

30 August 2013 SCA 2/2013

Appeal − Interlocutory ruling – Res judicata

The appellant sought special leave to appeal against an interlocutory ruling of the Supreme Court which had dismissed the pleas raised by the defendant in limine litis.

JUDGMENT Appeal dismissed.

HELD

1 Special leave should be granted only where there are exceptional reasons or in view of reasons which may have not been in the knowledge of the appellant at the time leave to appeal was sought or for reasons that supervened after the refusal to grant leave by the Supreme Court.

2 To bring an interlocutory judgment or order of the Supreme Court under review, it must be shown that such judgment or order is manifestly wrong and irreparable loss would be caused if the case proper were to proceed without the interlocutory judgment or order being corrected.

Legislation
Civil Code art 1351
Constitution art 120
Courts Act s 12

Cases
Beitsma v Dinjan (1974) SLR 302
Collet v Albert (1953) SLR 263

Islands Development Company v EME Management Services SCA 31/2009
Pillay v Pillay (1970) SLR 79
Seychelles Hindu Kovil Sangam v Pillay SCA 17/2009

Foreign cases
St Ange v Choppy MCA 18/1970
Mungur v Mungur (1965) MR 21
Coomootoosamy v Noorani (1916) MR 95

Counsel D Sabino for the applicant
S Rajasundaram for the respondent

The judgment of the Court was delivered by
FERNANDO JA

[1] This was an application by the defendant in Supreme Court case No CS 175/2011, now applicant before us in case No SCA MA 02/2013; for special leave to appeal against an interlocutory ruling of the Supreme Court dated 31 October 2012 dismissing the pleas *in limine litis* raised by the defendant, and against the order made by the Supreme Court that the suit shall proceed to be heard on the merits.

[2] The plaintiff had filed suit before the Supreme Court in case No CS 175/2011 against the defendant seeking rent for encroaching on her land parcel C4755 by way of a telephone exchange installation that had been fixed on her land.

[3] The applicant in its statement of defence had raised the following pleas *in limine litis* and had argued them before any evidence was led before the trial Court:

> 1) This matter is res judicata as per art 1351 of the Civil Code of Seychelles.

2) As an alternative to the above plea of res judicata, this matter is an abuse of process; it is an attempt to re-litigate on substantially the same issues.

3) The claim is prescribed. According to the plaint the claim was actionable upon from the date of the registration of the land transfer ie 5 April 2004, over 7 years ago.

4) No cause of action can be discerned from the Plaint. There is what appears to be a claim for rent but no mention of any rental agreement or contract.

[4] Other than an averment, making reference to SC case CS No 274 of 2009 filed by the respondent, which the applicant claims was based on the same facts, the statement of defence does not contain any material upon which a court could on the face of the pleadings before it, come to the conclusion as to whether the necessary elements to establish res judicata are satisfied or as to whether there has been an abuse of process or an attempt to re-litigate on issues already litigated upon. The issue of making a determination on res judicata or abuse of process, based merely on the pleadings becomes complicated in view of the statement in the judgment in SC case SC No 274 of 2009, referred to briefly in the plaint, to the effect:

> However, the court cannot and should not formulate a new case for the plaintiff basing on a cause of action, different from the one pleaded in the plaint and more so in the absence of any evidence on record. Unfortunately, the plaintiff has chosen a wrong provision of law basing on unjust enrichment to

> prosecute her claim in this matter. Obviously, the plaintiff could have availed herself of another action in law. Hence, in my judgment there are other legal remedies available for the plaintiff.

[5] In his ruling dismissing the pleas *in limine* on res judicata and abuse of process, the trial Judge had said "the court needs to compare the previous suit before the Court as against the present suit in order to verify whether the conditions exist" to make such a determination and the Court, being unaware as to what the subject matter in suit No CS 274 of 2009, is unable to uphold the said issues raised. We cannot but agree with the ruling of the trial Judge on this matter.

[6] As per paragraph 5 of the plaint, the plaintiff had been verbally demanding suitable remedies from the defendant since she bought the property from the Government in April 2004 and by virtue of a letter dated 3 October 2008 the applicant had acknowledged its encroachment on the respondent's property and never remedied it. The respondent claims that her cause of action is based on rent due to her. This is a matter that needs to be adjudicated upon as correctly stated by the trial Judge and cannot be determined on the basis of a plea *in limine litis.*

[7] On the plea of prescription the trial Judge had been of the view "There is established on the face of the pleadings that the parties were before the Court in 2009 which could have served to interrupt the period of prescription" and "This point will be better determined after hearing evidence." We agree with the trial Judge on this and are also of the view that the averments in paragraph 5 of the plaint referred to in the previous paragraph may also serve to interrupt the period of prescription.

[8] The trial Court by its ruling dated 2 April 2013 had declined to grant leave to appeal, to the applicant before this Court, against the Interlocutory Ruling dated 31 October 2012 on the basis:

> I … find that it would be an abuse of process to grant the Applicant leave to appeal against the interlocutory judgment … *The interlocutory judgment does not bar the Applicant to proceed to adduce evidence at the hearing to sustain the points of law so raised and likewise for the Respondent to adduce evidence in support of her claim. The ruling did not dispose of the case.* No prejudice will be caused to the Applicant. There is nothing exceptional that have arisen out of the interlocutory ruling. The comparative advantage will be in favour of the Applicant which is a large firm with a financial base out of proportion to the Respondent who would have to incur additional expenses to respond to an appeal against an interlocutory judgment. *The right of the Applicant to appeal against the interlocutory decision is preserved even until after the hearing of the suit on the merits.*[Emphasis added]

[9] The application for leave to appeal had been dismissed with costs to the respondent.

[10] It is in view of the refusal by the Supreme Court to grant leave to appeal, the applicant had sought relief from this Court under s 12(2)(c) of the Courts Act. It is to be noted that this is a fresh application for leave to appeal and not an appeal against the ruling of the Supreme Court dated the 2 April 2013, refusing to grant leave to appeal.

[11] The relevant provisions of the Courts Act read thus:

> Section 12(2) (a) - "in civil matters no appeal shall lie as of right-
>
> (i) From any interlocutory judgment or order of the Supreme Court; or
>
> (ii) …
>
> Section 12(2) (b) - 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.
>
> Section 12(2) (c) - Should the Supreme Court refuse to grant leave to appeal under the preceding paragraph, the Court of Appeal may grant special leave to appeal.

[12] The procedural bar to appeal as of right against an interlocutory judgment or order of the Supreme Court, is in accordance with art 120(2) of the Constitution which provides: "*Except* as this Constitution or *an Act otherwise provides,* there shall be a right of appeal to the Court of Appeal from a judgment, direction, decision, declaration, decree, writ or order of the Supreme Court." [Emphasis added]

[13] This Court stated in the cases of Seychelles *Sangam v Pillay* SCA 17/2009 and *Islands Development Company v EME Management Services* SCA 31/2009, that the words "special leave" have been used with a purpose, namely in this situation the Court of Appeal is being called upon to exercise its jurisdiction in a matter where no appeal lies as of right but also interferes with the exercise of discretion by the Supreme Court in refusing to grant leave to appeal. In the opinion of this Court "special leave" should therefore

be granted only where there are exceptional reasons for doing so, or in view of reasons which may not have been in the knowledge of the applicant at the time leave to appeal was sought from the Supreme Court or for reasons that supervened after the refusal to grant leave by the Supreme Court. The reasons before the Court should be such that the non-granting of "special leave" by this Court is likely to offend the principle of fair hearing enunciated in the Constitution. In this regard it is to be noted that an appeal against an interlocutory judgment or order has a tendency to delay the main action and contravene the rights of a person to a fair hearing within a reasonable time as stipulated by art 19(7) of the Constitution.

[14] This Court also stated that

> section 11(1)(b) of the Courts Ordinance 1964, was somewhat similar to section 12(2)(b) of Cap 52, save for the description it sought to provide to the words: "… the question involved in the appeal is one which ought to be the subject matter of an appeal" by the use of the words: "by reason of its general or public importance or otherwise". The words: "by reason of its general or public importance or otherwise" is not to be found in section 12(2)(b) of Cap 52. The omission of those words from Cap 52 certainly does not mean that in the court's exercise of discretion to grant leave to appeal this criterion is no longer valid. These words, in our view, would continue to be valid.

[15] In the case *St Ange v Choppy* MCA 18/1970 the Mauritius Court of Civil Appeal considered how its discretionary powers should be exercised in the case of an application for leave to appeal from an interlocutory judgment. It was of the view that before leave to appeal is granted the court must be satisfied:

a) That the interlocutory judgment disposes so substantially of all the matters in issue as to leave only subordinate or ancillary matters for decision; and

b) That there are grounds for treating the case as an exceptional one and granting leave to bring it under review.

[16] This view was followed by the Mauritius Court of Civil Appeal in the case of *Pillay v Pillay* (1970) SLR 79. In the case of *Pillay* the Mauritius Court of Civil Appeal held:

> The interlocutory judgment in this case does not put an end to the litigation between the parties, or at all events does not dispose so substantially of all the matters in issue as to leave only subordinate or ancillary matters for decision. Moreover the applicant will be entitled as of right to question the decision in the interlocutory judgment if and when he exercises his right to appeal from the final judgment. An appeal at this stage would entail unnecessary delay and expense …

[17] The cases of *Beitsma v Dinjan* (1974) SLR 302, *Collet v Albert* (1955) MR 107 also reported in (1953) SLR 263, *Mungur v Mungur* (1965) MR 21, *Coomootoosamy v Noorani* (1916) MR 95 have all adopted the same line of thinking as in *St Ange v Choppy* and *Pillay v Pillay*.

[18] In Bentwich, *Privy Council*, (3rd ed) at page 213, it has been stated: "The suitor need not appeal from every interlocutory order which does not purport to dispose of the case and by which he may feel aggrieved … - the appeal from the final decision enables the

Court to correct any interlocutory order which it may deem erroneous" and that "the delay occasioned by taking an additional appeal adds to the procrastination which is the bane of Indian litigation." This may become true of our litigation unless this Court is cautious in granting special leave. To treat a case as exceptional which would necessitate special leave of this Court to bring the interlocutory judgment or order of the Supreme Court under review, the applicant must be able to show that the interlocutory judgment or order is manifestly wrong and irreparable loss would be caused to him or her if the case proper were to proceed without the interlocutory judgment or order being corrected. It would not be in the 'public advantage and interest' to unnecessarily delay trials before the Supreme Court, otherwise.

[19] The applicant sets out the following grounds in its affidavit in support of the motion for special leave to appeal against the interlocutory ruling:

1) That the trial Judge erred in both the law and on the facts in his ruling.

2) That the intended appeal discloses important issues relating to our law concerning the principles behind, res judicata, the abuse of process, prescription and causes of action, upon which further argument and a decision of the Court of Appeal would be in the public advantage and interest.

3) The intended appeal has a realistic chance of success.

4) It is just and in the interest of justice that leave be granted to the applicant to appeal against the ruling on the plea *in Limine Litis*, in the circumstances.

[20] We are surprised to note that the counsel for the applicant has rushed to make this application for special leave to appeal against the interlocutory ruling of the trial Judge dated 31 October 2012, and thus delaying the proceedings before the Supreme Court, either without bothering himself to read such ruling and the ruling of the trial Judge dated 2 April 2013 declining leave to the applicant to appeal against the interlocutory ruling; or understanding the contents of the said rulings. The quotation from the ruling of 2 April 2013 referred to at paragraph 8 above and the ruling of 31 October 2012, against which special leave to appeal has been sought, makes it abundantly clear that the trial Judge had not made any final decision on res judicata, abuse of process, prescription or failure to plead a cause of action and that rightly so, due to insufficiency of material before him to make a determination on any one of those matters. The trial Judge had specifically stated that the ruling on the pleas in *limine litis* do not dispose of the action and the applicant would have the right to appeal against the interlocutory ruling even after the hearing of the suit on the merits. This obviously, if the trial Judge decides to dismiss the pleas on res judicata, abuse of process, prescription or failure to plead a cause of action after considering all the evidence led by the parties before him at the trial. Counsel would be better advised not to rush into the Court of Appeal seeking special leave to appeal against interlocutory rulings, thus delaying trials before the Supreme Court unless there is an absolute need to do so.

[21] We therefore dismiss the application for special leave to appeal against the interlocutory ruling of the Supreme Court dated 31 October 2012 and award costs to the respondent.