IN THE SYCHELLES COURT OF APPEAL

CIVIL APPEAL NO. 15 OF 1992

Serge Esparon and
Lyra Gabrielle — Appellants

VERSUS

Andre Esparon — Respondent

Mr. Antony Juliette for Appellants

Mr. K.B. Shah for Respondent

JUDGEMENT OF SILUNGWE J.A.

This is an appeal against the decision of Alleear, J., wherein judgement was given in favour of the respondent (then Plaintiff) in the sum of R27,000, with interest at the legal (i.e. Bank) rate, with effect from March 31, 1990 (when "a mise en demeure" was served on the appelants) and costs.

Mr. Juliette, learned Counsel for the appellants, raised a preliminary point (previously canvassed by him, unsuccessfully, at the trial, namely, that the plaint disclosed no cause of action against the appellants in that it did not state whether the action was based on tort or contract. However, the point was not pressed when the court intimated that in its view, it was not really necessary to state in a plaint that the cause of action was tortious or contractial (or both). In any event,

failure to aver in a plaint, as in this case, that the cause of action is founded in tort or contract does not ipso facto amount to non-disclosure of the cause of action.

On the facts of this case, the second appellant, Gabrielle, is a concumbine of the first appellant, Serge Esparon, and the latter is a son of the respondent's brother. In 1988, the respondent, Andre Sparon, was living alone in a house that was within a stone's throw from the appellants' house in Port-Gland. In August of that year, the respondent fell ill with severe abdomenal pain and was hospitalised for a month and five days. It was not in dispute that the second appellant looked after the respondent and cleaned his house both prior to and during his hospitalisation.

The case for the respondent at the trial was that, while he was in hospital, the second appellant came to him and took away his house key from him. Subsequently, the second appellant informed the respondent that she had taken for safe-keeping his life savings (amounting to more than R27,000) which he had kept in an unlocked chest within his house. He then advised his two sons - Desire and Alaine Agathine - when they visited him in hospital, to go to the house of the appellants in order to count the money that the second appellant had taken there. He was corroborated by the two sons of his, already referred to; his Daughter, Marie Andre Agathine; and his neighbour, Roselia Fanchette. All these witnesses testified that when they visited the house of the appellants' they found the first

appellant there (as the second one was away at the time) and told him that they had come to count the respondent's money which the second appellant had removed from the respondent's house. According to their evidence, the first appellant produced the money which the witnesses counted in his presence and found to amount to R27,000. The money was then handed back to the first appellant for safe-keeping.

When the respondent was discharged from hospital, he entered into an arrangement to live with the appellants as he was not fit enough to live alone in his house. The arrangement lasted for one year during which the respondent paid his monthly social security allowance to the appellants for his upkeep. The respondent asked for his money, while the arrangement lasted, but the second appellant told him that she was keeping it for him. When the second appellant drove away the respondent from the house, following an argument between them, the respondent again asked her for his money but he was told to go to hell. In March 1990, the respondent, acting through his lawyer, wrote to the appellants and asked for the return of his money but the letter was not responded to.

The appellants' Defence was that the second appellant had neither taken the respondent's house key while the respondent was in hospital nor the R27,000 from his unlocked chest in his house. According to the testimony of the second appellant, she had not even been aware that the respondent had any money

in his house. As for the first appellant, he denied that the respondent's witnesses had ever called at his house or counted the respondent's money in his presence.

In his judgement, the learned trial judge found that the respondent had got muddled up and given contradictory evidence during cross-examination in regard to the following points;

(a) the exact day on which the respondent handed over the house key to the second appellant;

(b) whether the second appellant was present at home when the respondent callapsed; and

(c) whether the second appellant accompanied the respondent to the hospital in an ambulance.

Despite these findings, however, the learned trial judge was satisfied that the respondent had handed over the house key to the second appellant; that the second appellant had then taken away the respondent's money; and that the money had subsequently been counted in the house of the appellants in the presence, inter alios, of the respondent's children and a stranger In the final analysis, the learned trial judge accepted the case for the respondent and rejected that of the appellants whom he found to be "dishonest" and "outright liars."

The learned trial judge found that, although the respondent's claim rested entirely on oral evidence, contrary to the provisions of Article 1341 of the Civil Code of Sychelles which requires evidence of documentary proof, the claim was nevertheless legally sustainable and was in fact sustained on the authority of Article 1348 of the Civil Code which provides an exception to Article 1341 whenever it is not possible. as

in this case, for a creditor to obtain written proof of an obligation undertaken towards him. He cited, in aid, the Mauritian case of Nunkoo and other v Nunkoo (1973), Mauritius Law Report, page 269.

At the hearing of this appeal, Mr.Juliette informed the Court, on behalf of the appellants, that the appeal was based purely on facts. He drew attention to the respondent's contradictory testimony under cross-examination to which reference has already been made and, after contending that the respondent's witnesses had rehassed their evidence, particularly with regard to the aspect relating to the counting of the money at the house of the appellants, he submitted that the respondent and his witnesses were not credible witnesses. He then urged the Court to allow the appeal as the trial judge had failed to appreciate the facts of the case.

With regard to the question of credibility, the learned trial judge had the opportunity to see and hear all the witnesses in this case. He was alive to the respondent's contradictory evidence in crosss-examination but nevertheless came to the conclusion that the respondent was credible when he gave what may be termed as the core of his evidence which tied in well with the evidence of his witnesses, namely, that he had handed over his house key to the second appellant and that the latter had subsequently told him that she had taken his money away for safe-keeping. It was that money that was later counted at the house of the appelants, in the presence, not only of the respondent's witnesses, but also that of the first

that the trial judge in any way failed to appreciate the facts that emerged in this case or that he misidirected himself on the issue of credibility. He was, in point of fact, satisfied with, and believed, the respondent's case as opposed to that of the appellants whom he disbelieved and found to be dishonest and outright liars.

In my considered opinion, the learned trial judge did not at all misdirect himself in this matter and his findings on the facts of the case and on the credibility of the witnesses cannot be impugned. It follows that I would dismiss the appeal with costs in this Court and in the court below.

Annel M. Silungwe
Justice of Appeal

Judgment delivered in the presence of counsel for the Appellant and Respondent

date at.....this...31st...day of...March...1993.

A. L. Boxshall
JUDGE