25

IN THE SUPREME COURT OF SEYCHELLES

Civil Appeal No. 13 of 1993

GILBERT HOAREAU APPELLANT

V.

THE GOVERNMENT OF SEYCHELLES RESPONDENT
represented by the
ATTORNEY GENERAL

Before A.M. Silungwe, E.O. Ayoola and M.A. Adam, JJA

Mr. J. Renaud for the appellant
Mr. A. Fernando for the respondent

Judgment of Silungwe, J.A.

On October 22, 1990, the appellant bought from the respondent a parcel of land No.H.790 for R.170,000.00. On that same day, the appellant charged his interest in the said land to the respondent as security for the payment of R.153,000.00 which was payable in monthly instalments of R.2,448.00 over a period of seven years. On April 25, 1991, however, the said charge was transferred to the Seychelles Housing Development Corporation (hereinafter referred to as SHDC) to which the appellant was to make his repayments henceforth.

There was another parcel of land No.H351 which the appellant owned but, unlike the former, this was unencumbered by any charge or mortgage. Sometime in August 1991, the appellant sought to sell this parcel of land to one Gian Carlo Lauro, a non-Seychellois. However, as no foreigner can purchase any immovable property situated in Seychelles or any rights therein without having first obtained the sanction of the Council of Ministers, in terms of section 4(1) of the

Immovable Property (Transfer Restriction) Act, Cap. 96, Mr. Lauro accordingly made his application to the Council of Ministers. On August 5, 1991, the Ministry of Community Development made the following reply in writing (a copy of which was sent to the appellant):

> "I refer to the application for sanction by Mr. Gian carlo Lauro to purchase parcel H351 and house thereon, Machabee.
>
> I am directed to inform you that permission has been granted for Mr. Lauro to purchase the above-mentioned property on condition that you pay SHDC the balance outstanding on the purchase of Parcel H790, Machabee. This payment should be made prior to the letter of sanction being issued to Mr. Lauro.
>
> I would appreciate if you would inform us once the payment has been made to SHDC so that the letter of sanction can be issued."

The condition relating to the payment of the outstanding balance on Parcel H790 was met and the letter of sanction was accordingly issued to Mr. Lauro.

The appellant sued the respondent on the ground that the condition attached to the sanction by the Council of Ministers was not only intimidating but also amounted to a fault and had caused him prejudice for which he claimed R.160,000.00.

After trial, Perera, J.S., held rightly in my view, that the clear intention of the legislature (i.e. section 4 of Cap. 96, ibid) was to safeguard the interests of the country when the granting sanction to foreigners to purchase land in Seychelles (or to acquire rights therein); and that the Council of Ministers was empowered to attach any conditions in furtherance of that object. Therefore, to attach a condition on a Seychellois vendor would be to act in excess of the powers conferred by the statute.

With regard to the appellant's averment that he had been intimidated by the respondent who had thus committed a delictual fault, Perera, J.S., held that this was a claim under Article 1382(3) but that the element of a dominant purpose to harm the appellant had not been made out. He further found that intimidation had not been proved. In the result, the appellant lost his action.

In arguing this appeal, Mr. Renaud contended that the learned trial judge had erred by holding that there had been no proof of intimidation. He pointed out that the intimidation complained of was that the respondent had forced the appellant's hands to settle a debt which was not due and which related to a different parcel of land that was not the subject of the foreign vendor's application to the Council of Ministers. It was said that had the parcel of land involved been the same, the action in this case could not have arisen.

In his reply, Mr. Fernando supported the trial court's finding that intimidation had not been proved.

As the learned trial judge properly found, the respondent's condition imposed on the appellant was ultra vires. There is no doubt in my mind that it was that condition that prompted the premature settlement of the outstanding debt to S.H.D.C. since the appellant must seemingly have regarded the sale transaction with the foreign vendor as crucial. He must have come to a realisation that failure on his part to meet the imposed condition might consequently render his sale transaction nugatory, an eventuality that he was obviously keen to avert. I am satisfied that the respondent's conduct clearly amounted to intimidation against the appellant.

Whether the respondent's conduct was caught by the provisions of Article 1382(3) of the Civil Code now falls to be considered. I would like to refer to clauses or paragraphs 1 and 3 of the Article. These paragraphs provide as follows:

> "1382.1. Every act whatever of man that causes damage to another obliges him by whose fault it occurs to repair it.
>
> 3. Fault may also consist of an act or an omission the dominant purpose of which is to cause harm to another even if it appears to have been done in the exercise of a legitimate interest."

Paragraph 3 of the article, as Chloros says in his Codification in a Mixed Jurisdiction, The Civil and Commercial Law of Seychelles, 1977 edition, at page 123, incorporates a definition of abuse of rights. Surely, any alleged abuse of rights envisages or presupposes that such rights exist as it would be preposterous to allege an abuse of non existent rights! What this comes to, therefore, is that paragraph 3 is irrelevant in, and so inapplicable to, the case under consideration since the Council of Ministers had no right to abuse vis avis the appellant.

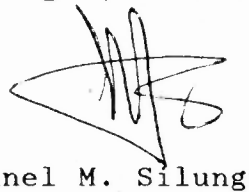
What is relevant and thus applicable to this case is, I think, paragraph 2 of the Article which stipulate that -

> "1382. 2. Fault is an error of conduct which would not have been committed by a prudent person in the special circumstances in which the damage was caused. It may be the result of a positive act or an omission."

According to my perception, the appellant did establish liability against the respondent, his damages being limited to the extent to which he had suffered as a result of his premature settlement of the balance of the undue debt to S.H.D.C. But the appellant did not prove the quantum of the damages suffered. In the circumstances, he would be

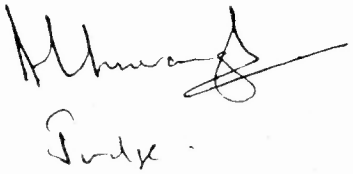
entitled to nominal damages only.

I would allow the appeal; set aside the judgment in the court below and award the sum of R.1,000.00 as nominal damages, with costs.



Annel M. Silungwe
Judge of Appeal

Dated 25-08-1994



IN THE SEYCHELLES COURT OF APPEAL

GILBERT HOAREAU

V.

The Government of Seychelles
(Represented by the Attorney General)

Civil Appeal No. 13 of 1993

Before

Mr. Justice A.M. Silungwe J.A.
Mr. Justice E.O.Ayoola J.A.
Mr. Justice M.A. Adam J.A.

Mr. J. Renaud for the appellant
Mr. A. Fernando for the respondent

Judgment of E.O. Ayoola J.A.

This appeal arises out of an action brought by the appellant, Gilbert Hoareau, who was owner of two parcels of land at Machabee, against the Government of Seychelles, ("the respondent",) represented by the Attorney General, in which the appellant claimed against the respondent R.160,000.

The appellant owned a parcel of land bearing No.H790 at Machabee having bought the land from the respondent on 22nd October 1990. On that day he charged his interest in the said land to the Respondent to secure the payment of a sum of R.153,000 which was to be payable in monthly instalments of R.2,448 over a period of seven years. On 25th April 1991 the said charge was transferred to the Seychelles Housing Development Corporation (SHDC)/ to make his repayments. The appellant owned another parcel of land, also at Machabee, bearing No. H351. That parcel of land was not encumbered by

any charge or mortgage. Sometime in August 1991 he sought to sell that parcel of land (henceforth referred to as "parcel H351") to one Gian Carlo Lauro a non-Seychellois. Pursuant to section 4 of the Immovable Property (Transfer Restriction) Act (Cap. 94), Mr. Lauro applied to the Council of Ministers for sanction to purchase parcel H351. By a letter dated August 1991 written by the Ministry of Community Development to the appellant, the appellant was informed that permission has been granted for Mr. Lauro to purchase the property on condition that the appellant pays SHDC the balance outstanding on the purchase of Parcel H790 and that such payment should be made prior to the letter of sanction being issued to Mr. Lauro. Mr. Lauro then paid the sum of R.139,759.45 to the SHDC upon the appellant's instructions such sum having been deducted from the purchase price of Parcel H351. By plaint dated 18th August 1992 the appellant who is in the hotel business commenced the action that led to this appeal contending that the "condition attached to the sanction by the Council of Ministers was not only intimidating but amounted to faute and has caused the plaintiff (now appellant) damage which the Defendant (now respondent) is bound to make good."

By section 4(1) of the Immovable Property (Transfer Restriction) Act, ("the Act"):

> "A non Seychellois may not
>
> (a) Purchase any immovable property situate in Seychelles or any rights therein .....
> .....
> without having first obtained the sanction of the Council of Ministers."

By section 5(a) of the Act, the Council of Ministers in considering an application of a non-Seychellois made pursuant to section 4 shall have regard to the following matters:

> "(a) the character of the applicant or, if the applicant is a company, the character of every director of the company

> (b) whether the applicant's declared purpose in acquiring the land in question is consistent with the polices of the Government on the use and development of land in Seychelles.
>
> (c) whether the propose acquisition is in the interest of Seychelles."

By section 5A(2) of the Act the Council of Ministers is empowered to impose any conditions or restrictions on the grant of sanction under section 5. Such conditions or restrictions shall be incorporated in and form part of all deeds and documents relating to the transaction to which the said sanction relates. It was provided in section 5A(4) of the Act that:

> "A decision of the Council of Ministers under this Ordinance shall be final and shall not be subject to review in any Court."

The issue which, somehow, loomed large at the hearing before Perera, J. was a preliminary issue that in terms of section 5A(4) of the act the jurisdiction of the Supreme Court to try the action had been ousted. Perera J. after reviewing the arguments submitted to him on the preliminary issue held that the action was a regular action for damages and not an application invoking the supervisory jurisdiction of the Court and that the court could make a finding on the legality or valdity of the decision of the Council of Ministers in so far as it is relevant to the claim for damages but it could not declare the decision to be ultra vires or null and void. He also held that the decision of the Council of Ministers in respect of the sale of parcel H351 did not fall to be considered under the provisions of section 5 of the Act because the condition attached to the sanction was not shown to be incorporated in the deed to which the sanction related. Perera J. was of the view that "to attach a condition on the Seychellois vendor would be to act in excess of the powers conferred by the statute."

The main issue canvassed before Perera J. was the effect of the provision of section 5A(4) of the Act which the

Government had contented ousted the jurisdiction of the court. The other issue whether the condition attached to the sanction amounted to fault was only dealt with in the judgment of the Learned Judge. He dismissed the action on the grounds that the appellant had not proved to his satisfaction the intimidation he alleged and the quantum of damages. Although he made reference to the abuse of right provision contained in Article 1382(3) of the Civil Code and found that the element of dominant purpose to harm cannot be made out it is not quite clear to what extent he had considered the act of the respondent to have been done in the exercise of a legitimate interest.

Before this court the decision of the Supreme Court has been attacked on three grounds, namely:

> (1) That the finding of the learned trial Judge that the appellant was unable to substantiate his claim is contrary to evidence on record.
>
> (2) that the learned trial Judge was wrong in his analysis of Article 1382 of the Civil Code of Seychelles.
>
> (3) That there is sufficient evidence to show that the Appellant had been intimated.

The respondent has not cross appealed and no issue therefore arises whether or not the Supreme Court had jurisdiction to entertain the action or to pronounce on the validity of the decision of the Council of Ministers even though that issue was at the centre of the respondent's defence to the action. It suffices to observe that the current trend of judicial attitude in most common law jurisdictions is not to regard a provision such as in section 5A(4) of the act as ousting the jurisdiction of the court to determine the validity of administrative decisions. The merit of administrative decisions will not be questioned by the court, but where a decision is challenged on the grounds of

procedural impropriety or unreasonableness or illegality the power of the court to review such decision is beyond doubt.

The view held by Perera J. that the Council of Ministers acted in excess of powers conferred by the Act in asking a Seychellois to fulfil a condition subject to which a sanction under the act would be granted to an alien purchaser, has not been challenged. In the result, it is to be taken as accepted that although the Council of Ministers had power to grant a sanction it had no power to ask the appellant to fulfil such a condition as was imposed on him as a prerequisite to granting such sanction. The issue on this appeal as I see it, is whether in the circumstances of this case, the appellant who has complied with the condition can sue the Government in delict on the ground that he had been damnified by the imposition of the condition. It is expedient to say that it is not for this court to raise on its own issues that have not been raised by the parties. It is for this reason that the question whether the respondent can be liable for decisions taken by the Council of Ministers has not arisen and is not pronounced on. The case has been fought purely on the basis that if the appellant had been damnified by the act of the respondent he should recover damages.

It is evident that the condition precedent imposed before the necessary sanction to the sale of the land by the appellant to Mr. Lauro is the payment by the appellant of the debt owed to the SHDC. To the extent that the transaction of sale would have become abortive were the condition not fulfilled, the appellant was exerted upon to fulfil the condition by payment of the debt. As has been held by the learned judge the respondent has no power to impose such condition. Its imposition therefore amounts to fault. That the appellant has been made by such error of

conduct, to pay a debt earlier than due date is in itself damage suffered by him for which he should be compensated. I do not share the view held by the learned judge that the appellant had "agreed" to repay the debt owed to SHDC earlier than its due date and in terms different from what he bargained for. The true view as I apprehend it, is that the obvious inequality in the relative strengths of the appellant who was desirous of selling his property and the respondent who can prevent or delay the sale by withholding sanction makes it unrealistic to hold the view that the appellant had "agreed" to repay the loan to SHDC.

Furthermore, although the learned judge made reference to Article 1382(3), which makes abuse of rights actionable, and justified the respondent's action on the ground that the appellant had not proved that the dominant purpose of the respondent's act was to cause harm, I am of the view that Article 1382(3) does not apply in the circumstances of this case. As I understand it, Article 1382(3) is to make an act or omission which would otherwise have not been actionable because it was done in the exercise of a legitimate interest, actionable if its dominant purpose is to cause harm. In my opinion Article 1382(3) is not applicable where the defendant has no right to perform the act in the first place.

In my judgment the learned judge should have found for the appellant on the issue of liability provided that damage is proved to have been suffered by the appellant. The appellant cannot recover damages in delict unless he can show that he had suffered damage as a result of the respondent's conduct. The conclusion reached by the learned judge dismissing the appellant's claim had been based on the twin grounds that the appellant could not claim to have been intimidated and that he had not proved the quantum of damages. As regards the former, I hold the view that he had

taken a much narrower view than should have been taken of what amounts to intimidation. On the question of quantum of damages, the distinction ought to be borne in mind between proof that damage was suffered and proof of quantum of damages. On the issue of liability what the appellant must prove is not quantum in the first instance but damage which has been described as consisting of "prejudice to a legitimate interest protected by the law." (See Amos & Walton: Introduction to French Law, p. 207). I do not think it can be right to hold that a party who had been put under pressure, not justified by law, to pay a debt in full before due date, has not suffered any prejudice. He has been made to part with money which he could have retained for his own use. To that extent the appellant had suffered damage.

As to the quantum of damages the appellant claimed R.160,000 which he claimed he had lost by reason of his inability to carry out improvements in his business because he had little money left after he had been made to pay his debt to SHDC. He did not attempt to state how he arrived at the global figure of R.160,000. In my view the learned judge was quite right in holding that quantum of damages has not been proved. I would venture to think that where a party had been made to pay a debt before due date a manner of measurement of damages is to take the difference between the interest payable in raising loan of the same amount elsewhere and the interest payable on the loan repaid before due date if the former is higher than the latter. Be that as it may, the appellant has failed to prove that he suffered damages in the sum he claimed.

On this appeal learned counsel for the appellant shifted grounds when he argued that moral damages ought to have been awarded. It is clear that moral damages do not

necessarily follow on the commission of tort as of course. Where a party seeks to claim moral damages the party so claiming must at least plead facts which show in what circumstances moral damage had been occasioned him. The appellant's pleading was devoid of any averment as would suggest that he had suffered any moral damage.

Notwithstanding that the appellant had failed to prove the quantum of his damages, since an act prejudicial to his interest has been proved, he should be entitled to nominal damages in recognition of his right. I would award him R.1,000 as damages.

In the result this appeal succeeds and it is allowed. I would set aside the judgment of Perera J. dismissing the appellant's claim and enter judgment for the appellant in the sum of R.1,000.

E.O. Ayoola

Read and delivered on 25-08-94

Judge.

IN THE SEYCHELLES COURT OF APPEAL

CIVIL APPEAL NO 13 OF 1993

GILBERT HOAREAU APPELLANT

v

THE GOVERNMENT OF SEYCHELLES
REPRESENTED By The Attorney General RESPONDENT

Before : Silungwe, Ayoola & Adam JJA

Mr. J. Renaud for the Appellant
Mr. A. Fernando Principal State Counsel, for the Respondent

JUDGMENT OF ADAM, J.A.

This is an appeal against the judgment of Perera J. in Civil Side No 193 of 1992. In his Plaint the Appellant had claimed SR 160 000, which estimated the prejudice suffered by him as a result of the condition attached to the sanction by the Council of Ministers and which was not only intimidating but also amounted to 'faute'. The Appellant had on the 22nd October 1990 charged his land, Parcel No H790 to the Government of Seychelles for a loan of SR 153 000 which charge had been assigned on the 25th April 1991 to the Seychelles Housing Development Corporation. In January 1991 the Appellant wanted to sell his other unencumbered land, Parcel No H351, to a foreigner, who required the sanction of the Council of Ministers. This sanction was granted to the foreigner on the condition that the Appellant paid off the balance of loan on Parcel No H790. In the Statement of Defence the Respondent averred that the sanction granted was subject to the conditions and restrictions that could be imposed under section 5(2) of the Immovable Property (Transfer Restriction) Act (Cap.96), that in terms of section 5(4) the decision of the Council of

In his judgment the learned trial judge said that the foreigner, Mr Lauro, had made an application to the Council of Ministers, that the Ministry of Community Development by letter of the 5th August 1991 to the Appellant, with a copy to Mr Lauro, informed him that permission had been granted to Mr Lauro to purchase Parcel H351 on the condition that the Appellant paid the balance outstanding on Parcel H790 which payment should have to be made prior to the letter of sanction being issued to Mr Lauro. The learned judge also held that the "ouster" clause in section 5(4) would have applied if the Council of Ministers had not erred but instead they imposed a condition on a foreigner which was not within the scope of section 5 as such a condition had to be in furtherance of the object of safeguarding the interests of Seychelles. He also found that this case was a regular action for damages and not an application invoking the supervisory jurisdiction of the Court. Therefore, he could only rule on the validity or legality of the decision of the Council of Ministers in so far as it was relevant to the claim of damages but not declare their decision null and void. He further held that there was another aspect to the matter, which was that in the absence of proof that the condition was incorporated in the deed of transfer, the decision of the Council of Ministers did not fall to be considered under the provisions of section 5. Further, Perera J dealt with the issue of breach of an agreement concerning Parcel H351 which permitted payment of the loan within a 7 year period. The Appellant regarded payment demanded by the Respondent before the expiry of 7 years as "intimidating". The learned trial judge found that the Appellant had failed to substantiate his claim. He held that in terms of Article 1382(3) of the Seychelles Civil Code the element of

found that the Respondent appeared to have sought payment before the expiry of the period for the mutual benefit of both parties since if the Appellant had been allowed to repay within 7 years he would have paid SR 205 632 at the end of October 1997 by way of interest and capital and so by making payment of the outstanding loan of SR 199 759.45, he had made a saving on the interest. Also, as the Appellant had agreed to repay unconditionally, he could not after nearly one year claim that he was intimated and consequently suffered damages without adducing proof of this to the satisfaction of the Court.

In his Memorandum of the Appeal the Appellant's grounds were that the finding by the learned Judge that the Appellant was unable to substantiate his claim is contrary to the evidence on record, that he was wrong in his analysis of Article 1382, and that there was sufficient evidence to show that the Appellant was intimidated.

Mr Renaud for the Appellant submitted that the learned Judge accepted that unconditional sanction had been imposed on Mr Lauro but conditional on the Appellant therefore section 5 did not apply. But by imposing the condition the Respondent went beyond its powers and this constituted intimidation. He asserted that the intimidation was the condition imposed on the Appellant when the Respondent had no right to do so since the condition that the Respondent could impose must relate to that particular transaction involving a foreigner. In terms of Article 1382(2) "faute" is error of conduct. He maintained that intimidation of the Appellant was covered by Article 1382(2) and that Article 1382(3) did not apply.

On the question of quantum, Mr Renaud pointed out that the claim was for SR 160 000, which was for moral damages, being the prejudice suffered. He asserted that there was evidence of suffering and anxiety - René de Commarmond v The Government of Seychelles and Seychelles Public Transport Corporation, Seychelles Court of Appeal, Civil Appeal No 1 of 1986.

Mr Fernando for the State submitted that the Appellant relied in the Plaint on the condition attached to the sanction being not only intimidating but amounted to a 'faute' (fault). He argued that Article 1382(3) applied. He submitted that the Council of Ministers purported to act under the Immovable Property (Transfer Restriction) Act and that an ultra vires act was not excluded from the doctrine of abuse of rights. Mr Fernando maintained that even if Article 1382(2) applied, the Appellant must prove fault and damages. He argued that prejudice is not moral damages and this had not been pleaded by the Appellant in his Plaint - Cable & Wireless Ltd v Michel (1966) 3 SLR 253. The burden of proof was on the Appellant as to what prejudice he suffered. In his evidence the Appellant said (a) that he owed money to the previous owner of Parcel H351 and as he had accepted to pay so he had to pay him from the money received from Mr Lauro but in so doing saved on the interest he would have had to pay; (b) that he wanted to carry out repairs on the house on Parcel H790 but was short of money; (c) that he wanted to carry out improvements on the bungalows and build a bungalow that were rented to tourists and could not do so; and (c) that the land on which he intended to build he was forced recently to sell for SR 185 000 so that he could put the house on Parcel H 790 in order and make improvements and this affected him morally because

submitted that the Appellant produced nothing before the trial judge to substantiate the prejudice that he claimed that he suffered. He argued that the Appellant would have had to pay, up till the 31st October 1997, the sum of SR 205 632 in capital and interest and by making payment of SR 139 757.45 the Appellant saved on the interest and the property became unencumbered.

Parcel H 790 was purchased by the Appellant for SR 170 000 and was transferred to him on the 22nd October, 1990, on which date a charge for a loan of SR 153 000 was put on it by the Respondent. This charge had been assigned. Parcel H351 had been sold for SR 500 000.

In Tirant & Anor v Banane (1977) 10 SLR 219 it was held that issues could not be considered by the Court as it had not been raised in the pleadings and that a party is only entitled to relief in regard to what is pleaded and proved at trial.

It is clear from the Plaint that the Appellant had found his claim on intimidation and fault on the part of the Respondent that had caused him prejudice. This was an ordinary action for delictual damages that required proof and a claim for moral damages was not pleaded.

Further, the learned trial judge concluded that, as the evidence clearly disclosed, because the Appellant had agreed to the condition attached to the sanction and had made repayment, he could not after nearly one year allege that he was intimidated without adducing proof

cannot be maintained that Perera J. erred in any way in this finding. He also found that the Appellant had not established, in terms of paragraph 3 of Article 1382, that the Respondent's dominant purpose was to cause harm to the Appellant. Rather the Respondent acted for the mutual benefit of the parties. It was Mr Shah's contention that even if paragraph 2 of Article 1382 applied, the Appellant must prove fault and damages. Mr Renaud was unable to show exactly what damages had been suffered and what proof was adduced for this by the Appellant and that explains his submission that moral damages were being claimed by the Appellant. Having failed to substantiate his claim as pleaded in his Plaint, the Appellant is not entitled to relief.

In the circumstances the appeal is dismissed with costs.

Dated at this day of 1994

M. A. Adam

Mahomed Ali Adam
JUDGE OF APPEAL