



IN THE SEYCHELLES COURT OF APPEAL
VILLAGE MANAGEMENT LIMITED

APPELLANT

VERSUS

- | | | |
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| 1. | ALBERT GEERS | 1ST RESPONDENT |
| 2. | VILLAGE DU PARADIS (PTY) LIMITED | 2ND RESPONDENT |

JUDGMENT

The Appellant entered a claim against the Respondents in the sum of R 1882000 including R 500000 as moral damages. The Respondents in their defence denied the claim and made a counter claim in the sum of R 868,000 including R 500,000 as moral damages.

The Respondents made an application to the Court for an order to require the Appellant to "provide security for costs to the value of R 868 000". That application was made in terms of section 218 of the Code of Civil Procedure and Article 16 of the Civil Code and it was clear that the application was limited to the provision of security for costs.

The trial judge regarded the application as one for the provision of security for costs. He referred specifically to section 338 of the Companies Act which provides as follows:-

"... where a company or an overseas company is a plaintiff in any action or other legal proceedings and the court having jurisdiction on the matter may, if it appears by credible testimony that there is reason to believe that the company or the overseas company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs and may stay all proceedings until the security is given..."

(The underlining is mine for emphasis).

In the last two paragraphs of his judgment he had this to say:-

"Taking into consideration the provisions of section 338 of the Companies Ordinance, I am satisfied that the applicants have credible reasons and testimony to convince this court to order for costs."

"I rule that there is sufficient requirement for the respondents to furnish security for costs to the value of SR 868,000/. I order accordingly".

The trial judge did not make in his judgment any reference to the damages of R 868,000 claimed by the Respondents in their counter claim but he surprisingly determined the value of the security for costs to be furnished at the amount of R 868,000 claimed as damages. he did not assess the amount which would have been payable as costs although there was evidence that those costs would amount to about R 5000 to R 10000.

Counsel for the Appellant submitted that as the amount required to be furnished as security was R 868,000 it was abundantly clear that the Order was not one in respect of costs but relates to damages. The application made by the Respondents was however in respect of security for costs only and accordingly the Order of the trial judge was ultra petita.

Counsel for the Respondents made the ingenious submission that the word "costs" include "damages" and that the Order made was therefore valid. I find that submission rather startling as there is no indication whatsoever in Article 16 of the Civil Code as it now stands or as it stood in the 1807 edition of the French Civil Code which applied in Seychelles until 1975. That Article uses the words "costs" and "damages" disjunctively.

On the other hand, the terms in which section 218 of the Code of Civil Procedure and section 338 of the Companies Act clearly do not admit the interpretation on which Counsel for the Respondent relies. It is true that the marginal note to section 218 of the Code of Civil Procedure makes reference to "security" only would not justify any such interpretation. It is trite law that a marginal note is provided for reference and may only be taken into account if there is an ambiguity in the text of the substantive provision. This is clearly not the case here.

The expression "costs" is nowhere defined in the Civil Code or any Statute. The dictionary meaning of the expression is "law expenses especially those allowed in favour of a winning party". It will thus appear that the essence of costs ~~✓~~necessarily implies~~✓~~ expenses" but not damages and still less ~~no~~ moral damages.

I therefore uphold Counsel's submission that the Order to furnish security in the sum of R 868,000 is ultra petita the application to furnish security.

I must add that even if there had been a proper application for an Order to furnish security in respect of damages I would still not have allowed the Order to stand in view of the fact that the Order relates to the maximum amount claimed inclusive of the total amount for moral damages - a matter which is always in issue. It is a settled principle that where a discretion is vested, that discretion must be exercised judiciously and not arbitrarily or capriciously. In the present case the Order is so arbitrary that it is tantamount to denying a litigant his fundamental right of access to the courts.