IN THE SEYCHELLES COURT OF APPEAL

SIDNA RUDDENKLAU — APPELLANT

VERSUS

TIMM ADOLF BOTEL — RESPONDENT

Civil Appeal No. 4 of 1995

(Before A.M. Silungwe, E. O. Ayoola, L.E. Venchard JJ. A.)

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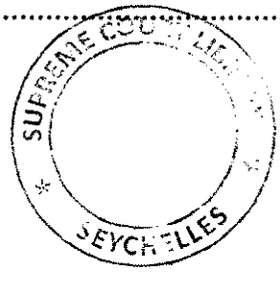


Mr. B. Georges for the Appellant
Mr. K. Shah for the Respondent

JUDGMENT OF THE COURT

Delivered by Ayoola, J.A.

This is an appeal from the decision of the Supreme Court giving judgment for the plaintiff (now, the "the respondent") in an action for the recission of a deed of sale of portion of land described as parcel No. H1056.

The respondent at all material times is a German national resident in Germany while the appellant (who was defendant in the action) is a Seychellois, ordinarily resident at the material time in Germany and married to a German national. The respondent who was owner of two parcels of land described as H1055 and H1056 situate at Mare Anglaise, Mahe transferred both parcels to the appellant for a sum of R500,000.

By virtue of a deed made on 15th October 1984 and registered, as the learned trial judge noted, in what was described as the "old land register", the appellant became to all intents and purposes the ostensible owner of the property by right of purchase. She exercised rights of ownership thereon when sometime in 1989 she sold and transferred title in parcel H1055 to purchasers and sometime in

1988 mortgaged parcel H1055 and H1056 to Barclays Bank PLC as security for a loan of R20,000.

Alleging that the foregoing acts of ownership and the appellant's appropriation to her use of rents received in respect of a dwelling house on parcel H1056 from January 1987 onwards amounted to a non performance of an undertaking upon the transfer of the property to the appellant in October 1984 that she would hold the property on behalf and for the benefit of the respondent, the respondent commenced the action from which this appeal arose.

Perera, J. who tried the action succinctly summed up the main issue in the case when he stated:-

> *"... the deed of transfer evidences an absolute sale of the property in consideration of the payment of the purchase price, which is duly acknowledged by the vendor. However both parties now admit that no payment was made nor received as stated in the deed. The plaintiff avers that this was a "disguised sale" not intended to transfer ownership. The defendant avers that it was an absolute sale in consideration of a debt owed to her husband ..."*

After a consideration of the totality of the evidence, the learned judge concluded that the document, (Exhibit P21) under private signature was not intended to transfer the beneficial interest in the property to the appellant. The secret agreement relied on by the judge to come to that conclusion was not proved by evidence in writing. However, the learned judge held, rightly, that the secret agreement had been established by personal answers of the appellant which is tantamount to a commencement of proof in writing under Article 1347 supplemented by oral and documentary evidence.

The learned judge rightly treated the case as one of simulation in which the apparent and ostensible agreement is destroyed, in effect, by a secret contract. A simulation is the concealment by the party of the true nature of their agreement behind the facade of a disguised transaction which the parties never intended to

have the ostensible effect. The hidden agreement by which the parties agreed to conceal the true nature of the ostensible transaction as a sham is referred to in the Civil Code of Seychelles as a back-letter. The back-letter provides evidence of the simulation. As stated in a passage from Amos and Walton: The introduction to French Law (2nd Ed. p. 177):

> *"If the ostensible agreement is in writing, ... the back letter cannot, according to the general rules of evidence, be proved by oral testimony. There must be written proof or at least commencement of proof in writing supplemented by oral testimony."*

However, Article 1321(4) of the Civil Code of Seychelles ("the Code) provides that:

> *"Any back-letter or other deed, other than a back-letter or deed ... which purports to vary amend or rescind any registered deed of or agreement for sale transfer, exchange, mortgage, lease or charge or to show that any registered deed of or agreement for, or any part of any registered deed of or agreement for sale, transfer, mortgage, lease or charge of or on any immovable property is simulated, shall in law be of no force or avail whatsoever unless it shall have been registered within six months from the date of the making of the deed or of agreement for sale, transfer, exchange, mortgage, lease or charge of or on the immovable property to which it refers."*

Thus, while the requirement of writing may in other cases be merely evidentiary pursuant to Article 1341 of the Code albeit subject to the exception provided by article 1347 of the Code, the requirement of writing in cases provided for in Article 1321(4) is formal. The consequence is that such secret contract is void by reason of the absence of writing. The true effect of the relevant paragraphs of Article 1321 is clearly put in Chloros: Codification in a Mixed Jurisdiction (p. 103) thus:

> *"The Code specifically declares null those back-letters which purports to vary a transaction involving immovable or commercial property. It also declares null any simulation of a registrable deed or agreement unless the back-letter which provides evidence of the simulation is also registered within six months of the making of the agreement."*

In this case it is evident that the "back-letter" relied on by the respondent was not in writing and consequently was not and could not have been registered as required by Article 1321(4) of the Code. In the result the back-letter is "of no force or avail whatsoever." Therefore there was nothing that could in law be relied on as evidence that the transaction embodied in the deed of transfer (Exhibit P21) was a simulation or a sham. The ostensible transaction therefore ought to have been given effect to.

Before this appeal is parted with, it is pertinent to observe that it is difficult to fathom what useful purpose Article 1321(4) which, as has been seen in this case, is capable of producing harsh and unexpected results, is designed to serve. If the purpose is to effect publicity so that the secret transaction may come to the notice of third parties, then the provisions of Article 1321(1) of the Code would seem to have made Article 1321(4) superfluous since by Article 1321(1):

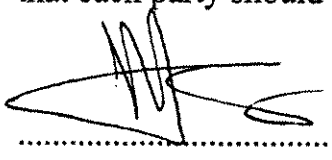
> *"Back-letters shall only effect as between the contracting parties: they shall not be relied upon as regards third parties."*

If, as is implied in the argument put before us by Mr. Shah, counsel for the respondent, Article 1321(4) of the Code is to ensure that the provisions are for fiscal purposes only, its clear the provisions have gone beyond what is necessary for that purpose. The clear and unambiguous provisions of Article 1321(4) are so sweeping that it will be a daring and unnecessary piece of judicial legislation to restrict the effect of the nullity they declare of back-letters which offend the provisions of Article 1321(4) to third parties only while making them valid as between the parties.

Further, we do observe that counsel did not invite the attention of the learned judge to Article 1321(4) and that as a result the judge decided the case without adverting to its provisions. It is manifest, in our view, that had Article 1321(4) been brought to the notice of Perera, J. he would have come to the conclusion which we now come to, that by virtue of the provisions of Article 1321(4) of the Code, there was nothing before him to prevent the transaction embodied in the deed (exhibit P21) from being given full effect to, and that the respondent failed to establish his case.

For these reasons, we would allow the appeal and set aside the judgment entered for the respondent by Perera, J. on 10th February 1995. We would substitute therefor an order dismissing the respondent's claim. If the appellant had raised at the trial the point on which this appeal is now decided an appeal would probably not have been necessary.

It is therefore ordered that the appellant is entitled to costs of the trial and that each party should bear his or her own costs of the appeal.



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A. M. SILUNGWE, J.A. E. O. AYOOLA , J.A L.E. VENCHARD, J.A

Delivered on this 1st day of March 1996.