IN THE SEYCHELLES COURT OF APPEAL

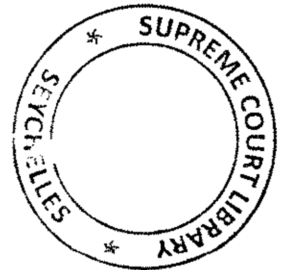
OGILVY BERLOUIS

V.

ROGER CLAETZIE

CIVIL APPEAL NO. 10/96

Before: SILUNGWE, AYOOLA, ADAM JJ.A.



MR. P. PARDIWALLA FOR THE APPELLANT
MR. F. BONTE FOR THE RESPONDENT

JUDGMENT OF THE COURT DELIVERED
BY E.O. AYOOLA, J.A.

Mr. Roger Claetzle obtained judgment in the Supreme Court in March 1996 against Mr. Ogilvy Berlouis in the sum of Rs.214,428.48 less Rs.18,565.80 in an action instituted by him for damages and loss arising from the failure of Mr. Berlouis to honour an "Acknowledgement of Debt" dated 14th March 1993 whereby Mr. Berlouis "acknowledged owing to Mr. Roger Glaetzle the sum of US Dollars forty thousand eight hundred only (US $40,800)". By the said "Acknowledgement" Mr. Berlouis undertook to pay the said debt as follows:

> "US $20,000 in foreign exchange by 1st April 1993 and the balance (less any bills paid in Seychelles) to be paid in Seychelles by July 1993."

Consequent on the failure of Mr. Berlouis to pay the debt, Mr. Glaetzle by plaint issued on 18th January 1994 commenced the action to which this appeal relates against Mr. Berlouis. Judgment having been entered against him as earlier mentioned, Mr. Berlouis has appealed to this court from the judgment of the Supreme Court. Mr. Berlouis who is now the appellant is referred to in this judgment as "the defendant"; and, Mr. Glaetzle who is
the respondent to the appeal is referred to as "the plaintiff."

By his plaint the plaintiff averred <u>inter alia</u> as follows: The parties were at all material times businessmen. On 14th March 1993 the defendant signed an "Acknowledgment of Debt" owing to the plaintiff in the sum of US $40,800. The defendant has failed to pay as stated in the said Acknowledgment of Debt thereby occasioning loss and damage to the plaintiff for which the defendant is liable. The defendant by his answer raised what was described as a "plea in limine litis" in the following terms: "The defendant disputes the Acknowledgment of Debt in that it does not conform with the provisions of law and is therefore not valid." Having done that, he admitted the averment that both parties were at all material times businessmen. The main averment of fact in the answer was that the defendant did not sign an Acknowledgment of Debt on the date specified or at all.

Upon a preliminary point of law being tried as to the validity of the Acknowledgment of Debt, Perera, J. ruled that the defendant having admitted that both parties were businessmen, the plea in limine litis failed. According to him, the exception to article 1326 of the Civil Code operated.

Article 1326 of the Civil Code provides that:

> "A note or promise under private signature whereby only one party undertakes an obligation towards another to pay him a sum of money or something of value shall be written in full, in the hand of a person who signs it; or at least it shall be necessary that apart from his signature he adds in his own hand the formula "valid for" or "approved for" followed by the amount in letters of the quantity of the thing. This requirement shall not apply to tradesmen and employees acting within the scope of their trade or employment."

This appeal as well as the case at the trial, had proceeded on the footing that the Acknowledgment of Debt ("the Acknowledgment") was such note or promise envisage in Article 1326 of the Civil Code.

The Acknowledgment was neither written in the hand of the appellant nor did it contain the prescribed formula that would have, in the alternative, made it comply with the prescribed form. It is therefore plain that unless the

exception in article 1326 operated, it was not in proper form. Hence, the question was whether it fell within the exception.

It is evident from the provisions of article 1326 that the fact that the person unilaterally undertaking an obligation is a "tradesman" does not by itself exempt from the need to comply with the requirement of that article. For the exception to operate the 'tradesman' must have made the note or promise under private signature acting within the scope of his trade. Whether the tradesman was acting within the scope of his trade or not is a question of fact.

A person who alleges that a note or promise falls within the exception must aver and prove facts as would bring the circumstances within the exception. In this regard, therefore, mere admission that the maker of the note or promise is a tradesman does not suffice without an additional admission expressly or by necessary implication that the tradesman was acting within the scope of his trade.

In the present case Perera, J. held in limine that the exception in article 1326 operated on an admission that the parties were businessmen before the facts were ascertained. On an ascertainment of the facts and on the finding which he made, it was manifest that a not unsubstantial part of the sum acknowledged arose not at all in course of trade but from personal debt owed by the defendant, and that, as to the rest, the debt acknowledged arose from the obligation to reimburse the plaintiff for goods which he had paid for in Austria. On the facts as found, it cannot be said that the defendant made the Acknowledgment of Debt while acting within the scope of his trade. The admission that he was a businessman was not sufficient to justify the conclusion that the exception to article 1326 applied.

Before the next branch of the defendant's counsel's submission is considered and as a preface to such consideration, it is expedient to observe that article 1326 is in the category of cases in which the requirement of writing is evidential and not formal. When the requirement of writing is evidential the rule by which oral evidence is admitted whenever there existed 'a beginning of written proof' provides an exception. A writing providing initial proof is a written act emanating from the defendant which makes it probable that the fact alleged is true. A document which is not in proper form may nevertheless be used as writing providing initial proof.

The defendant's submission on this appeal is that the plaintiff, having a choice of cause of action, could base his cause of action on the Acknowledgment or on the nature of the contract described by him as "the actual transaction". It was argued that if the action was based on the transaction such transaction should be pleaded but it was not pleaded. That being so, it was submitted, it was not possible to use the document as beginning of proof in writing to prove a fact which was not pleaded.

It is pertinent to note that counsel for the defendant did not at the trial sustain his initial objection to the leading of oral evidence on the nature of the transaction that led to the indebtedness acknowledged by the defendant. There were two versions, namely: one by the plaintiff, which was that the indebtedness arose from personal loans made to the defendant; cash handed over to him; and, undertaking by him to re-imburse the plaintiff for goods which the plaintiff had already paid for in Austria and sent to Seychelles; and, the other by the defendant, which was that apart from a loan of £2000 the goods were ordered by the Seychelles Liberal Party and the sums received in cash were donated to that party. The judge preferred the plaintiff's version, holding, as he was entitled to hold, that the evidence both

oral and documentary did not support the defendant's case.

The argument advanced by counsel on behalf of the defendant overlooked the fact that the fact alleged was that the defendant had acknowledged indebtedness to the plaintiff and had set out how he would settle such indebtedness. The claim was made on the basis of those facts. The defendant denied those facts. As has been stated earlier, the judge rejected the defence of the defendant which was: "that the acknowledgment of debt was meant to be only a receipt to be produced in Austria, as according to Austria law, donation of funds to political parties was prohibited."

While rightly conceding that Acknowledgment not conformed to form could be used as 'beginning of proof in writing', counsel for the defendant opined that the beginning of proof should relate to what he had described as the "actual transaction (buying/selling/non payment etc.)". The facts alleged and which the plaintiff had set out as basis of his claim were acknowledgment of indebtedness by the defendant and a promise by him as to the instalments and time by and in which he would settle such. The writing providing initial proof related to those facts. After admitting both oral and documentary evidence the judge found those facts proved. In the result, the contention of the defendant that other transactions ought to have been pleaded for the acknowledgment to be of any probative value is misconceived and must be rejected.

The only other point made by the defendant's counsel on this appeal touches on the judge's view that the Seychelles Liberal Party to which the defendant had sought to ascribed liability for the plaintiff's claim had no legal personality and could therefore not sue or be sued.

By section 2 of the Political Parties (Registration and Regulation) (Amendment) Act 1995 the Political Parties (Registration and Regulation) Act Cap. 173 was amended by the insertion of new sections numbered section 23 - 26. Section 23(1) and (2) which are here relevant provides thus:

> "23 (1) A registered political party shall from the date of its registration under this Act be a body corporate.
>
> (2) A political party registered under this Act prior to the date of the commencement of this section shall from that date be a body corporate."

The date of commencement of the Act was 16th March 1995 but it would appear from the judgment that the date of commencement of the section was 15th April 1995. The judge reasoned, though unnecessarily, that the plaint in this case having been filed before the date of commencement of the Amending Act, section 23(2) could not apply ex post facto.

While it may be expedient for the a judge to pronounce on all issues canvassed before him in an appellable matter, pronouncement on issues which become purely academic or irrelevant having regard to the facts pleaded or established should be avoided. A final Court of Appeal, would be wary of pronouncing <u>obiter</u> on issues of problematic interpretation of statutes which are not necessary for the determination of an appeal. In view of the fact that the judge had rightly rejected the defence of the defendant, the questions whether the Seychelles Liberal Party was the proper defendant to be sued and whether the Act had a post facto effect were no more live issues in the appeal and should not engage the attention of this Court notwithstanding the apparent conflict in subsection (1) and (2) of section 23 of the Act. It suffices, merely by way of observation, to note that in the Supreme Court the questions relating to the capacity of the

party to sue or be sued had not arisen there being no averment in the pleadings that the Seychelles Liberal Party was "a registered political party" and, if it is, the date of its registration.

For the reasons which have been stated, this appeal must fail. It is hereby dismissed accordingly. The plaintiff is entitled to costs of the appeal.

E.O. AYOOLA
JUSTICE OF APPEAL

A.M. SILUNGWE
JUSTICE OF APPEAL

M.A. ADAM
JUSTICE OF APEAL

Delivered on the 31st day of October 1996.