# IN THE SEYCHELLES COURT OF APPEAL

**JOHN AH TIVE & THEOLINE WAYE HIVE** — **1ST APPELLANT, 2ND APPELLANT**

**VERSUS**

**ZITA DELPECH** — **RESPONDENT**

Civil Appeal No. 26 of 1997

(Before Goburhum, P, Silungwe & Adam JJA)

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Mr. R. Valabhji for the Appellant
Mr. J. Hodoul for the Respondent

## JUDGMENT OF THE COURT

Appeal is allowed with costs and the judgment is set aside. Reasons to follow.

Dated at Victoria, Mahe this 9th day of April 1998

| H. GOBURDHUN | A.M. SILUNGWE | M.A. ADAM |
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| PRESIDENT | JUSTICE OF APPEAL | JUSTICE OF APPEAL |

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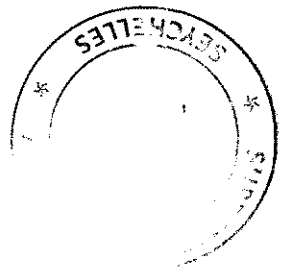

## REASONS OF THE COURT

(Delivered by Silungwe J.A.)

On April 9, 1998, we allowed the appeal with costs and set aside the judgment of the Supreme Court, for reasons to follow. These are our reasons.

At all material times, the respondent was the plaintiff and the 1st and 2nd appellants were the defendants, respectively.

It is common cause that the respondent is the owner of a parcel of land No. LD17, at La Pass, La Digue, on which stands a shop presently occupied by the second appellant. The respondent, who was at the time of the trial aged 80 years and feeble, was represented by Benjamin Paul Delpech, her son, who held a power of attorney.

The plaint shows, inter alia, that some time in 1971, the plaintiff and the 1st defendant entered into an (oral) agreement whereby the 1st defendant agreed to renovate the building then existing on the said immovable property, take a lease thereof, and carry on a retail business; the 1st defendant duly renovated the building, and carried on the retail business with the 2nd defendant as his clerk (manager); and that, on a date unknown

to the plaintiff, the 1st defendant agreed to sell the building to the 2nd defendant and, following the said agreement, the 2nd defendant carried out renovation works on the building without the consent or knowledge of the plaintiff and now claims that the building is hers. The plaintiff then prayed for the following declarations:-

(a) as to whether a relationship of lessor and lessee exists between the plaintff and the 1st defendant;

(b) that the said builidng on the plaintiff's land belongs to the plaintiff;

(c) that the 2nd defendant has no legal rights as lessee or otherwise in the said building or against the plaintiff in that connection or at all;

(d) that the purported sale of the building by the 1st defendant to the 2nd defendant is null and of no effect; and

(e) such other declaration as may be necessary in the circumstances of the case.

For the purposes of this judgment, it is unnecessary to advert to the defence of both defendants (appellants)

On the facts of the case, paragraph (d) of the plaint did not arise at all.

When contentious declarations are sought, as in this case, it is a basic requirement that the making of such declarations (if at all) must be based on the court's findings. The rationale for this is that no declarations can be made in a vacuum.

In the instant case, there were certain contentious matters on which the trial court's findings should have been made but that was not done. For instance (and this is not the only illustration), on the question whether there was a lessor/lessee relationship between the respondent and the 2nd appellant, the 1st appellant testified that the respondent was aware at an early stage that the 2nd appellant was going to run the shop as manager; and that on several occasions, the 1st appellant went to see the respondent and told her: "if my sister-in-law continues working well, I would pass on the stock to her. Mrs. Delpech said that it would be a good idea, as Theoline has 3 children, it would be a good idea if she gets the stocks." (See middle of handwritten page 27 of the record).

During cross-examination, the 1st appellant told the court that he sold his stock-in-trade to the 2nd appellant when the latter had worked and repaid the money he had spent on the stock. The 1st appellant then said (bottom of handwritten page 28): "After that I sold my stock to Theoline Waye Hive. I went to see Mrs. Delpech and told her that I had sold my stock to Theoline Waye Hive and informed her that she could take the rent now from Mrs. Waye Hive."

Further, the 2nd appellant testified that after she had worked for several years, she paid off the 1st appellant for his stock-in-trade which thereafter became hers. She went on to say that after the 1st appellant had carried out initial renovations, she herself carried out her own renovations every 3 or 5 years because the shop building was close to the sea. She used to tell the respondent about the renovations she was carrying out; and, each time she completed such renovations, the respondent increased the rent.

As against the evidence of the 1st and 2nd appellants, the respondent was not herself able to testify, and so, she was represented by her proxy. What compounded the situation was that no findings of fact were made on these and other contentious issues.

Ultimately, certain declarations were made by the trial court in favour of the respondent which declarations were unsupported by any findings of fact.

It was for the foregoing reasons that the appeal was allowed with costs and the judgment of the trial court was set aside. Consequently, we order a retrial before another judge.

Dated at Victoria, Mahe this ..13th.. day of ***August*** 1998.

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| **H. GOBURDHUN** | **A.M SILUNGWE** | **M.A. ADAM** |
| **PRESIDENT** | **JUSTICE OF APPEAL** | **JUSTICE OF APPEAL** |

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# IN THE SEYCHELLES COURT OF APPEAL

JOHN AH-TIVE — 1ST APPELLANT
THEOLINE WAYE-HIVE — 2ND APPELLANT

versus

ZITA DELPECH — RESPONDENT

Civil Appeal No:26 of 1997

*[Before: Goburdhun P, Silungwe & Adam, JJ.A]*

.....

Mr. R. Valabhji for the Appellants
Mr. J. Hodoul for the Respondent

## REASONS FOR THE JUDGMENT OF THE COURT

(Delivered by Adam J.A.)

The respondent's plaint was that she owned the immovable property concerned, that on an unknown date in 1971 she entered into an agreement with the first appellant whereby he would renovate the existing building on it who would then lease it from her, that he renovated the building but unknown to her the first apepllant agreed to sell it to the second appellant and following this agreement the second appellant carried out renovations on it without her consent or knowledge and now claimed the building as hers, that at no stage did the respondent give or sell the building to the first appellant at the commencement of the lease, that there was no condition before or after his renovations that it would belong to him, that she did not agree to the sale of the building by the first appellant to the second appellant and that she did not agree to renovations of it by the second appellant, therefore, she asked for a declaration from the Supreme Court.

In their joint defence both appellants averred that the second appellant owned the building in which he had carried out a retail business and that the second appellant had acquired a 'droit de superficie'; they denied all the other averments in the plaint and instead asserted that they and/or her predecessors rented the land from the respondent and/or her predecessors and had acquired a 'droit de superficie'; they denied the respondent owned the building or that she leased it as distinct from leasing the ground; that it was rebuilt with her knowledge and consent; that she was fully aware of the sale of stock in trade to the second appellant in it from where she conducted her retail business and of the renovations done by the second appellant and that the respondent continued to accept 'ground rent' until her descendants decided they wanted to have the retail outlet of the second appellant at which time it was when they denied she owned the building.

At the trial in the Supreme Court the respondent (plaintiff) did not give evidence but the only witness for her was her son who had her Power of Attorney and who said that he was away not there from 1985 to 1995. He produced receipts from 30 April 1971 to 30 April 1984 which indicated 'location d'un care de terre' which he said meant rent for the plot area, that the first receipt showed a rent of SR20 and these went up to SR50 in 1981 till 1984 but prior to 1971 he conceded the rent for the plot was around 25 to 50 cents; that his mother now (March 1997) was 80 years old.

In his evidence the first appellant explained that he bought the stock in trade in 1971 from second appellant's uncle who had traded in the shop on the plot; that when he bought the stock in trade he went to see the respondent with the second appellant's uncle who told the respondent that he wanted to sell the stock in trade but the second appellant's uncle would not agree to the first appellant buying the building from the second appellant's uncle, that when he bought the stock in trade in 1971 the roof was in a bad condition, the building had planks so he took off the old

wooden planks on the floor by instead recementing it, a separated kitchen building was taken down by him, with the kitchen newly added to the shop and he re-roofed the building which was all done when the second appellant was still there; that he went to see the respondent several times to tell her that if the second appellant continued to work well for him in the shop he would sell her the stock in trade and the respondent replied that this was a good idea since the second appellant had 3 children; that he did not sell the building to the second appellant; that when he had first bought the stock in trade he saw the respondent who told him that she would charge him SR15 monthly as ground rent for the piece of land; that after selling the stock in trade to the second appellant he saw the respondent at which time he told her that he had sold the stock in trade to the second appellant and that the respondent could take the 'ground rent' from the second appellant; that the respondent came to the shop several times until the first appellant had finished his business there. Under cross examination for the respondent, when asked to whom the building belonged, he replied that it was owned by the second appellant's uncle but he did not know who had constructed it; that he could not say when he sold the stock in trade to the second appellant as he had forgotten since it was so long ago; that he had attended the Rent Board but he could not be removed because the building belonged to the second appellant because her uncle gave it to her; that he had not agreed to be evicted from the builidng in front of the Rent Board because the building did not belong to him. When asked by the Court what actually now was his interest he replied that he did not have any interest in the matter. Mr. Valabhji intervened by informing the Court that he was a party to proceedings with which the Court agreed that he had sold his stock in trade and that at the moment he had no claim. The respondent's counsel told the Court that the reason for having the two appellants was because the receipts were in both their names. Under further cross examination the first appellant reiterated that he went and saw the respondent to inform her that he would be buying the stock in trade in the shop from the second appellant's

uncle and that he would follow any conditions she had with the second appellant's uncle to rent the piece of land and that when he bought the stock in trade he was told by the second appellant's uncle that he would be only buying the stock in trade and that the building would not be sold to him since it would be passed on to the one who looked after him and this happened while the second appellant's uncle was still living. In reply to the Court's question he said that from 1971 until he died aged 93 some 13 years from now (in 1984) the second appellant looked after him which he knew as she worked for him in the shop. The other person who looked after him was the second apepllant's uncle's concubine.

The second appellant testified that she had been 26 years in the buidling; that she paid the second appellant for the stock in trade in the building and the shop became hers but there was no written document to show this; that she did not know who built it; that the first renovations were done by the first appellant, then it was herself every three years and five years; that each occasion she made the repairs she told the respondent when she then each time increased the 'ground rent' and the respondent did not raise any objections when she changed from wood to corrugated iron sheets to cement; that when she took over from the first appellant she paid respondent ground rent of SR50 but after 2 years the respondent refused to take the rent, that she spent a lot of money to renovate the buidling and took out a loan for SR30,000 since she had to change the sheets to aluminium as the building was beside the sea. Under cross examination she indicated that she had agreed before the Rent Board to leave the building if she was paid, and also some one from the Housing Department put the valuation of it at SR80,000.

In his judgment Perera J said that in 1971 as admitted by the respondent (plaintiff) the first appellant (first defendant) entered into agreement, whereby he renovated the building to run a retail business; that there was no written lease agreement but the relationship between

the first appellant and the respondent consequent to the agreement was that he held a lease from the respondent with authority to renovate and that the renovation done by him amounted to rebuilding so where the second appellant's uncle was concerned even if he had constructed the original building his right to 'droit de superficie' ended with the rebuilding; that the first appellant did not however claimed compensation for the rebuilding and that he had now no interest either in the business or the building. He hold that whatever interest the second appellant's uncle had in the building had lapsed by the time the second appellant purchased the stock in trade from the first appellant.

In the Memorandum of Appeal the grounds of appeal were that the trial judge was wrong to hold that (a) the receipts given to the appellants by the respodnent to 'ground rent' were for rent of the property and the building; (b) that the building belonged to the respondent without payment of compensation; (c) that the appellants (or second appellant) were not entitled to an indemnity for the building; (d) that the second appellant was not a lessee; (e) that the second appellant had not succeeded to the right of her 'auteurs' and (g) that the second appellant had no 'droit de superficie'. Further, he was wrong to make the declaration sought and so the judgment should be set aside.

It was for the respondent (plaintiff) to call evidence to prove what was averred in her plaint, that is (a) proof of the agreement alleged between herself and the first appellant relating to building renovations, (b) proof about the term of that agreement that he would then lease the land and the building to carry on retail business, (c) proof that the first appellant in terms of the agreement did the renovations, etc; (d) proof that unknown to her the first appellant agreed to sell the building to the second appellant and following upon such agreement the second appellant carried out renovations without her consent or knowledge.

The record of proceedings on the evidence of both of the appellants contradicted the foregoing and there was no evidence adduced on behalf of the respondent that provided the necessary proof on a balance of probability. The respondent's son could not assist Perera J since he did not have personal knowledge of the matters involving the appellants and his mother.

The respondent had not pleaded (and had not relied) on any 'droit de superficie' which was on her land which had been extinguished as far as the second appellant's uncle was concerned when the first appellant had done the rebuilding. What she specifically pleaded was an agreement between her and the first appellant. The respodnent as plaintiff could not admit (and did not admit) that in 1971 the first appellant entered into an agreement whereby he renovated the buidling and leased the land and building to run the retail business as Perera J found since there was no such evidence from anyone from which this could be inferred. Perera J erred in making such a finding and then holding that there was a lessor – lessee relationship between the respondent and the first appellant which relationship end when the first appellant sold the stock in trade to the second appellant and vacated the shop. In fact the evidence before him was that there existed a lessor – lessee relationship for a piece of land between the respondent and the second appellant's uncle; that the respondent knew that building on that piece of land did not belong to her; that the first appellant agreed to take over the liability of the second appellant's uncle and pay respondent the 'ground rent' only for the piece of land (which created a lessor-lessee relationship for the piece of land only between the first appellant and the respondent) and abide by any conditions the respondent had relating to this with the second appellant's uncle; that the first appellant went and saw the respondent on several occasions and informed her that he would sell the stock in trade to the second appellant with which the respondent agreed as the second appellant had three children; that the first appellant went and saw the

respondent and told her that he had sold his stock in trade to the second appellant and informed her that she could take 'ground rent' from the second appellant; that the second appellant thereby agreed to take over the liability of the first appellant and pay the respondent 'ground rent' only for the piece of land. This now created a new lessor – lessee relationship for the piece of land only. By accepting for two years the 'ground rent' from the second appellant and as the second appellant testified, which was not contradicted, that each time she carried out repairs to the building with the knowledge of the respondent the respondent increased the 'ground rent', so the respondent cannot now deny that the second appellant had no legal rights as lessee or otherwise in that building.

It follows that the judgment of Perera J cannot be sustained. The appeal is allowed with costs in this Court and in the Supreme Court. The judgment of Perera J is set aside.

Dated at Victoria, Mahe this 4th day of ***December*** 1998.

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| **H. Goburdhun** | **A. M. Silungwe** | **M.A. Adam** |
| **PRESIDENT** | **JUSTICE OF APPEAL** | **JUSTICE OF APPEAL** |