

IN THE SEYCHELLES COURT OF APPEAL

GABRIEL ADONIS

APPELLANT

versus

REMY LARUE

RESPONDENT

Civil Appeal No: 39 of 1999

[Before: Ayoola, P., Silungwe & De Silva, JJA]

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Ms. K. Domingue for the Appellant

Mr. P. Boulle for the Respondent

JUDGMENT OF THE COURT

(Delivered by Silungwe, JA.)



This is an appeal against a ruling of the Supreme Court wherein it was held that the appellant (then plaintiff) could not adduce oral evidence for the purpose of establishing a back-letter on the basis that, in such circumstances, oral evidence is inadmissible in law.

The critical issue that arises in this appeal is whether the learned trial judge was right in his ruling that the alleged agreement between the parties amounted to a back-letter. Both sides hold diametrically opposed views on the matter. In considering the issue, it is apposite to have recourse to the appellant's plaint which reads:-

1. The plaintiff is and was at all material times a Housemaid and the mother of the Defendant. The Defendant is at all material times unemployed and the son of the Plaintiff.
2. On the 19th day of August 1994 the Plaintiff and the Defendant agreed for the Plaintiff to buy a parcel of land known as title No. B858 situated at Barbaron, Mahe, and to register the same in the Defendant's name temporarily until she returns to

the Republic of Seychelles. The Plaintiff was at the material time residing in Italy.

3. In breach of the agreement the Defendant has failed, refused or neglected to transfer and register the said parcel of land to the Plaintiff upon her return to the Republic of Seychelles despite several requests from the Plaintiff to the Defendant to do so.
4. By reason of the matters aforesaid the Plaintiff has suffered loss and damage.

PARTICULARS

....."

Miss Domingue is standing in for Mr. Frank Elizabeth who is away but she relies on his written submissions. The gist of the submissions is that the action of the appellant is one for specific performance of a contract pertaining to the parcel of land which the respondent purchased from the Government of Seychelles (the Government) with money provided by her on the understanding that the said land would subsequently be transferred to her, pursuant to their agreement.

It is further submitted that since the agreement between the parties has no bearing or effect upon the validity of the title deed effected by the Government in favour of the respondent, the agreement does not amount to a back-letter in law in the sense of Article 1321 of the Civil code of Seychelles (the Code) or the case of **Sidna Ruddenklau v Timm Adolph Botel** (Civil Appeal No. 4 of 1995) which is allegedly distinguishable on the facts, as that case consisted of two agreements: a "secret agreement" and an "apparent and ostensible agreement"; and this Court held that the trial judge had rightly treated the case as one of simulation in which the secret contract had the effect of invalidating the apparent and ostensible agreement.

By analogy, it is contended that as the secret agreement between the parties in the present case does not affect the validity of the title deed issued to the respondent by the Government, it follows that the said agreement does not amount to a back-letter, as it did in **Botel's** case, supra.

Although the argument canvassed on behalf of the appellant sounds ingenious and plausible, it is in fact flawed, as we shall presently see. In Botel's case, the learned trial judge succinctly summed up the main issue in these terms:-

"... 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."

Hence, the secret agreement between the parties which concealed the true nature of the ostensible transaction was clearly a simulation. As the secret agreement purported to vary the ostensible agreement, it amounted to a back-letter and was consequently "of no force or avail whatsoever" unless it had "been registered within six months", pursuant to Article 1321(4) of the Code which provides:-

"1321(4) Any back-letter or other deed, other than a back-letter or deed as aforesaid, 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 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, mortgaged, lease or charge of or on the immovable property to which it refers."

And, according to Chloros: Codification in a Mixed Jurisdiction, at page 103:-

"The Code specifically declares null those back-letters which purport 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.”

As we stated in Botel's case, “A simulation is the concealment by a party of the true nature of their agreement behind the façade of a disguised transaction which the parties never intended to have the ostensible effect.”

On a consideration of the excerpts, vis-à-vis the plaint, as well as the plaintiff's testimony, it is evident that the alleged agreement between the parties was a double-pronged one consisting of a secret agreement, namely: that the respondent would buy the parcel of land on the appellant's behalf, using her funds, and that the parcel of land was subsequently to be transferred to the appellant; and an ostensible agreement whereby the appellant was to be an apparent owner of the piece of land but only until the appellant returned to Seychelles. It follows that in the instant case, as in Botel, there was a simulation since the secret agreement purported to vary the ostensible one. Herein lies the misconception of the appellant's argument in relation to the validity of the respondent's title deed. As Mr. Boulle properly contends, on behalf of the respondent, the latter's “ownership” of the parcel of land did not confer upon him the “... widest right to enjoy and freely dispose of (it) to the exclusion of others” in terms of Article 544 of the Code; on the contrary, however, it purported to confer upon him a simulated minimal right in movable property in his name, pending the plaintiff's return to Seychelles. In the circumstances, Mr. Boulle's support for the trial court's ruling to the effect that the agreement between the parties was a back-letter is well founded. As this was not, and could not be, registered in terms of Article 1321 of the Code, it was “of no force or avail whatsoever.”

There remains a submission made on the appellant's behalf which needs but a brief mention, to wit: that there is nothing in Article 1321 of the Code that provides for inadmissibility of oral evidence to prove back-letters. It suffices to observe here that it is difficult to imagine how an oral back-letter can be registered! As we indicated in Botel:

"... 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 by Article 1321(4) is formal."

In conclusion, and for the reasons given, we are constrained to uphold the trial court's ruling. Accordingly, the appeal is dismissed but, in the circumstances of the case, no order is made as to costs.



E. O AYOOLA
PRESIDENT



A. M. SILUNGWE
JUSTICE OF APPEAL



G. P. S. DE SILVA
JUSTICE OF APPEAL

Dated at Victoria, Mahe this 3rd day of November 2000.