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**IN THE SEYCHELLES COURT OF APPEAL**

**CEDRIC PETIT**

**APPELLANT**

versus

**MARGHITA BONTE**

**RESPONDENT**

Civil Appeal No: 45 of 1999

*[Before: Ayoola, P., De Silva & Matadeen, J.J.A]*

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Mr. P. Boulle for the Appellant

Messrs. A. Derjacques & F. Elizabeth for the Respondent

**JUDGMENT OF THE COURT**

*(Delivered by Matadeen, JA.)*



This is an appeal against a judgment of the Supreme Court which dismissed the appellant's possessory action after upholding a preliminary objection raised by the respondent to the effect that the appellant had previously been an unsuccessful plaintiff in a petitory action.

The appellant had brought a possessory action based on Section 97 of the Seychelles Code of Civil Procedure claiming that he had been in quiet and peaceful possession and occupation of an immovable property comprising of two plots of land registered as Parcels Nos. J203 and J204 for more than a year and alleging that he had been ousted therefrom by the respondent. He therefore asked that he be restored to the quiet enjoyment and possession of his immovable property.

At the hearing before the trial Court, the respondent took a preliminary objection to the effect that the appellant's possessory action was not maintainable inasmuch as the appellant had been " an

unsuccessful Plaintiff in a petitory action in respect of the said property and in respect of the Defendant in Civil Side No. 161 of 1993 and in Civil Appeal No. 28 of 1995.”

The Learned Judge upheld the preliminary objection and dismissed the appellant’s possessory action.

The central issue of this appeal is whether the action that was brought by the appellant (Civil Side No. 161 of 1993) was in truth and in fact a petitory action in which case the appellant would, pursuant to Article 100 of the Seychelles Code of Civil Procedure, be precluded from proceeding with his possessory action. That Article provides as follows:-

“It shall not be lawful for an unsuccessful plaintiff in a petitory action (action pétitoire) to enter a possessory action.”

It is not disputed that the appellant was unsuccessful in an action directed against the respondent and her former husband for the specific performance of an alleged agreement to sell. The appellant had sought a judgment from the Supreme Court compelling the respondent and her former husband to transfer to him their respective half shares in the above-mentioned two portions of land, namely Parcels Nos. J.203 and J204, which the appellant claimed to have acquired by virtue of a promise of sale. The Learned trial Judge upheld the defence of the respondent and her former husband that the parties had not reached an agreement on the subject matter of the transaction which formed the basis of the appellant’s claim to justify the order claimed by him in the nature of specific performance and dismissed the appellant’s action. The appellant’s appeal to the Court of Appeal was equally dismissed [Civil Appal No. 28/95].

Now, can it be said that that action for specific performance entered by the appellant was a petitory action? In view of the fact that the French expression ("action pétitoire") is also used in Article 100 of the Seychelles Code of Civil Procedure we may, pursuant to Section 21 of the Interpretation and General Provisions Act, usefully refer to Mazeaud: *Leçons de Droit Civil*, 6<sup>th</sup> Edition, Tome II, Vol. 2 para. 1628 et seq. From the learned author's comments, it is possible to draw a number of conclusions, namely that:-

- (a) a petitory action is an action in rem;
- (b) it is an action whereby the plaintiff seeks to vindicate or enforce his right of ownership over property;
- (c) the action is invariably directed against the person who is in possession or occupation of the property.

The same principles can be culled out from Dalloz *Encyclopedie Juridique*, Vo Revendication. The whole basis of the petitory action, therefore, is the title of the plaintiff and the denial of that title or the interference with the plaintiff's right under it by the defendant. It is similar to the 'rei vindicatio' action in Roman Dutch Law which is equally founded on ownership, one of the attributes of which being the right to possess or to recover possession on the basis of title.

The appellant's action in Civil Side No. 161 of 1993 was admittedly one for specific performance of an alleged agreement to sell. Now, the jurisdiction to order specific performance is based on the existence of a valid and enforceable contract and the action is one whereby the plaintiff elects to insist on the actual performance of a contractual obligation. The action is therefore a contractual action and the remedy is an equitable one

based on the contract. Moreover an action for specific performance is one in personam.

An examination of the appellant's action in Civil Side No. 161 of 1993 in the light of what we have said above shows that it cannot by any stretch of the imagination be assimilated with a petitory action. In the circumstances, we hold that the Learned trial Judge was wrong to have considered the appellant's action for specific performance of an alleged agreement to sell as a petitory action.

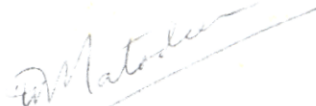
We therefore quash the judgment of the Learned Judge on the preliminary objection raised by the respondent and remit the case back to him for hearing on the merits. The respondent shall pay the costs of this appeal.



**E. O. AYoola**  
**PRESIDENT**



**G. P. S. DE SILVA**  
**JUSTICE OF APPEAL**



**K. P. MATADEEN**  
**JUSTICE OF APPEAL**

Delivered at Victoria, Mahe this 14<sup>th</sup> day of **April** 2000.