

IN THE SEYCHELLES COURT OF APPEAL

MRS JULIE VARNIER

APPELLANT

VERSUS

MR MICHEL ALCINDOR

RESPONDENT

Civil Appeal No: 28 of 2000

MICHEL ALCINDOR

CROSS APPELLANT

VERSUS

JULIE VARNIER

CROSS RESPONDENT

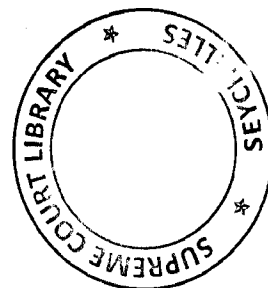
[Before: Ayoola P., Silungwe & De Silva, JJ.A]

.....
Mr. P. Boulle for the Appellant

Mr. C. Lucas for the Respondent

JUDGMENT OF THE COURT

(Delivered by Ayoola, P.)



This is an appeal from the decision of the Supreme Court (Perera, J.) whereby judgment was entered in favour of the plaintiff (now "the respondent") against the defendant (now "the appellant") and the appellant was ordered to execute the transfer of his property bearing title Nos. H583 and H714 to the respondent.

The respondent was a lessee of a house and curtilage situate at Anse Etoile on titles H583 and H714 ("the property") of which the appellant was the lessor and owner. On 11th December 1986 the respondent was registered as a Provisional Statutory Tenant in respect of the property and on the 29th November 1993 he was registered as the Statutory Tenant under the Tenants Rights Act 1981. By his plaint dated 16th July 1997 the respondent claimed against the appellant orders that the appellant (i) specifically perform a contract of sale of the property and (ii) render account

of all rents received by the appellant in respect of the property from January 1994 and moral damages.

The respondent's case on the pleadings was that the appellant through her representatives agreed to sell the respondent the property in consideration of SR80,000 "*which represented its value as per assessment carried out by expert Quantity Surveyor at the instance of the Tenants' Rights Registrar.*" Pursuant to this agreement the respondent applied to the Seychelles Housing Development Corporation ("SHDC") for a housing loan of SR80,000 to pay the agreed consideration. The loan was approved in January 1994 and the respondent deposited SR20,000 on 2nd January 1994 and thereafter had since been paying SR1200 monthly towards the loan. It was averred by the plaintiff that:-

"... the Defendant's acceptance of the offer (to buy the property) was binding in contract and she is obliged by law to perform the contract and execute the transfer." (emphasis and brackets ours)

and also that:-

"Despite various requests by the Plaintiff and the Registrar of Tenants Rights, the Defendant has failed to complete the transfer and has failed to collect the consideration from the office of the SHDC."

The appellant by her defence denied that she entered into any agreement to sell the property or that she authorised anyone to accept an offer to buy the property. At the end of the respondent's case the appellant did not call any evidence. Her Counsel contended that the claim being one based on a "*civil contract*" was not proved. The substance of his contention was that the respondent's claim as formulated being one for specific

performance of a contract under the Civil Code, the respondent ought to have proved with appropriate evidence the existence of an agreement and that the evidence having shown that the respondent was unable to accept the offer of the appellant to sell the house for SR120,000 there had been no agreement. In the course of his address and in the exchanges with the trial judge Counsel for the appellant, Mr. Boulle emphasised the distinction between a contractual obligation and a statutory obligation in terms of the Tenants' Rights Act, 1981. He submitted:-

“... one cannot talk of a contract of sale, the same way when land is acquired, one cannot talk in terms of – one can talk in terms of a statutory application (sic: obligation) to transfer and a statutory obligation to buy...

... This is a statutory obligation and the course (cause?) should have followed under that.”

The position taken by Counsel for the respondent, Mr. Charles Lucas, at the trial was that *“there was a contract to sell, but that contract, ultimately, went through the process of the provisions of the Tenants' Rights Act.”* It would appear that the trial judge had appreciated the distinction between a claim based on contract and one based on the Tenants' Rights Act when in the course of exchanges he had said:-

“When you are actually making this claim here, the case can be based purely on the civil contract, promise of sale or under the Tenants' Rights procedure. You are using your position as a statutory tenant now.”

Mr. Lucas answered – “Yes”, and went on to elaborate that *“the pleadings are as per the Tenants' Rights Act.”*

However, the judge started his judgment with a statement that this "*is an action for specific performance of an alleged agreement to sell.*" His understanding of the respondent's case was that in 1982 the agreed price was SR120,000 but as the respondent could not obtain a government loan as there was no access road to the property, the respondent made an application under the Tenants' Rights Act to purchase the property as a statutory tenant. Notwithstanding his earlier view that the action was for specific performance of an agreement to sell, he held that "*what was being sought to be specifically performed was section 34(1)(a) of the Tenants' Rights Act.*" He then proceeded to consider the case on that basis.

The crux of this appeal is whether he was right to have so proceeded when the case had been formulated to enforce a contractual rather than a statutory right. It was argued by Mr. Boule that the view of the judge that "*there had been an agreement for the sale of the property ... to the plaintiff in the statutory sense of a finalisation of the procedure towards the transfer of the statutory tenant, and hence the Defendant is obliged to execute the transfer thereof for the price of SR80,000.00*" was ultra petita. Mr. Lucas for the respondent argued that the machinery of the Act was merely used as a means of raising money to buy the property.

It is evident that there is a difference between enforcement of a contractual right, and enforcement of a statutory duty. It is an obvious distinction that emanates from the difference in the source of both. A contractual right is founded on agreement while a statutory obligation is created by legislation and is not constituted by agreement. That agreement is fundamental to a contract is expressed in the definition of contract in Article 1101 of the Civil Code of Seychelles as "*an agreement by which one or several persons bind themselves towards one or several others to give, do or refrain from doing*

something." The consequence of the parties' agreement is in the notion in Article 1134 of the Civil Code that: "*Agreements lawfully concluded shall have the force of law for those who have entered into them*". Obligations created by law are binding not because the parties have agreed but because they are imposed.

In this case the Tenants' Rights Act ("the Act") created its own statutory rights and duties independent of the agreement of the parties. The long title of the Act itself showed that it was an act, among other things, to enable Seychellois who own and occupy a home on another person's land or who are residential tenants to purchase that land or those premises. It created the status of "*Statutory Tenant*" and that of "*Statutory Landlord*" with their respective attendant rights and duties. By virtue of section 7(1)(b) a Statutory Tenant has a right to purchase those premises which he has taken on lease as his home and occupied as his home for a continuous period of 5 years or more whether before or after the commencement of the Act. A Statutory Tenant by virtue of Section 3(1) is "*a person provisionally registered under section 14 or registered under section 23*" of the Act. Section 23 provides for the final registration of a provisional statutory tenant as the Statutory Tenant of the premises.

One of the rights of a Statutory Tenant is to purchase the premises in terms of Part VII of the Act. It is one of the duties of a Statutory Landlord, by virtue of section 27(1)(e) of the Act:

"to grant a transfer of the premises to the Statutory
Tenant when called on to do so under section 34."

It is to be noted that if a Statutory Tenant does not apply to the Registrar of Tenants' Rights ("the Registrar") to purchase the premises within 5 years from the registration date the Statutory Tenancy terminates. The exercise of

the tenant's right of purchase is regulated by section 31 of the Act. Subsection 1 of section 31 provides that:-

“At any time after the issue of a Certificate of Statutory Tenancy under section 23 but within 5 years of the registration date, a Statutory Tenant may give notice to the Registrar on the form provided by the Registrar that he wishes to purchase the registered premises from the Statutory Landlord.”

The purchase price of the registered premises may or may not be determined by the agreement of the parties. Notwithstanding that the parties have agreed on the purchase price, which may be the statutory value of the registered premises by virtue of section 32(2), such statutory value may nevertheless be subject to assessment of a valuer pursuant to section 32(2)(a) or (b) and section 33 of the Act.

By virtue of section 34(1) in the purchase of the premises by the Statutory Tenant the duty of the Statutory Landlord is to grant a transfer of the registered premises to the Statutory Tenant. The grant by the Statutory Landlord of a transfer is one of several steps to the completion of the purchase of the registered premises by the Statutory Tenant.

From the foregoing analysis of the nature of rights and duties created by the Act, it seems manifest that where the action is to compel the Statutory Landlord to perform his duty pursuant to Section 27(1)(e) to grant a transfer of the premises to the Statutory Tenant, the Statutory Tenant need not aver and prove an antecedent agreement of sale but must aver:-

- (i) that the premises are registered premises in terms of section 14 and 23 of the Act;

- (ii) that the plaintiff is a Statutory Tenant and the defendant a Statutory Landlord in terms of the Act;
- (iii) that the plaintiff had given notice to the Registrar in terms of section 31(1) of the Act that he wishes to purchase the registered premises from the Statutory Landlord; and
- (iv) that the Statutory Value of the registered premises has been determined and finalised as provided by sections 32 and 33.

In making these averments in the plaint it must be noted that in terms of the Act the purchase price of the premises is not necessarily the same as the Statutory Value. The purchase price is the price agreed to by the Statutory Landlord while the Statutory Value may be such purchase price in terms of section 32(2) or assessed value in terms of the proviso to section 32(2) and section 33. A Statutory Tenant who seeks to enforce the duty of the Statutory Landlord to grant a transfer must disclose that he has granted, or, when required to do so, will grant a Tenant's Mortgage over the premises under section 34.

It is evident that the averments that are essential to support an action of specific performance of a contract are quite different from the above. All that is needed to be averred in such action are (i) the contract and (ii) its breach. In an action for specific performance several considerations are material; such as, whether it is equitable to order specific performance; or, whether an award of damages would be a more appropriate remedy; or, whether it is more equitable to award damages in lieu of specific performance. These are not considerations which come into play in enforcing the statutory duty under the Act.

In the present case although the plaint contained averments that the respondent was a Statutory Tenant, there is not much in the plaint to indicate that the action was one to enforce the appellant's duties under the Act. Paragraph 3 of the plaint emphasised an agreement to sell whereas under the Act the Statutory Landlord's agreement to sell is not an essential pre-requisite to his duty to grant a transfer. Agreement to sell is not the same thing as, and must not be confused with, agreement to a purchase price. In paragraph 5 of the plaint averment was made of "*Defendant's acceptance*" which was also not a pre-requisite to a duty to grant a transfer under the Act. Finally, in paragraph 6 of the plaint the predominating language was of offer and acceptance and of a performance of a contract, and not of the performance of a duty imposed by statute. The averments that would have brought it home clearly to the appellant that the action was founded on the rights and obligations created by the Act were absent.

The trial judge proceeded on a wrong footing when he held that "*what is being sought to be specifically performed is section 34(1)(a) of the Act, as the statutory valuation has been finalised.*" The averments in the plaint did not support such conclusion notwithstanding the gloss which the trial judge sought to put on some averments in the plaint such as that: "*The averment of the plaintiff that the defendant agreed to the sale of the property, for SR80,000 was the 'Statutory Value' assessed by the SHDC valuer.*" The trial judge summarised Mr. Boulle's submission as follows:-

"Mr. Boulle's submission of a no case to answer is based primarily on the contention that there was no agreement on price, and hence there was no contract of sale for the plaintiff to seek specific performance by transfer of the property. He was therefore considering the plaint as one based on civil contract."

However, that submission was made in the context of an action in contract. Without ascertaining and pronouncing on whether Mr. Boulle's submission was correct on the contention that the claim was based on civil contract, the judge proceeded to deal with the case as if it were one to enforce a statutory duty and as if the issue as to purchase price was in the context of a case founded on the Act. It was this erroneous approach which led to the conclusion that had been justifiably criticised in this appeal that there has been "*an agreement for the sale of the property ... to the plaintiff, in the statutory sense of a finding of the procedure towards the transfer of the premises to the statutory tenant.*"

There is no doubt that the respondent made a mistake in formulating his claim for specific performance of a contract when he should have initiated proceedings to compel performance of the appellant's duty as statutory Landlord, if so he was. In claiming in contract he had assumed a responsibility to show that the purchase price was agreed to by the parties and that he was prepared to pay the agreed purchase price. Where the parties agreed to a purchase price a Statutory Value fixed by procedure set by the Act lower than the agreed purchase price cannot be relied on as the agreed purchase price in a claim for specific performance of an alleged contract. A party who claims specific performance of a contract must rely on the terms of the contract as agreed to by the parties. A sale by private treaty of the parties cannot be equated to a "*sale*" by compulsion of the Act.

The cause of action disclosed on the plaint, in terms of section 71 of the Code of Civil Procedure, was one for enforcement of a civil contract. Without amending the plaint, it will be contrary to natural justice to expect the defendant to meet a case other than one pleaded or to pronounce judgment on the basis of a cause of action different from that disclosed by the plaint. A cause of action for specific performance of a contract being

different from one founded on enforcement of a duty imposed by statute, the decision of the trial judge based on the latter when that pleaded was the former, is erroneous.

It is to be noted that by virtue of section 27(3) of the Act, a Statutory Landlord who contravenes subsection (1) of section 27 (which includes the duty to grant a transfer of the premises to the Statutory Tenant) is guilty of an offence and is liable to imprisonment for 1 year and to a fine of SR10,000. Notwithstanding that the Act has been repealed by Act No. 7 of 1992, applications, such as the present one, received before 13th April 1992 by the Registrar and pending on that date continues to be dealt with under the Act as if it had not been repealed. Even if it may be a moot point whether prosecutions under the repealed Act can now be instituted, the provisions of section 27(3) show beyond peradventure that the duties created by section 27(1) were not at all contractual.

For the reasons that we have stated, we come to the conclusion that the trial judge erred in treating the action as one to perform a duty imposed by the Act. He should have dismissed the action for specific performance of the alleged contract, without prejudice to the liberty of the respondent to seek appropriate remedies as the Act may offer him.

The respondent has cross-appealed from the decision of the judge refusing his claim for accounts and damages. As these reliefs were predicated on the success of the main claim as formulated, they must also fail. Pronouncing on whether the claims for account and damages would have succeeded had the action been properly brought under the Act will be tantamount to indulging in speculation. The cross-appeal must fail.

In sum, the appeal is allowed. The judgment of the Court below is set aside and judgment is entered dismissing the plaintiff's claim in its entirety. The cross-appeal is dismissed. The appellant is entitled to costs of the appeal and of the cross-appeal to be assessed.



E. O. AYoola
PRESIDENT



A. M. SILUNGWE
JUSTICE OF APPEAL



G. P. S. DE SILVA
JUSTICE OF APPEAL

Dated at Victoria, Mahe this 19th day of **April** 2002.