

IN THE SEYCHELLES COURT OF APPEAL

DESIRE VIDOT

APPELLANT

VERSUS

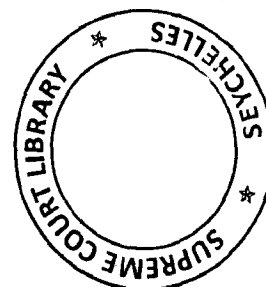
PLANUS DENTAL TECHNOLOGY

RESPONDENT

Civil Appeal No. 10 of 2003

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

Mr. P. Pardiwalla for the Appellant
Mr. A. Derjacques for the Respondent



JUDGMENT OF THE COURT

(Delivered by Ayoola, P.)

The central issue between the parties in this appeal is whether the transaction whereby the parties agreed that of the parcel of land transferred to the respondent, the respondent will transfer back a portion to the appellant was a back-letter and was therefore of no force or avail whatsoever pursuant to article 1321-4 of the Civil Code of Seychelles ("the Civil Code"). The appellant and respondent are referred to as plaintiff and defendant, respectively, henceforth in this judgment.

The plaintiff was the owner of a parcel of land known as Parcel No. T1160. By an application dated 13th January 1995 the plaintiff applied to the Town and Country Planning Authorities ("the Authority") for sub-division of the land. The sketch attached to the application showed that the proposed sub-division was into four (4) parcels consisting of one large parcel and three smaller ones. The Authorities granted permission on 13th January 1995. In the meantime, sometime in 1993 and 1994, the parties have entered into

negotiation for the sale by the plaintiff to the defendant, a non-Seychellois, of part of Parcel T1160.

In compliance with Section 4(1) of the Property (Transfer Restrictions) Act, Cap 96 ("the Act") the defendant, through Mr. James Mancham, sought sanction of the Government by a letter dated 29th September 1995. In that letter it was stated that the defendant sought sanction "*to acquire a portion of land at Takamaka under registration number T1160 belonging to Mr. Desire Vidot.*". The plot of land was stated to be about 12 acres "*of which approximately one third is steep land and more or less useless*". It was stated that "*Mr. Vidot will be keeping part of this land for himself.*"

By letter dated 13th October 1995 sanction to purchase parcel T1160 was granted to the defendant with the condition among others that: "*The Ministry should be informed in writing when the portion of the property is returned to Mr. Desire Vidot.*" Thereafter, by document dated 14th November and 14th December 1995 the plaintiff transferred the land comprised in Title No. T1160 to the defendant on the same conditions as in the letter of sanction.

By 15th December 1995 the sub-division of Parcel T1160 had been completed and the land comprised in Title No. T1160 had been subdivided into four parcels. Approval granted was thereto on 26th July 1996. The sub-division was as follows:

1. Parcel T1651 representing 3157 sq metres
2. Parcel T1652 representing 2626 sq. metres
3. Parcel T1653 representing 2051 sq. metres
4. Parcel T1654 representing 53906 sq metres

By a document dated 17th October 1996 the defendant transferred Title No.T1651 to the plaintiff in consideration of the price of One Seychelles Rupee. The value of the land conveyed, for stamp duty purposes, was stated to be sixty thousand Seychelles Rupees. By their letter of 8th July 1999 attorney at law acting on behalf of the plaintiff claimed from the defendant *"the return of the whole portion of the property due to him as per the condition for obtaining government sanction"* for purchase of plot T1160. On 11th September 2000, the plaintiff commenced the action which gave rise to the appeal claiming damages in the sum of SR414,000 and transfer of parcel Nos. T1652 and T1653 to the plaintiff.

By his plaint the plaintiff averred that in view of time constraint and of the fact that the Defendant company wished to immediately proceed with the purchase, the parties agreed that the whole parcel T1160 be transferred to the Defendant upon government sanction being granted, and the Defendant company would after subdivision was approved and registered transfer back to the Plaintiff plots T1651, T1652 and T1653. The plaintiff alleged that the transfer to him by the defendant of plot T1651 only was a breach of the agreement.

The defence of the defendant was a denial of the agreement alleged or its breach. It averred that it purchased parcel T1160 from the plaintiff.

At the trial, the plaintiff adduced evidence of the sub-division and the condition of the transfer of parcel T1160 to the defendant. He put in evidence documents confirming the sub-division and the land comprised in the parcels carved out of parcel T1160; the condition of the sanction granted to the defendant; the condition of the transfer of parcel T1160 to the defendant and the transfer back of a portion of that parcel to the plaintiff by the defendant. The defendant neither adduced evidence in support of its defence nor

challenged the evidence in support of the plaintiff's case. However, the trial judge dismissed the case.

The only ground on which the trial judge dismissed the plaintiff's case was that there was no evidence in support of the averment which was the main-stay of the action, that there was an agreement for the return of three plots of land after sub-division. He held that the registered transfer deed, Exhibit P9, was a notarial document evidencing the fact that the plaintiff had transferred the parent parcel T1160 to the defendant and that the plaintiff was trying to prove that there was a secret agreement prior to Exhibit P9 that was not reduced into writing whereby the defendant agreed to return three plots to the plaintiff.

The learned judge reasoned as follows:-

"This secret agreement claimed by the plaintiff evidently purports to vary, amend or rescind the registered sale deed Exhibit P9, which is being rendered a simulation ... the alleged back-letter in this respect requires a document that should have been registered within six months from the date of making Exhibit P9, the original transfer deed that refers to the immovable property in question."

In the event, he dismissed the case.

In this appeal, learned Counsel for the appellant argued that the case was not one of simulation or secret back-letter and that article 1321-4 of the Civil Code had no application in the case. It was submitted that Exhibits P9 and P12, transfer documents signed by the representative of the defendant,

were enough to open the door for the admission of oral evidence in terms of article 1341 of the Civil Code. As he did in the trial Court, counsel for the defendant argued that the claim had not been proved and that Exhibit P9 was a simulation.

As the central issue was whether the agreement whereby the defendant was to transfer to the plaintiff portion of land sold and transferred to it was a back-letter, it is essential to consider the nature of a back-letter. In Ruddenklau v Bottel Civil Appeal No. 4 of 1994 (Judgement delivered on 1 March 1996) we described simulation and back-letter in the following words:-

“A simulation is the concealment by the party of the nature of their agreement behind the façade of a disguised transaction which the parties never intended to have the ostensible effect. The hidden agreement by which the parties agreed to conceal the true nature of the ostensible transaction as a sham is referred to in the Civil Code of Seychelles as a back-letter. The back-letter provides evidence of the simulation.”

In terms of the effect of certain types of back-letters, article 1321-4 of the Civil Code provides that:-

“Any back-letter or other deed other than a back-letter or deed as aforesaid (that is a back-letter declared void in 1321-3) which purports to vary amend or rescind any registered deed 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 of 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, mortgage, lease or charge of or on the immovable property to which it refers." (Emphasis ours)

In Nicholas: The French Law of Contract (2nd Edition) p195-6 the forms and various motives of simulation were described. We abridge the description as follows:-

- (a) The sham transaction may be entirely illusory, the parties intending their relationship to remain unaltered.
- (b) The secretly intended transaction may be different in its legal character from the ostensible one.
- (c) The ostensible transaction may differ only in some term, as where the price of the rent to be paid is understated in the ostensible transaction, the motive being usually to evade tax.
- (d) The ostensible transaction may conceal the identity of one of the parties.

The back-letter must have the characteristic of concealment and the effect of making the ostensible transaction a sham. An agreement the terms of which are incorporated in a subsequent registered deed or agreement for sale, transfer etc of immovable property cannot be a back-letter.

The learned trial judge appreciated the essentially secret nature of a back-letter when he described the agreement alleged by the plaintiff as a "secret agreement." However, we are of the opinion that he was in error in his finding that the agreement was a "secret agreement." It could not have been. In the letter of application for sanction dated 29th September 1995 written apparently on behalf of the defendant by Mr. Mancham it was clearly stated that the plaintiff would be keeping part of T1160. In the sanction granted (Exhibit P10) it was implied that sanction to purchase T1160 was subject to a condition that portion of the property would be returned to the plaintiff. Hence, the condition that - "The Ministry should be informed in writing when the portion of property is returned to Mr. Desire Vidot." In the deed of transfer of title No. T1160 (Exhibit P9) the same condition was repeated.

From all these it was manifest that there was nothing secret about the agreement that the defendant should return portion of Parcel T1160 to the plaintiff. Indeed, in terms of Section 5(3) of the Act, non-compliance with the condition as to return of a portion of the land to the plaintiff would have rendered the whole transaction for which sanction was granted unlawful and void.

Besides, it was clear on the face of the deed of transfer, Exhibit P9, that the defendant was under obligation to transfer a portion of the property to the plaintiff and inform the Minister in writing when the portion had been so returned. In these circumstances, there was nothing in the agreement

relied on by the plaintiff which, in terms of article 1321-4, purported to "vary, amend or rescind" the registered deed of transfer of Parcel T1160.

The transaction in the document of transfer was neither a sham nor was it illusory. The agreement relied on by the plaintiff was not at all a back-letter. The judge should have given effect to it.

The agreement that the defendant was under obligation to return a portion of property comprised in parcel T1160 to the plaintiff was sufficiently established by the documentary evidence already alluded to in this judgment: namely, Exhibit P9, signed by both parties, Exhibit P10, Exhibit P12 whereby the defendant purported to perform the agreement by returning one of the plots comprised in Title T1160 and Exhibit P13 – the defendant's application for sanction.

The central issue having been resolved as stated earlier in this judgment, the only question of any practical significance to the case is whether there was any evidence of the identity of the portion that the defendant undertook to return to the plaintiff. By returning to the plaintiff the land comprised in Title T1651 containing 3157 square metres the defendant acknowledged its obligation to return portion of the land comprised in T1160. By refusing to return the remaining two small plots in the subdivision, it implied that that portion returned was the portion agreed upon. The question is: Was it right?

The survey plans Exhibits P5, P6, P7 and P8, showing the subdivisions of T1160, show that the total land area of property comprised in T1160 was 61,740 square metres made up as follows:-

Title 1651 (P5)	3157 sq. metres
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Title 1652 (P6)	2626 sq. metres
Title 1653 (P7)	2051 sq. metres
Title 1654 (P8)	53906 sq. metres

Of these, Title 1651 has been transferred to the plaintiff. The plaintiff claims land comprised in Title T1652 and T1653. The area comprised in T1654 which the plaintiff concedes was the property which the defendant could retain is 53906 square metres. Given that 4046.8 square metres make an acre, 53,906 square metres is equivalent to 13.32 acres. In the letter of application for sanction Exhibit P13 written on behalf of the defendant the plot of land intended to be acquired was described as being about 12 acres. The three smaller plots (T1651, T1652 and T1653) all add up in area to 7,834 square metres, that is, a mere 1.936 acres. If one were to choose which of the two portions: namely, T1654 on the one hand, and T1651, T1652 and T1653 put together, on the other hand is nearer "about 12 acres" mentioned in the application for sanction, Exhibit P13, it is obvious, on the balance of probabilities, that it was T1654 which the plaintiff claims was the portion of land the parties had agreed the defendant was entitled to hold while the rest is the portion that the defendant agreed to return. We so find.

For the reasons we have given, we feel no hesitation in holding that the trial judge was in error in the conclusion he had come to. It is not necessary to discuss the minor issues discussed in the appeal since the appeal can easily be disposed of for the reasons we have given.

The defendant was in breach of its obligation to return plots T1652 and T1653 to the defendant. The justice of the case is met by granting an order sought, that the defendant do transfer plots T1652 and T1653 to the plaintiff. We would order accordingly. The plaintiff is entitled to damages which the Supreme Court should proceed to assess.

In sum, the appeal is allowed. We set aside the judgment of the Supreme Court. We enter judgment for the plaintiff as follows:-

The defendant is hereby ordered to transfer plots T1652 and T1653 to the plaintiff. The case is remitted to the Supreme Court for damages to be assessed. The plaintiff is entitled to costs of the trial and of this appeal.

PRESIDENT

JUSTICE OF APPEAL

JUSTICE OF APPEAL

Delivered at Victoria, Mahe, this 5 day of December 2003