(3)

**IN THE SEYCHELLES COURT OF APPEAL**

**Kevin Barbe** - APPELLANT

Versus

**Jules Hoareau** - RESPONDENT

Civil Appeal No. 5 of 2003

*(Before Ramodibedi, P., Perera & Renaud JJA)*

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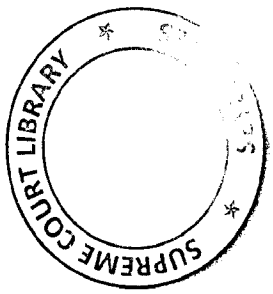
Hearing on 9 November 2004
Judgment delivered on 16 November 2004




Mr. F. Bonte for the Appellant
Mr. W.Lucas for the Respondent

**JUDGMENT**

***Delivered by Renaud, J.A***

The Appellant has appealed to this Court against a judgment delivered by Justice D. Karunkaran in the Court below on 3rd March, 2003. The only ground of appeal advanced by the Appellant is as follows:

> *"**The Learned Judge acted and founded his Judgment 'ultra petita'** in ordering the defendant to pay to the plaintiff the sum of Seychelles Rupees Forty Thousand (S.R.40,000/-) and upon receipt of the said sum for the transfer of the ownership of the motor vehicle S8973 to the defendant **in that neither the Plaintiff nor the Defendant had prayed for such kind of orders in their pleadings.**"*

The Appellant, who was the Plaintiff, entered an action against the Respondent, who was the Defendant in the case below. The Plaint and prayer were worded as follows:

> "*1. At all material times the Plaintiff is the registered owner of pickup S.8973 and the Defendnat is and was the driver of the said vehicle.*
>
> *2. In October 1997, the Plaintiff and the Defendant entered into a verbal agreement whereby the Defendant would use the said vehicle for commercial purposes and he would hand over half of the proceeds to the Plaintiff.*

4. *Paragraph 4 is denied. The Defendant denies that the Plaintiff is entitled to the said profit if any or that he had received any request from the Plaintiff for the said pick up. The Defendant repeats paragraph 1 hereabove and avers that the Plaintiff is not entitled to the said pick-up or profit at all.*

5. *Paragraph 5 is denied. The Defendant denies that he has to account to the Plaintiff on the income received from the said pick-up or any other income at all. Further the Defendant denies the existence of such income or that he is entitled to account to the Plaintiff for the same.*

6. *Paragraph 6 is strictly and specifically denied and the Plaintiff is put to the strictest proof thereof. The Defendant denies that the Plaintiff has suffered the loss and damages claimed or any loss and damages at all and put the Plaintiff to the strictest proof of the same.*

*WHEREFORE the* ***Defendant prays this Honourable court to dismiss the Plaintiff claim with costs.*** *"* (emphasis is mine)

The Learned Trial Judge in considering the merits of the case states:

*"It is evident that the testimony of the Plaintiff does not tally with the pleadings in the plaint on the material particulars of the claim. There is also considerable variation between the pleadings and documentary evidence adduced by the parties. There are inconsistencies and inexplicable gaps in the evidence given by both parties. It lacks cogency. However, in the overall assessment of the entire evidence on record I find on the preponderance of probabilities that the following facts and circumstances are established to my satisfaction:-*

1. *The parties did enter into a partnership venture whereby they jointly purchased a pick-up for commercial use with a view to share the profits.*

2. *There were no clear terms agreed upon by the parties as to profit sharing, as to who should contribute what towards capital investment and as to who should pay what for the initial expenditures.*

3. *The parties never agreed upon anything nor made provision as to what should be done when the partnership is dissolved; and*

3. *The agreement is silent in respect* (sic) *the crucial terms that are necessary for the determination of the issues that arise before this court in this matter.*

3. *The Plaintiff avers that since June 1998 the Defendant has failed to give him the said share of the profit.*

4. *The Plaintiff avers that after the Defendant repeated failure to hand over his share of the profits he had requested the Defendant to give him back the said pickup abovementioned, the Defendant refuses to comply.*

5. *It is necessary that the Defendant should account to the Plaintiff on the income received from the pickup.*

6. *As a result of the Defendant's action the Plaintiff has suffered loss and damages for which the Defendant is liable.*

***Particulars***

| | |
|---|---|
| *Loss of revenue from June 1998 todate at R3,500 per month* | *77,000* |
| *Moral damage* | *50,000* |
| | *127,000* |

*WHEREFORE the Plaintiff* ***prays this Honourable Court to pay him the sum of Rs127,000 with interest and costs and to order the Defendant return the Plaintiff's pickup with immediate effect.*** " (emphasis is mine)

In his Statement of Defence, the Defendant stated as follows:

"1. *Paragraph 1 of the Plaint is denied. The Defendant avers that the pickup S8973 was purchased by the Defendant from a loan obtained from Development Bank of Seychelles in the sum of Rs214,315/-. It is denied that the Plaintiff is the registered owner of the same.*

2. *Paragraph 2 is denied. The Defendant denies that he entered into such an agreement with the Plaintiff or any agreement at all. The Defendant avers that he is the one who works in the said pick up and pay the loan to the Development of Seychelles. In the circumstances the Plaintiff is not legally or otherwise entitled to half the said proceeds or any proceeds at all.*

3. *In answer to paragraph 3 the Defendant avers that he has not paid the Plaintiff a share of the profit because the Plaintiff is not entitled to any such share or any share at all. The Defendant denies that there is a profit and put the Plaintiff to the strict proof of the same.*

*Having said that, I note that a partnership agreement must be drawn up in writing when the object exceeds the value of R5000/- and no oral evidence shall be admissible against and beyond the terms of the agreement vide article 1834 of the Civil Code. However, the parties did not object to, during trial and thus the evidence in this respect came in, that would have otherwise been rendered inadmissible. Therefore, I have to rely and act upon the evidence to the extent as it has been admitted to render justice to the parties. In my considered view, this court in the given circumstances of this case has no other choice but to steer the law towards the administration of justice rather than the administration of the letter of the law."*

The Learned Trial Judge then took into consideration Articles 1134, 1135 and 1853 of the Civil Code and endeavoured to arrive *"at a just and equitable solution in this matter,"* and took into account the following:

1. *The bank loan was secured by mortgaging the property belonging to the defendant.*

2. *The plaintiff has not contributed anything in substance to raise the bank loan for the purchase of the pick-up.*

3. *The plaintiff's only contribution to the partnership business was R40,000/- the sum he directly paid to the said importer of the pick-up and so I find.*

4. *All the loan repayments, which the plaintiff made to the bank up to April 1998, were from the earnings of defendant.*

5. *The plaintiff in breach the terms of the agreement defaulted loan repayments with the bank and so I find.*

6. *The defendant has contributed his work, in addition to his contribution of money totalling Rs62,500/- towards the purchase-price of the pick up.*

7. *Now, there is a balance of Rs103,776/- remains due and payable by the defendant on the said loan account with the bank as his immovable property is still burdened with mortgage.*

8. *Since the plaintiff was the one who initiated the breach of the agreement, and is at fault, he is not entitled to any moral damages."*

The Learned Trial Judge in entering final judgment states thus –

*"In the circumstances, though it might appear ultra petita, justice, equity and fairness dictate this court to enter judgment an the following terms:*

1. *I declare that the agreement between the parties in respect the business involving motor vehicle registration umber S.8973 was terminated in April 1998 by the conduct of the parties following the breach by the plaintiff of the terms as to loan repayment.*

2. *I order the defendant to pay the sum of R40,000/- to the plaintiff with interest at the commercial rate of 10% per annum on the said sum as from the date of the plaint.*

3. *Upon receipt of the said sum, I order the plaintiff to effect transfer of ownership of the said motor vehicle Registration Number S.8973 to the defendant.*

4. *I award neither damages nor costs of this suit for or against any party."*

The Respondent did not file a counter-appeal. However, Learned Counsel on behalf of the Respondent argued that the Learned Judge was right to infer and acted upon evidence produced before him throughout the trial in order to do justice to the case. Learned Counsel also argued that the Learned Judge found that there was a partnership agreement between the parties, which the pleadings failed to disclose and added that, the Learned Judge reached the conclusion that paragraph 1 and 2 of the plaint were misleading and inconsistent with evidence adduced during the trial. Learned Counsel for the Respondent however agreed that based on the principle of "*ultra petita*", the Learned Judge should have dismissed the Plaint as it did not disclose the facts of the case, in particular, the relationship of the parties and the nature of the transaction. Learned Counsel however urged this Honourable Court to uphold the decision of the Learned Judge, as a reversal of that decision will prejudice the Respondent whose property is still mortgaged to the Development Bank of Seychelles and is subject to foreclosure since there is an unpaid loan balance of SR.95,000.00. The motor vehicle, which is in the custody of the Respondent, is registered in the sole name of the Plaintiff.

Learned Counsel for the Appellant argued that the Learned Judge not only misconstrued but also wrongly considered and interpreted the law in the circumstances of this case. He agreed that the Learned Judge though rightly referred to Article 1135 of the Civil Code. However, he submitted that he used the said provision of the law not only to bypass the clear intentions of the parties but to further act ***ultra petita*** by awarding claims not pleaded in the plaint nor in the statement of defence, thus rendering the whole judgment invalid in law. Learned Counsel further argued that although it was clear to the Learned Judge that he was acting *ultra petita*, yet he tried to hide behind the veil of justice, equity and fairness to arrive at unlawful and unprayed orders in this case, in particular orders 2 and 3 of his judgment.

Be that as it may, the issue that falls to be determined by this Court is whether the judgment of the Learned Trial Judge was indeed *ultra petita* and that it should be set aside or ought it to be maintained based on the principle of equity.

In the case of Tirant versus Banane (1977) SLR (No.49 p.219) it was held that - ***in civil litigation each party must state his whole case and must plead all facts on which he intends to rely, otherwise he cannot at the trial give evidence of facts not pleaded, and the defence of an act by a third party not having been pleaded could not be considered.***

Further guidance is provided by the decision of this Court in the case of Confait versus Mathurin (1995) SCAR – when, in reversing the decision of the Court below, this Court held that – ***"the case had to be decided on the pleadings and the respondent's case that it was the appellant's own acts that had caused the damages since it had been denied it was incumbent on the respondent to prove his case, which he had not."***

This Court, in the case of Charlie versus Francoise (1995) SCAR, in reversing the decision of the court below, held that – ***"the system of justice does not permit the Court to formulate a case for a party after listening to the evidence and to grant relief not sought in the pleadings."***

In the case of Equator Hotel versus Ministry of Employment and Social Affairs (SCA No.8 of 1997), this Court, in no uncertain term held that the hitherto decision in the case of Philip D'Offay versus Geoffrey Cedras (SCA 14/92) that – *"the evidence outside the pleadings not objected to could be acted upon by the judge in the final determination of the case before him"*, **was wrongly decided**. The principle to be followed is that – ***"failure or omission to object to the introduction of such issues during proceedings or in evidence cannot, and does not, have the effects of translating the said issues into pleadings or evidence".***

Consequently, this Court holds that the decision of the Learned Trial Judge was *ultra petita* and that the principles of equity cannot be invoked in the circumstances. The appeal is allowed and the judgment is accordingly set aside.

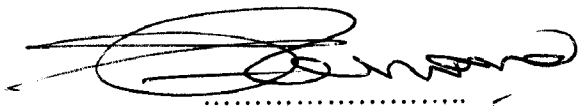
Of equal concern to this Court is the fact that, regrettably, the Learned trial Judge failed to make any findings on two fundamental issues arising from the pleadings, namely:-

(a) Plaintiff's alleged loss of revenue or share accruing from the parties' joint venture.

(b) Plaintiff's claim to the return to him of the pick-up in question.

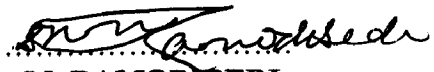
In the particular circumstances of this case, and in order to meet the ends of justice, this Court remits this case to the Court below and orders a re-trial by another Judge to adjudicate on the issue of the Plaintiff's claim of SR.127,000.00 and the return to him of the pick-up, as well as other related and appropppriate issues that the parties, if so advised, may raise in amended pleadings.

No order as to costs.



**B.RENAUD**
**JUSTICE OF APPEAL**

I concur



**M. RAMODIBEDI**
**PRESIDENT OF THE COURT OF APPEAL**

I concur

**A.R. PERERA**
**JUSTICE OF APPEAL**

Delivered at Victoria, Mahe, Seychelles,
This 16th November 2004.