**IN THE COURT OF APPEAL OF SEYCHELLES**

**1. LENA DESAUBIN**

**2. MONICA DIDON**

**3. GUY DESAUBIN**

**APPELLANTS**

**vs**

**CHRISTINA SEDWICK**

**RESPONDENTS**

***SCA 12 of 2012***

Before: McGregor,P, Domah and Twomey JJA,

Counsel: Mr F. Bonté for the Appellants.
Mr F. Elizabeth for the Respondent

Date of hearing: 7th August 2014
Date of judgment: 14th August 2014

**JUDGMENT**

**TWOMEY, MATHILDA, JA**

**[1].** The appellants are the legitimate children of Olderick Desaubin who passed away on 18 September 2010. Olderik Desaubin left a Will, disinheriting the appellants and leaving his whole estate to his *ménagère*, the Respondent. The provisions of the Will were contested before the Supreme Court and in a judgement given on 23rd April 2012, Burhan J found in favour of the Respondent. It is this judgment that has given rise to this appeal.

**[2].** Counsel for the appellants has raised the following grounds of appeal:

1. The whole of the decision is wrong in law.

2. The learned judge wrongly appreciated the evidence on record and reached a decision which is contrary to the principles of natural justice and grossly unreasonable in all the circumstances of the case.

Short and sweet but also commendable and appropriate in this case since no opposition to this appeal could succeed. The reality is that the trial judge failed both to appreciate the law and apply it to this case.

**[3].** Faced with the obvious futility of fighting this appeal on the merits, learned counsel for the respondent, tried to raise procedural objections to the hearing of this appeal. He has submitted that the appeal grounds are too vague. The first ground of appeal taken on its own is undoubtedly vague and would have been taken to be no ground at all except that in

the appellants' written submissions, the error in law is demonstrated and is all too obvious. We reject his argument, all the more so when, having seen the error, he has attempted to have the provisions of the Civil Code in relation to forced heirship declared unconstitutional by asking this court to refer this matter to the Constitutional Court. He relied on article 46 (7) of the Constitution and filed the application an instant before this Court sat on this appeal. Not only were we totally unimpressed by the tardiness of his application but we were also surprised at the total lack of merit of the application. For one thing, article 46 (7) refers to constitutional questions arising in courts other than the Court of Appeal. For another, the issue of the constitutionality of forced heirship provisions has already been decided, as recently as May 2013 by the Constitutional Court in the case of *Achilla Durup and ors and Josepha Brassel and anor (unreported) CC 4/2012.* The court, in that case held that the law of reserved heirs contained in article 913 of the Civil Code was proportionate to the legitimate aim pursued by the Civil Code and a limitation necessary in a democratic society in order to guarantee the family, economic and social protection. That decision has not been appealed but we endorse it.

**[4].** In a final attempt to thwart the hearing of the appeal its merits, Mr. Elizabeth has submitted that the action is wrongly brought by the heirs and should have been brought by the executor of the estate. We are unable to agree with him and only have to point out that not only was this matter not raised at trial but that it was also established at trial that the 1st appellant was the executrix of her father's estate and a copy of the court appointment to that effect was produced by her. We therefore dismiss all learned counsel's preliminary applications and turn to the substantive issues of this appeal.

**[5].** The deceased's Will read, inter alia:

> *"I hereby and with this Will and Testament, expressly and irrevocably disinherit my children. They shall not inherit any part of my estate."*

As pointed by learned Counsel, Mr. Bonté, disinheritance is permissible by law in this jurisdiction only in specific circumstances: where the heir is convicted of murder or of an attempt on the life of the deceased, where an heir has made an accusation against the deceased which is of defamatory nature about a capital offence or where the heir having information about the unlawful homicide of the deceased fails to report it to the authorities. [see *Article 727 of the Civil Code of Seychelles*].

**[6].** In this case it is admitted by both parties that the deceased died of cancer and that there was no attempt on his life or a defamation as outlined in *Article 727.* That being the case the full rigours of the forced heirship provisions of the law of Seychelles has to apply. Article 731 of the Civil Code states in no uncertain terms that:

> *"Succession <u>shall</u> devolve upon the children and other descendants of the deceased… (our emphasis).*

In cases of testate succession, *Article 913* provides that:

> *" Gifts inter vivos or by will shall not exceed one half of the property of the donor, if he leaves at death one child; one third, if he leaves two children; one fourth, if he leaves three or more children…*

The evidence shows that altogether the deceased had five children, four of which were legitimate, being the respondents and their brother Teddy who died before the deceased, and also a natural child, Justin. In legal parlance, *la reserve* in this particular case is three quarters of the estate as there were three or more children. The *quotité disponible* that could have been gifted to the Respondent could not amount to more than one quarter.

**[7].** It was therefore nonsensical and in total denial of the law for the trial judge to state that:

> *"It is the duty of the court in interpreting a Will to ensure that the intention or the desire of the testator is given effect to."*

That may well be true in jurisdictions which have testamentary freedom provisions in their law. Seychelles does not and until the law is changed by the legislature we have to apply it. Hence the Will of the testator can only be given effect within the confines of the law. In this respect Article 920 which states that at the opening of the succession, dispositions exceeding the disposable portion shall be reduced will apply.

**[8].** There are unfortunate legal impediments to the final disposal of this case solely on the statement of the applicable law as we have decided above. The facts show that simultaneously with the filing of the present case challenging the Will, counsel for the appellants filed a plaint alleging several *donations deguisées* in favour of the respondent and four of her children. A perusal of the proceedings seems to indicate that both cases were consolidated. During the trial of the case involving the challenge to the Will, the trial judge thought it fit to unconsolidate the case involving the alleged *donations deguisées.* Accordingly, until that case is decided we cannot proceed to modify the dispositions contained in the Will to declare what shares the heirs and the respondent might be entitled to. A final disposition will depend on whether the properties, the subject of the *donations deguisées* are returned to the hotchpot for distribution.

**[9].** The other impediment relates to the fact that part of the estate of the deceased, namely Parcel T332, is subject to a court order dated 3rd June 1996 which stipulates that the matrimonial home cannot be transferred. This order relates to matrimonial property held by the deceased and his wife Mirena Belle that was settled in favour of their four legitimate children. As we have already pointed, one of these children, Teddy, has died but is survived by his son Emmanuel who will take a share *per stirpes* [see *Article 745 of the Civil Code of Seychelles*]. Nor, is it clear whether it is the case of both parties that the transfers of Parcels T2496, T 2984 and T1927 to Teddy (aka Keddy) are to be treated as gifts *inter vivos* reducing his share of the estate and which should be taken into account in the modification of dispositions in the Will. If the gift to Teddy (now transferred to his son Emmanuel) exceeded the disposable portion, it will also have to clawed back and brought to the hotchpot pursuant to *Articles 1076, 1077* and *913* of the *Civil Code*. These matters will have to be cleared up at the hearing of the suit in CS 279/2010.

**[10].** The deceased also had a 'natural' child, Justin Confiance Desaubin whom he also disinherited. That son will also inherit part of the estate thought not in the same proportion as the legitimate heirs [see *Article 760 of the Civil Code of Seychelles*].

**[11].** I think it is now obvious to Counsel, given the imponderables and uncertainties above, that the case on appeal decides only that the disposition in the Will is subject to *'la*

*réserve"* provided for under article 913 of the Seychelles Civil Code. The Will should be read down to the allowable portion only of the '*quotité disponible*". We cannot make a final order in this case. Counsel, having carriage of their case need to ensure that all the facts are clearly established at trial. A Court of Appeal is ill-placed to decide on evidential facts from a transcript of proceedings as it were. In this respect, we also urge trial judges to consider wisely matters pertinent to the whole case before making their decisions. Had CS 278 and CS. 279 been decided together we would not now be in the unfortunate position of making an order which only partly disposes of this appeal and will further delay justice being done in this case, court time taken and further expenses ensuing.

**[12].** In the circumstances we make the following order:

Judgement is entered declaring that the children of the deceased, Olderick Desaubin, may not be disinherited as the Will purports to do but are entitled to the shares which accrue to them by the application of article 913 and the other articles of the Seychelles Civil Code as will be decided by the courts in the case that is pending determination.

Costs are awarded to the appellants.

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| **F. McGREGOR** | **S. DOMAH** | **M. TWOMEY** |
| **PRESIDENT** | **JUSTICE OF APPEAL** | **JUSTICE OF APPEAL** |

**Dated this 14th August 2014, Ile du Port, Mahé, Seychelles.**