**IN THE SEYCHELLES COURT OF APPEAL**

In the matter Between

Vestalene Investments Limited **APPELLANT**
Trading as PACTEL

**VS**

Cable & Wireless (Seychelles) Limited **1st RESPONDENT**

Kenneth Bisogno **2nd RESPONDENT**

Debra Lee Bisogno **3rd RESPONDENT**

**AND**

Kenneth Bisogno **1st APPELLANT**
(of South Africa)

Debra Lee-Bisogno **2nd APPELLANT**
(of Australia)

**VS**

Vestalene Investments (Pty) Ltd **1st Respondent**
(C/o Frank ally, Premire Building,
Suite 213, Victoria, Mahe)

Cable & Wireless (Seychelles) Ltd **2nd Respondent**
(of Francis Rachel Street, Victoria, Mahe)

**C. A. Civil Side No. 17 & 18 of 2002**

**BEFORE:** Fernando, Twomey, Msoffe, JJA

**COUNSEL**: Mr. F. Ally for the Appellant Vestalene Investments Limited
Mr. B. Hoareau for the Appellants Kenneth Bisogno and Debra Lee Bisogno
Mr. C. Lablache for the Respondent Cable & Wireless (Seychelles) Limited

Date of Hearing: 8th August 2014
Date of Judgment: 14th August 2014

**JUDGMENT**

**A.F. T. FERNANDO. JA**

1. The Appellant Vestalene Investments Limited (hereinafter referred to as **V. I. Ltd**) has appealed against the judgment of the Supreme Court for failing to order Cable & Wireless (Seychelles) Limited (hereinafter referred to as **C & W Ltd**) to pay and satisfy its claim of US $ 196,372.00 made against C & W Ltd in Civil Suit No. 197/2004. By way of relief V. I. Ltd has sought that judgment be entered in favour of it against C & W Ltd or against C & W Ltd, Kenneth Bisogno (hereinafter referred to as **K.B.**) and Debra Lee Bisogno (hereinafter referred to as **D.B.**) and trading as Soft-Cell (Seychelles), jointly and severally or alternatively that the judgment against K. B. and D. B. be maintained.

   K. B. and D. B. have appealed against the same judgment for ordering them to pay V. I. Ltd the sum of US $ 196,372.00 and SR 62,500. By way of relief K. B. and D. B. have sought to have the decision of the Trial Judge reversed and consequently to dismiss the whole Plaint filed by V. I. Ltd against them.

   V.I. Ltd has not cross- appealed the judgment entered against it in favour of C & W Ltd on the counter-claim in the sum of SR 62,500 made by C & W Ltd.

2. V. I. Ltd had originally entered an action against C & W Ltd by its Plaint dated 28th June 2004 claiming a sum of US $ 196,372.00 in respect of mobile phone handsets sold and delivered to C & W Ltd in pursuance of an agreement constituted by exchange of correspondence between V. I. Ltd and C & W Ltd. By its motion dated 17th October 2005

C & W Ltd made application for an order joining K. B. and D. B. as co-defendants to the suit on the basis that K. B. and D. B. were at all material times members of a business undertaking trading under the name Soft-Cell (Seychelles) and acting as the agent of V. I. Ltd in Seychelles in respect of sales transactions mentioned in the Plaint and that the sum claimed by V. I. Ltd had been paid in full to K. B. and D. B. in their capacity as agent of V. I. Ltd in Seychelles.

3. V. I. Ltd had not objected to the application for joinder and the Court had accordingly granted leave to C & W Ltd to join K. B. and D. B. as co-defendants to the suit. V. I. Ltd had thereafter filed an Amended Plaint dated 5th December 2005 making K. B. and D. B. as co-defendants to the suit claiming as an alternative to C & W Ltd not satisfying their claim, that if it is proved, that C & W Ltd. had paid K. B. and D. B the sum claimed by V. I. Ltd from C & W Ltd; that K. B. and D. B be ordered to pay V. I. Ltd the sum of US $ 196,372.00.

4. The averments in the Defence and Counter Claim of C & W Ltd in response to the Amended Plaint reveal, that C & W Ltd has admitted that V. I. Ltd had sold and delivered to C & W Ltd the quantity of mobile phones and handsets as set out in the Amended Plaint. However V. I. Ltd's claim that C & W Ltd had to pay US $ 196,372.00 in respect of the mobile phones and handsets by telegraphic transfers of eight weekly installments and that such sum had not been paid to V. I. Ltd had been denied by C & W Ltd. It had been the position of C & W Ltd that the agreement was to pay the purchase price of all mobile phones in Seychelles rupees to K. B. and D. B in Seychelles to the credit of V. I. Ltd as they were the agents of V.I. Ltd. According to C & W Ltd it had paid a total amount of SR 1,370,078.58 (consisting of 6 installments of SR 203,347.93 and 1 installment of SR 150,000) to K. B. and D. B to the credit of V. I. Ltd although the sum owed to V. I. Ltd was SR 1,046,862.17 and thus over paid V. I. Ltd by a sum of SR 323,225.41.

5. It is the position of V. I. Ltd that it has never appointed K. B. and D. B or notified C & W Ltd that it had appointed K. B. and D. B as its agents for the purpose of the sale of mobile phones and handsets and that if K. B. and D. B. represented to C & W Ltd that they were the agents of V. I. Ltd, this had been done without their authority.

6. C & W Ltd by way of a Counter Claim against V. I. Ltd had pleaded that there had been an overpayment of SR 323,225.41 in connection with the purchase of mobile phones but setting off a credit of SR 260,725.40 made by V. I. Ltd at its request to the trading

account of C & W Ltd with K. B. and D. B for the provision of repair services and phones had claimed the outstanding balance of SR 62,500.00 from V.I. Ltd. V. I. Ltd had denied the counter claim.

7. K. B. and D. B in its Defence by way of a Plea in Limine Litis had taken up the position that they had been improperly joined as defendants to the suit and the pleadings against them should be struck out as it does not disclose any reasonable cause of action against them. They had denied representing to C & W Ltd that they were the agents of V. I. Ltd for the purpose of receiving the sum of SR 1,370,082.50; that C & W Ltd had discharged its payment obligations to V. I. Ltd by having paid the sum of SR 1,370,082.50 to them and that C & W Ltd had paid to V. I. Ltd the sum of SR 1,370,082.50 through them. It had been their contention that any sum of money they received from C & W was a result of separate contracts for sale and services between them trading as Soft-Cell and C & W Ltd.

8. V.I. Ltd had filed the following grounds of appeal:

    a) The learned trial Judge erred in failing to order the 1st Respondent (***C & W Ltd***) to pay and satisfy the Appellant's (***V. I. Ltd***) claim in that there was no evidence adduced to establish that the Appellant (***V. I. Ltd***) had authorized the 1st Respondent (***C & W Ltd***) to pay any funds due to the Appellant (***V. I. Ltd***) in the hands of the 2nd and/or the 3rd Respondents (***K. B. and D. B***) or that the Appellant (***V. I. Ltd***) had appointed the 2nd and/or the 3rd Respondents (***K. B. and D. B***) as its agent in respect of the transaction between the Appellant (***V. I. Ltd***) and the 1st Respondent (***C & W Ltd***) or that the Appellant(***V. I. Ltd***) had authorised the 2nd and/or the 3rd Respondents (***K. B. and D. B***) to receive any funds due to the Appellant (***V. I. Ltd***) from the 1st Respondent (***C & W Ltd***).

    b) The learned trial Judge did not make any findings that the 2nd and/or the 3rd Respondents (***K. B. and D. B***) were the Appellant's (***V. I. Ltd***) agent or that the 2nd and/or the 3rd Respondents (***K. B. and D. B***) were authorised by the Appellant (***V. I. Ltd***) to receive funds on its behalf from the Appellant (***V. I. Ltd***). As a result of such a failure, the learned Trial Judge erred in his decision and he should have ordered that the 1st Respondent (***C & W Ltd***) shall be and remain responsible to pay and satisfy the Appellant's (***V. I. Ltd***) claim and

that the 1st Respondent (***C & W Ltd***) shall if it deems necessary recover any funds paid to the 2nd and/or the 3rd Respondents (***K. B. and D. B***) from them.

c) Having found at page 30 of the Judgment that "the 2nd and 3rd Defendants (i.e. the 2nd and 3rd Respondents) [***K. B. and D. B***] shrewdly, cunningly and acting in bad faith abused the trust of the 1st Defendant (i.e. the 1st Respondent) [***C & W Ltd***] and passed themselves off as the Plaintiff's (i.e. the Appellant) [***V. I. Ltd***] authorised representatives in Seychelles for the purpose of receiving the sum of SR 1,370,087.80 from the 1st Defendant (i.e. the 1st Respondent) [***C & W Ltd***]" coupled with the failure of the trial Judge to make any findings as to whether the Appellant had authorised the 2nd and/or 3rd Respondents (***K. B. and D. B***) or appointed them as its agent to receive any funds due to it from the 1st Respondent (***C & W Ltd***) and the absence of any evidence to establish such authority and/or appointment the learned trial Judge was in error in not ordering the 1st Respondent (***C & W Ltd***) to pay and satisfy the Appellant's (***V. I. Ltd***) claim.

The relief sought by V. I. Ltd has been set out at paragraph 1 above. V. I. Ltd has also sought for costs in the Supreme Court and in the Court of Appeal.

9. K. B. and D. B have filed the following grounds of appeal:

a) The learned trial judge erred in law in joining the Appellants (***K. B. and D. B***) as Defendants to the suit.

b) The learned trial judge erred in law and on the evidence, in ordering the Appellants (***K. B. and D. B***) to pay the sum of US dollars 196,372 and SR 62,500, as the Appellants (***K. B. and D. B***) were not agent of the 1st Respondent (***V. I. Ltd***).

c) The learned trial judge erred in law, as on the basis of the pleadings and/or evidence the learned trial judge could not have held that the Appellants (***K. B. and D.***) were the "agents" of the 1st Respondent (***V. I. Ltd***).

d) The learned trial judge erred in law, in failing to hold that the 1st Respondent (***V. I. Ltd***) could not institute proceeding before the Supreme Court, as it had failed to comply with the provisions of section 310(i) of the Companies Act 1972.

e) The learned trial judge erred in law, in failing to hold that as the Respondent failed to comply with section 310(i) of the Companies Act, the contract between the 1st Respondent (***V. I. Ltd***) and 2nd Respondent (***C & W Ltd***) was against public policy.

10. C & W Ltd in their Skeleton Heads of Argument filed before this Court in responding to the challenge by K. B. and D. B. to their joinder as co-defendants to the suit before the Supreme Court, states; that the joinder had been made under the provisions of section 112 of the Seychelles Code of Civil Procedure ('C.C.P.') which reads as follows:

"No cause or matter shall be defeated by reason of the misjoinder or non-joinder of parties and the court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the names of any persons improperly joined, whether as plaintiffs or defendants, be struck out, and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added."

It is clear from the section that no cause or matter shall be defeated by reason of the misjoinder of parties, even if that is the case. We are in agreement with the contention of C & W Ltd that the joinder satisfies the requirements laid down in section 112 of C.C.P. Contrary to what K. B. and D. B. states in their Skeleton arguments, paragraph 12 of the Amended Plaint did disclose a cause of action against K. B. and D. B. We agree with the statement of C & W Ltd in their Skeleton Heads of Argument: "If Soft-Cell (*namely, K. B. and D. B.*) had not been joined and the Supreme Court had found the transaction amounts had been paid by CWS (*namely,C & W Ltd*) to Soft-Cell in its capacity as agent of the Vestalene (*namely, V. I. Ltd*) as was alleged by CWS, then the claim against CWS would have been dismissed and Vestalene would have had to file a separate action to recover the funds from the defaulting agent. And if the Supreme Court found (as it did) that CWS had mistakenly paid the amount to Soft-Cell instead of Vestalene, then the court would have been bound to order CWS to pay the amount owed to Vestalene and CWS would have had to file a separate action against Soft-Cell to recover the amount mistakenly paid." We are also of the view that the Plea in Limine

Litis of K. B. and D. B could not have been determined by the Supreme Court without hearing evidence as correctly stated by the Learned Trial Judge. We therefore dismiss ground (a) of appeal raised by K. B. and D. B.

11. V. I. Ltd in responding to the ground of appeal raised by K. B. and D. B. as to the failure of V. I. Ltd to comply with section 310 (I) of the Companies Act 1972 has stated in their Skeleton Heads of Arguments that "This was not raised in the pleadings or in closing addresses and in any event the 2nd and 3rd Respondents are estopped from raising them on appeal." C & W Ltd in their Skeleton Heads of Arguments has, in supporting the ground of appeal raised by K. B. and D. B.; submitted, citing the case of **W & C French (Seychelles) Limited V Oliaji and Others (1978-1982) SCAR 448** that "a point of law relating to public policy may be raised for the first time on appeal". This certainly is a misconception of the said judgment as the judgment has been to the effect that a Court of Appeal may entertain for the first time arguments on the legal result or consequences of pleaded facts although such legal result or consequences were not advanced in the Court below except in a case where, to ascertain the validity of the legal result or consequences claimed, would require the investigation of new and disputed facts which have not been investigated at the trial. The pleaded facts in this case had not made any reference to requirements under the Companies Act. Even if they had been such a reference; to ascertain the validity of the legal result or consequences claimed, would necessarily have required the investigation of new and disputed facts which have not been investigated at the trial. The submission by C & W Ltd that the non-compliance with the provisions of the Companies Act was made a live issue in the cross-examination of Ed Marchand, representative of V. I. Ltd, by counsel for K. B. and D. B is of no significance, as that was evidence outside the pleaded facts. What is noteworthy is that C & W Ltd and K. B. and D. B had admitted without reservation or qualification the averment of V. I. Ltd that it "is an existing company registered under the laws of South Africa trading under the business name Pactel". It is in our view improper for C & W Ltd to rely now, on such a ground of appeal raised by K. B. and D. B after having voluntarily entered into an agreement with V. I. Ltd to purchase mobile phone handsets from them. We therefore dismiss grounds (d) and (e) raised by K. B. and D. B.

12. Having disposed off the two legal issues raised in the grounds of appeal we now turn to the one and only factual issue raised in the grounds of appeal, namely were K. B. and D. B. trading as Soft-Cell (Seychelles) the agents of V. I. Ltd for the purposes of the transaction which is the subject matter of this case? The answer to this can best be found in the initial correspondence between V. I. Ltd and C & W Ltd.

**P9** is the first letter written by V. I. Ltd to C & W Ltd in this connection and is dated 4th April 2003. It makes reference to the order (Order no. CWS0148/03) placed by C & W Ltd for mobile phone handsets; the partial fulfillment of such order by V. I. Ltd as per the acknowledgement of receipt of the handsets by Mr. Peter Durup of C & W Ltd; V. I. Ltd invoicing C & W Ltd for the quantities shipped and sending the invoices (no. 5082187 and 5082791) to Mr. Durup and the fact that no payments had been received by V. I. Ltd from C & W Ltd for the invoices. A perusal of the purchase order no. CWS0148/03 dated 13th November 2002, issued on a letterhead of C & W Ltd, which was produced as **P3** shows that it is an order placed by C & W Ltd to V. I. Ltd requesting the supply of mobile phones. The quantity and the total value have been set out in the purchase order. The dispatch instructions have been to the effect that they must be packed for shipment addressed to C & W Ltd. Payment terms were to be by "8 wkly cash installments."It has been stated in the purchase order: "All queries relating to this order please address to Manager Support Services (*C & W Ltd*). All invoices must be sent to Cable & Wireless (Sey) Ltd financial Accounts department quoting our Purchase Order number". The invoices numbered 5082187 and 5082791 have been produced as P4 and P5 respectively. Both invoices have given the customer as C & W Ltd and are on the letterhead of V. I. Ltd. **Payment details as set out in the invoice are to the effect: "Telegraphic Transfer", "Name payment to Vestlane investments (Pty) Ltd South Africa (*V. I. Ltd*).**" The corresponding invoices to P4 and P 5 giving the purchase price in Seychelles Rupees have been produced as P6, P7 and P8 respectively. P6, P7 and P8 have set out the **"ACCT DETAILS" as follows: "VESTLANE INVESTMENTS (PTY) LTD, ABSA PRIVATE BANK, ACCT #4052 8300 25, BRANCH #633-505".**

13. C & W Ltd had responded to **P9** of V. I. Ltd. by its letter dated 17th April 2003 (**P10**) stating that:

"Payments for all telephone hand-sets supplied to us so far have been made to Soft Cell (*K. B. and D. B.*), your agent in Seychelles".

Lawyers representing V. I. Ltd. has responded to **P10** of C & W Ltd by their letter of 23rd April 2003 (**P13**) stating: "Kindly note that our client denies that Soft Cell is its agent in the Seychelles since the particular orders were placed directly with our client and not via Soft Cell. You were therefore not entitled to make payment to Soft Cell."

Lawyers representing V. I. Ltd. by its letter dated 25th April 2003 (**P14**) to C & W Ltd had stated: "There is absolutely no basis whatsoever on which the relationship between our client and Soft Cell can be construed as a principal/agent relationship. We reiterate that the orders concerned were placed directly with our client without Soft Cell being involved in any way. Even prior to the said orders, goods were ordered from our client by Soft Cell who in turn sold it to you and therefore even in that instance, Soft Cell was not an agent of our client."

By **P15** (letter dated 29th April 2003) C & W Ltd had denied V. I. Ltd's assertions that Soft Cell was not the agent of V. I. Ltd in Seychelles and that C & W Ltd was not entitled to make payments to Soft Cell. C & W Ltd had, in writing to the lawyers for V. I. Ltd, gone on to state: "Our business relationship with your client and Softcell dates back to some 2 years ago and involved several purchases; over that period of time payments of all monies due to your client were made to Softcell. As in previous purchases, Softcell was involved in this last transaction as the agent of your client and there never was the slightest indication that your client had terminated that mandate." The letter also states in connection with 2 printers supplied by V. I. Ltd to C & W Ltd that: "We do not have your client's bank details in Seychelles and would appreciate to be provided with the same so that we may make payment directly to your client's account."

Lawyers for V. I. Ltd has responded to **P15** by their letter dated 13th May 2003: "Save for the last transaction, Softcell has been purchasing goods from our client for the past two years and in turn sold some of the goods to yourselves. In this regard our client had no involvement whatsoever in the re-sale of the goods by Softcell to yourselves, save and except warranties and returns, if any. In that context, it can barely be said that Softcell was our client's agent. The relationship between our client and Softcell was therefore simply a seller/purchaser relationship and Softcell has never had any mandate to act as our client's agent. <u>However, this last transaction did not involve Softcell at all since your purchase order was issued directly to our client and was faxed directly to them by your manager Support Services. In addition all communications and shipments were made directly between our client and yourselves. This is unlike previous orders where all orders, communications, shipments, etc. were handled directly with Softcell, the purchaser, in those instances. There was never any indication by yourselves in your two purchase orders nor during any discussions with your Manager Support Services that payment would be made to Softcell</u>..." (underlining by us).

C & W Ltd's reply (**P17**) to the lawyers of V. I. Ltd in response to **P15** is to the effect: "Your client's insistence that Softcell was not mandated to act as its agent in Seychelles in respect of the last transaction flies in the teeth of the correspondence emanating from your client. Furthermore, your client's invoices for that transaction were printed and issued in Seychelles by Softcell. But more importantly, we have confirmation from Mr. Kenneth Bisogno of Softcell that he has paid your client a total of US $ 57,139, from funds collected on its behalf in Seychelles in respect of the last transaction. We are informed that a sum of US $ 20, 76 has been retained by Softcell on account of some dispute with your client. We have details of the payments made by Mr. Bisogno, including the (*sic*) your client's bank receipts for the payments made by way of bank transfers. We will make them available if you so require….."(underlining by us)

Lawyers of V. I. Ltd by its letter (**P18**) of 30th June 2003 has responded to **P17** to the effect: "Insofar as you allege that there is correspondence from our client which indicates that Softcell was in fact mandated to act as our client's agent, would you please let us have copies thereof. We have perused the correspondence and cannot find anything which even vaguely supports your contention in this regard…..As far as the alleged payments made by Softcell to our client are concerned, our client does not dispute the fact that certain payments were indeed made by Softcell, including the payment referred to in your letter. These payments, however, were made to our client in respect of the outstanding account of Softcell with our client and has no bearing whatsoever as far as your indebtedness towards our client is concerned…" and finally "If Softcell was an agent of our client as you allege, why was your client Mr Peter Durup communicating directly with our client on all matters relating to the order in question?"

**P20** is the reply of the lawyers of C & W Ltd to **P18**. It says that C & W Ltd does not intend dealing with each of the allegations contained in **P18** and conducting a trial by correspondence and that should not be construed as an admission as to the correctness of any such allegations. However a perusal of the contents of **P20** shows that there is a detailed reply to all the allegations in **P18** which are more or less a repetition of what have been stated already at **P10, P15** and **P17**; save a failure to respond to the request by V. I. Ltd to make available to them the alleged correspondence from V. I. Ltd which indicates that Softcell was in fact mandated to act as their agent, and to the statement that whatever payments made by Softcell to V. I. Ltd were in respect of the outstanding account of Softcell with V. I. Ltd and has no bearing whatsoever as far as C & W Ltd's indebtedness towards V. I. Ltd, is concerned. C & W Ltd had also failed to respond to the

Request by V. I. Ltd for Further and Better Particulars of the Defence of C & W Ltd in respect of the following matters:

(i) Who informed the 1st Defendant (*C & W Ltd*) that the 2nd and 3rd Defendants (*K. B. and D. B.*) represented the Plaintiff (*V. I. Ltd*)?
(ii) Was the alleged representation given or informed in writing?

14. V. I. Ltd. in their pleadings and oral testimony before the court have denied appointing K. B. and D. B. as their agents and K. B. and D. B. have denied by their pleadings being the agents of V. I. Ltd. The burden of proof was on C & W Ltd to prove agency as it is they who averred it. The oral testimonies of the two witnesses for C & W Ltd and the documents produced by both parties before the trial court have failed to show that K. B. and D. B were the agents of V. I. Ltd. Jerina Ah-Tive, Manager, Financial Planning testifying on behalf of C & W Ltd had said that she does not know who appointed K.B (Ken Bisogno) and had not seen any written document signed by V.I. Ltd or Mr. Ed Marchand of V. I. Ltd appointing Softcell as the representative of V. I. Ltd, in Seychelles. It was Peter Durup of C. &. W Ltd who was dealing with V. I. Ltd who had told her that Softcell was the representative of V. I. Ltd. She personally had no knowledge that K. B. & D. B. negotiated an agreement with V. I. Ltd and C & W Ltd, as the representative of V. I. Ltd. Peter Durup was never called as a witness by C&W Ltd and it transpired from Jerina's evidence that his services had been terminated due to misconduct. It had also been Jerina's evidence that it was Ken Bisogno of Softcell who had told her that the moneys due to V. I. Ltd had to be paid to him and not V. I. Ltd. It was also her evidence that all the moneys due to V. I.Ltd in respect of the mobile phones had been paid by way of cash to K. B. on the instructions of Peter Durup.

15. The evidence of Ed Marchand testifying for V. I. Ltd should be taken note of:

"Q. Mr. Marchand, Cable & Wireless is claiming that Softcell (*K. B. & D. B.*) was your agent in Seychelles, is that the case?
A. Never.
Q. Did you have any written agreement with them to become your agent in Seychelles?
A. No.
Q. Did you authorize 2nd and 3rd defendant (*K. B. & D. B.*) to receive money for you from Cable & Wireless?
A. Not at all. We did not ask any person to receive any money on our behalf.

Q. Did you authorize the first defendant (*C & W Ltd*) to pay the second or the third defendant (*K. B. & D. B.*) on your behalf?
A. No."

Marchand's evidence had been to the effect that he had received a call from Peter Durup of C & W Ltd requesting him to have Ken (K. B.) clear the printers and the phones on behalf of C & W Ltd. It had been Peter's position that Ken could expedite things through custom much quicker than C & W Ltd. and this is how Ken became involved in clearing the goods through customs. It did not matter to V. I .Ltd as to who cleared the goods. To the question "So Ken was your agent?" his answer had been "Ken was never my agent." Marchand had accepted that Softcell (K. B. & D. B.) had been their only customer in Seychelles until C & W Ltd contacted them directly in December 2002 to place this order which is the subject matter of this suit. According to Marchand prior to the purchase order from C&W Ltd Softcell had sold what they bought from V. I. Ltd to C & W Ltd but not as their agent. Marchand had said: "We sold to Softcell and they sold to their customers and C&W Ltd was one of their customers." It had been Marchand's evidence that V. I. Ltd had never appointed a managing agent in the Seychelles.

16. In view of this evidence both documentary and oral we agree with the submission of the Appellants V. I. Ltd and K. B. and D. B, that there is no evidence to show that K. B. and D. B had been authorized by the Appellant V. I. Ltd to receive from, and for the Respondent C & W Ltd to pay K. B. and D. B. money due to the Appellant V. I. Ltd. We also agree with the submission of the Appellant V. I. Ltd that there was no evidence of a written authority and that "the oral testimony fell short of any proof of such grant of authority. Furthermore, Mr. Peter Durup [Product Manager for *C & W Ltd at the relevant time*], who would have been a material witness for the case was not called by the 1st Respondent (*C & W Ltd*). The evidence of Jerina Ah-Tive (DW1) and Ms. Celeste (DW3) [*both witnesses for and employees of C & W Ltd*] was based on instructions that were given to them by Mr. Durup and not the Appellant (*V. I. Ltd.*)"

17. The Supreme Court did not make a finding that K. B. and D. B were acting as agents of V. I. Ltd and instead found that K. B. and D. B shrewdly, cunningly and acting in bad faith abused the trust of C & W Ltd and passed themselves off as the authorized representatives of V. I. Ltd in Seychelles for the purpose of receiving the sum of SR 1,370,087.80 from C & W Ltd. C & W has not cross-appealed this finding and has called upon us in its Skeleton Heads of Argument to re-characterize the relationship that existed between V. I. Ltd and K. B. and D. B in the transaction, under the powers vested

in us under rule 31 of the Seychelles Court of Appeal Rules. It is the position of C & W Ltd. that "that there is abundant evidence to show that Soft-Cell (*K. B. and D. B*) was the Seychelles representative in its affairs in Seychelles". We are of the view that there is no such evidence and this is not an appropriate case for us to exercise our powers under rule 31. We therefore agree with the submission of the Appellant V. I. Ltd that: "If the 1st Respondent (*C & W Ltd*) paid money to the 2nd and 3rd Respondents (*K. B. and D. B*) that were due to the Appellant (*V. I. Ltd.*), it did so by way of its own negligence or on its own volition and thus, the 1st Respondent (*C & W Ltd*) cannot be exonerated from liability towards the Appellant. We therefore hold that C & W Ltd are liable to pay V. I. Ltd the sum of US $ 196,372.00.

18. The Learned Trial Judge had come to the finding: "The 2nd and 3rd Defendants (*K. B. and D. B*) shrewdly, cunningly and acting in bad faith abused the trust of the 1st Defendant (*C & W Ltd*) and passed themselves off as the Plaintiff's (*V. I. Ltd.*) authorized representatives in Seychelles for the purpose of receiving the sum of SR 1,370,087 from the 1st Defendant (*C & W Ltd*)…. Having found that the 2nd and 3rd Defendants (*K. B. and D. B*) having passed themselves as the authorized representatives of the Plaintiff (*V. I. Ltd.*) and having collected the sum of SR 1,370,087 from the 1st Defendant (*C & W Ltd*) purportedly on behalf of the Plaintiff (*V. I. Ltd.*), I further find that 2nd and 3rd Defendants (*K. B. and D. B*) are liable to pay the Plaintiff (*V. I. Ltd.*) in the sum of SR 1,370,087 with interests at the commercial rate from the 17th April 2003." C & W in their Skeleton Heads of Arguments supports this part of the judgment on the basis of article 1376 of the Civil Code of Seychelles Act by stating: "The finding that the transaction amounts were paid to Soft-Cell (*K. B. and D. B*) puts Soft-Cell under the obligation of restituting such amounts by reasons of the principle relating to *paiement de l'indu* under article 1376 of the Civil Code. But in the circumstances of the case, the Supreme Court is empowered, in settling the dispute among all the parties, to order that the transaction amounts be paid by Soft-Cell directly to Vestalene." Section 1376 reads as follows:

"A person who, in error or knowingly, receives what is not due to him, shall be bound to make restitution **to the person from whom he has improperly received it**." (emphasis added by us). Thus the restitution if need be should be to the Respondent C & W Ltd. C & W Ltd in their Statement of Defence to the Amended Plaint before the Supreme Court had not by way of relief prayed for restitution of the sum of SR 1,370,087 to itself or to V.I. Ltd. We therefore see no merit in this submission.

19. We are in a difficulty to understand the legal basis for the finding of the Learned Trial Judge that the K. B. and D. B. are liable to pay V. I. Ltd. in the sum of SR 1,370,087, in the absence of any evidence to support the fact that K. B. and D. B. were agents of V. I. Ltd and in view of the clear provisions of article 1165 of the Civil Code of Seychelles. Article 1165 reads as follows:

    "Contracts shall only have effect as between the contracting parties; they shall not bind third parties and they shall not benefit them except as provided by article 1121." This is not a case where article 1121 has any application.

20. K .B. & D. B. in their statement of defence had averred "that any sum of money they received from the 1st Defendant (*C & W Ltd*) was a result of: (i) a separate contract of sale between the 1st Defendant (*C & W Ltd*) and the 2nd and 3rd Defendants (K .B. & D. B.) trading as Soft-cell; and (ii) a separate contract for service between the 1st Defendant (*C & W Ltd*) and the 2nd and 3rd Defendants (K .B. & D. B.) trading as Soft-cell." They have not specified the sum of money received by them from C & W Ltd nor denied that the sum of US $ 196,372.00 claimed by V. I. Ltd from K .B. & D. B. as an alternative form of relief was not received by them from C & W Ltd. K .B. & D. B. had not challenged the evidence of C & W Ltd as regards the payment of SR 1,370, 087.58 to them by C & W Ltd. C & W Ltd in their Statement of Defence had prayed by way of relief "to make such further or other order against the 2nd and 3rd Defendants, as the Court considers appropriate in the circumstances." We therefore hold that that K .B. & D. B. are under the obligation of restituting such amounts to C & W Ltd by reasons of the principle relating to *paiement de l'indu* under article 1376 of the Civil Code.

21. We find that there was insufficient evidence placed before the trial court by C & W Ltd as regards its counter-claim of SR 62,500. Counsel for C & W Ltd did not offer any submissions in regard to their counter-claim despite being invited to do so. We therefore dismiss the counter-claim of C & W Ltd.

22. We make the following orders:

    (a) C & W Ltd is hereby ordered to pay Vestalene Investments Limited the sum of US $ 196,372.00 with interest at the commercial rate from 17th April 2003;

(b) Kenneth Bisogno and Debra Lee Bisogno is hereby ordered to pay Cable & Wireless (Seychelles) Limited the sum of SR 1,370,087.50 with interest at the commercial rate from 30th December 2002;

(c) C & W Ltd pay costs to Vestalene Investments Limited in respect of both actions before the Supreme Court and the Court of Appeal.

A.F. T. Fernando
Justice of Appeal

I agree

M. Twomey
Justice of Appeal

I agree

J. Msoffe
Justice of Appeal

Dated this 14th day of August 2014, Victoria, Seychelles