

IN THE SEYCHELLES COURT OF APPEAL

[Coram: S. Domah (J.A) , M. Twomey (J.A) , J. Msoffe (J.A)]

Civil Appeal SCA 17/2013

(Appeal from Supreme Court Decision 65/2010)

Petite Anse Development Limited

Appellant

Versus

Iskander Adib Safa

Respondent

Heard: 20 August 2015

Counsel: Mr. Francis Chang Sam for the Appellant

Mr. Anthony Derjacques for the Repondent

Delivered: 28 August 2015

JUDGMENT

S. Domah (J.A)

[1] The appellant was at all material times a property developer and the respondent an international investor, a foreign national. The respondent, through a third party known to both parties, made two initial deposits for the purchase of one of the 22 villas being offered for sale by the appellant. The respondent then walked out of the transaction and demanded the return of his deposits. The appellant treated the demand as a breach of contract and the deposits as forfeited. The respondent brought an action against the respondent for restitution against the appellant who responded by a cross action for breach of contract. The matter was heard by the learned Judge of the Supreme Court who after going through the evidence found that the facts showed that the parties, albeit the deposits made, were still at the *pollicitation* stage and there had been no contract yet for a breach to have taken place. He, therefore, dismissed the cross-action in damages and made an order of restitution of the sums deposited, i.e. US\$1,175,050.00 with

interest at the commercial rate of 7% from the date of the demand of the refund which was 15 January 2010. This is an appeal on that judgment prosecuted by the appellant property developer.

[2] The grounds are as follows:

1. *The Learned Trial Judge erred by failing to consider all the evidence before the court including but not limited to the exchange of emails, the testimony of the Defendant's witnesses and the fact that the Sales and Purchase Agreement was with the Plaintiff's lawyer when the Plaintiff had been denying ever receiving the same when determining whether there was a legally binding contract between the Plaintiff (now respondent) and the Defendant (now the Appellant).*
2. *The Learned Trial Judge erred by not taking into consideration that there was a "mutual agreement" between the parties as admitted and pleaded by the Plaintiff at paragraph 5 of the Plaint and by not looking at all the evidence in order to ascertain what the agreement was about.*
3. *The Learned Trial Judge erred in law when he found that the agreement between the Plaintiff and the Defendant was caught by the prohibition contained in the Immovable Property (Transfer Restriction) Act.*
4. *The Learned Trial Judge erred in law when he awarded the Plaintiff 7% interest on the judgment sum merely at the request of the Plaintiff and without basing himself on any evidence that this was the agreed applicable rate.*

[3] The respondent resists the appeal. Grounds 1 and 2 have to do with appreciation of facts and we shall consider with them together.

THE FACTS PARTICULAR TO THIS CASE

- (1) Before we consider the grounds of appeal, it is befitting to take note of the type of contract we are dealing with as regards the "objet" or subject-matter.
- (2) First, the "objet" of the sale was not VR13 as such but a future property on VR13, and further, a novel concept in property ownership, *en voie de construction*.

- (3) Second, this was not a case of respondent being on the look-out for the purchase of a property in Mahe for his personal use and walking into the office of a property agent. The villas were being offered for sale to potential international buyers as Four Seasons Private Residence with a type of ownership arrangement which involved hotel-cum-private foreign residence with an inbuilt service and rental agreement.
- (4) Salem Al Niyadi was not the agent of the appellant. He was only a match-maker as it were who had introduced the transaction to the appellant as a business investment opportunity.
- (5) At the time the deposits had been made, details of the future construction were still embryonic and drawings were prepared and sent only much later by the appellant.
- (6) The remittance of the first deposit of \$1,000,000.00 on 29 April 2008 followed by another of \$175,050.00 on 5 May 2009 which made up for the 10% of the purchase price were rushed without sight of essential documentation and without visit to site.
- (7) The meeting had taken place in a social environment and at a social place.
- (8) The Respondent who makes his money by running shipyards in several countries had sent the money to the account of the appellant as a matter of course.
- (9) The respondent's explanation makes sense that, being an investor in shipping and account taken of the new concept in property ownership, he had advised himself that this was not his line of investment.

[4] He, accordingly, had simply ignored all documentations and correspondence sent to his office. These included the Sale and Purchase Agreement, the Addendum to the Sale and Purchase Agreement, The Private Residence Open License Agreement, the Rental Programme Agreement.

[5] On learning that the respondent was no longer willing to proceed with the purchase, a representative of the appellant had visited the respondent in Abu Dhabi. Each party had held to his position: one stated there was a mere reservation and no contract and the other that there were first deposits made a contract. The appellant stood by the 10% deposits made by the appellant, the number of documents sent to him as the work progressed and the periodical claims made to his office as they arose. The appellant

stood by his position that – other than the deposits made – he had sent back and signed none of the documents, no plans and drawings had been submitted to him for approval or acceptance and the only e-mail which was sent back was through his lawyer for the return of his deposits.

[6] Evidentially, the crucial question which arose at the trial was proof of contract by oral evidence rather than by document. That meant the nature of the conversation which Salem Al Niyadi had with the respondent and the respondent had with Salem Al Niyadi. Salem Al Niyadi, for a reason best known to appellant, did not come to depose. The respondent did.

[7] On the evidence, the respondent stated that he decided to make the deposits for a reservation of plot RV13 for the purpose of entering into serious discussions to finalize the contract.

[8] With these salient features, we come to consider the grounds of appeal. Under Grounds 1 and 2 which are being taken together, the appellant is challenging the appreciation of facts of the learned judge. On account of the rule that an appellate court is unwilling to interfere with the conclusion of the trial judge of facts, appellant is bound to demonstrate to us that the learned Judge misapprehended the facts or omitted to take into account primary facts and came to a conclusion which would have been opposite, had he properly apprehended them or taken the primary facts into account. The appellant points out to no particular fact specifically which, if it had been considered by the learned Judge, he would have come to a different conclusion.

GROUND 1 AND 2

[9] What learned counsel is challenging in the judgment under these grounds is that the learned judge did not look at all the evidence that had been adduced and given due weight to each of them. It is in very broad terms. They comprised emails, witness testimonies, the number of standard documents which had been sent, the conduct of the respondent, the nature of the pleadings such as paragraph 5 of the plaint etc.

- [10] We have gone through the record. True it is that the learned Judge did not go into minute details in his analysis of the evidence. He did not have to. He was impressively elaborate on the primary issues of fact and law. In fact, we are at pains to identify which aspect of the evidence would have gone in favour of the appellant had the learned judge delved further into the depositions.
- [11] When we, on our side, delved further into the facts, we came across evidence which are more in favour of the respondent than in favour of the appellant. For example, in an e-mail dated 26 January 2010, the demand of refund by the respondent's lawyer was acknowledged by the appellant to be "the first communication of any kind that we have received on the subject." The learned Judge would have further found that Salem Al Niyadi was never and had never acted as the agent of the appellant for the purposes of entering into a contract with the appellant. There was no agent principal relationship between. The learned Judge did not need to elaborate on the fact that after he ruled on the admissibility of oral evidence in favour of the appellant, the least the appellant could have done was to bring Salem Al Niyadi into the box to rebut the best evidence adduced on the core issue that the deposits were for engaging in serious negotiations for eventual contract but sent as a first installment. The learned Judge would have further found as we see it that the plot marked RV13 on the record of the appellant has been marked as "Reserved" and not as "Sold". However, the learned judge was not bound to exhaust all the reasons of the world for which he found for the respondent. His predicament was the paucity of evidence that went in favour of the appellant beyond the two deposits in the light of the standard correspondence sent by the appellant, through the Singapore Office, which remained largely unanswered, unattended and unreturned.
- [12] We are able to say that the learned Judge went well beyond the submissions made by the parties to consider issues which mattered – as he was bound to – before coming to the conclusion he did. The fact that the *Sales and Purchase Agreement* had been sent and found to be lying at the office of the respondent or with the lawyer is equivocal: the appellant may have shown thereby its serious interest to chase up and secure his next client but this client was not interested. Much is made of paragraph 5 of the plaint. This paragraph does no more than support the case for the respondent that the "mutual agreement" was not for the contract as such but for the serious beginning of negotiations towards the formation of a contract. Importantly, the drawings for the future building had yet to be finalized at the time the deposits were signed. This international investor in the

ship building industry was far from one who had decided to buy a pig in a poke. To all intents and purposes when he sent his money, his act constituted as the French jurist call it: *une invitation à entre en pourparlers*.

“L’offre, encore nommée pollicitation, est la proposition ferme de conclure, à des conditions déterminées, un contract de telle sorte que son acceptation suffit à la formation de celui-ci.” See Dalloz, Francois Terré, Philippe Simler, Yves Lequette, Droit Civil, Les Obligations, 10ème édition, para 108.

- [13] That the deposits by themselves were not enough to prove the existence of the contract must have loomed large in the mind of the Learned counsel. That is why he wanted to prove the contract by adducing oral evidence in accordance with article 1341 of the Seychelles Civil Code. After the Court offered him the opportunity, the appellant did not make much use of it. He did not call the crucial witness who was involved with the supposed meeting of minds prior to appellant’s sending the deposits.
- [14] It is Salem Al Niyadi who dealt with the respondent who should have come to give evidence to rebut whatever the respondent had stated. And what the respondent had stated, under oath, is that he is a mere investor. In one of the meetings, Salem Al Niyadi spoke to him about this opportunity for investment in villas in Seychelles. He barely knew the details or had them for that matter. He had been shown a small paper with a property marked RV13. He was told to reserve it with an initial sum of \$1, 000,000 to start negotiation towards contract finalization. This he did. He was later told that the remittance should be 10% of the purchase price. So he had to top up with the balance. His line of business is ship building. He has shipyards in several countries. Two social meetings, a small drawing, an SMS and a transfer of funds could not lead to a contract for such a type of project. It was not land he was buying. It was not a residence he was buying. He was buying a residential building attached to a hotel further tied with a number of other commitments contained in a number of Agreements none of which he was prepared to sign nor did he sign. All these he had not been made aware. The “offer” in the interpretation of the Civil Code should be both precise and firm. At the time of the meeting of Salim Al Niyadi and respondent, neither side had enough material to give to each other for which make the offer firm and precise.

[15] To be precise, the nature of the eventual contract must be known. As the French doctrine puts it:

*“Il faut qu’elle décrive clairement le contrat éventuel, en invoquant à tout le moins les éléments essentiels.” See Dalloz, **ibid.** para 109.*

The drawing plans were still in the pipe-line. The documents were yet to be submitted for perusal.

[16] To be firm, the offer should not be subject to any qualification. If there is a qualification, then the other party then becomes the pollicitant:

*“La reserve d’agrément provoque ainsi un veritable renversement de la situation”: le destinataire de la proposition de contracter devient le pollicitant ...” See Dalloz, **ibid.** para 110.*

The respondent had asked for the documents to be sent – they were meant to be read, signed and sent, after independent legal advice.

[17] The evidence of the appellant in the court below suffered from other weaknesses. All that appellant’s Director relied on was the deposits, the e-mails and the correspondence between the parties and the conduct of the respondent which was equivocal. There were two other witnesses for the appellants who came to usher evidence but none had personal knowledge of the facts which could have helped to determine whether the Respondent had taken a serious commitment to proceed with the purchase of the future construction or was at the preliminary stage prior to contract formation. In fact, Mr D’Abo agreed in evidence that the respondent did not see the drawings for the future construction.

[18] As against that, the respondent had come personally into the witness box to give evidence and explain how the agent, Mr Salem Al Niyadi, tempted him to make the deposits but he heard nothing thereafter for his investment and lost interest in this type of investment. Neither he nor his office responded to the several correspondence sent to him. So the Sale and Purchase Agreement, the Home Owner Service and Amenities

Access Agreement, the Private Residence Operation Licence Agreement and the Rental Programme Agreement sent by a Singapore Office of the appellant remained simply ignored, unsigned and unreturned. He had visited the place. He had met the appellant's representative. He preferred to remain quiet.

[19] In life, *“qui ne dit mot, consent.”* In love, *“un silence vaut mieux qu'un langage.”* But in law, *“qui ne dit mot, ne consent pas.”* See **Dalloz, ibid. para 124.** *“Il y a des approbations tacites, mais il y a aussi des réprobations muettes sans oublier les silences prudents.”*

[20] Francois Terré, Philippe Simler, Yves Lequette cites an important decision of the Cour de Cassation which laid down the principle in law that in law the silence of someone from whom an obligation is due falls short of an affirmation from his part for the obligation alleged against him:

“qu'en droit le silence de celui qu'on prétend obliger ne peut suffire, en l'absence de toute autre circonstance, pour faire preuve contre lui de l'obligation alléguée.” **See Dalloz, ibid. para 124.**

[21] In fact, except for the deposits, the rest of the evidence was self-serving of the case of the appellant which did not need to be rehashed. A large extent was hearsay.

[22] In the light of the above, one may not blame the learned Judge commenting that he had before him evidence under oath of the respondent and the hearsay evidence of the appellant company. For the appellant it was basically the waste of an offered opportunity to give evidence after he had successfully made a motion for calling the respondent on his personal answers.

[23] Learned counsel for the appellant argues before us that the learned Judge did not examine the emails and the exchanges which would have shown that there was already a binding contract between the parties and the deposits were forfeited by the fact that the company had proceeded to construction of the residential building and incurred substantial expenses to that effect, and not refundable. We have come across nothing in the documents which point to that effect. That the appellant had undergone expenses to

start construction, the appellant had to show that the plans had been agreed upon and approved before construction was to start at all.

[24] At the end of the day, what type of evidence did the learned Judge have before him for his evaluation? First, an unsigned document where it is stated that it is the signature that strikes the deal. Second, the unsigned document is silent as to the status of the deposits: namely whether they are to be forfeited. The appellant relied on such absence of agreement to say he needs to forfeit them. On the ground that he has used the money to construct the villa.

[25] We are not prepared in such important international transactions which stretch to millions to condone the sub-standard level in dealings likely to generate myriads of disputes of all types. Greater seriousness and professionalism are expected of property developers than the facts of this case suggest on account of the international image of the country outside. This lack of seriousness exists both at the level of the transaction and the attitude to the case.

[26] As regards the transaction, this was no conventional contract. The relationship arose between a property developer with officially approved plans to raise building with stated amenities and specified restrictions and encumbrances. We are not here dealing in the conventional setting of a seller and a buyer of residential property dealing face to face but in the context of a property developer and an investor dealing for the most part at arm's length. This was a contract for future construction which is regulated by Articles 1601-01 to 1601-03 of the Seychelles Civil Code.

[27] As regards their attitude to the case, from the moment an opportunity was given to the appellant to adduce oral evidence, appellant assumed a responsibility of ushering oral evidence and could not remain content with relying only on the documents which in any case were equivocal one way or the other. The agent who dealt with the respondent should have been called to depose as to the type of talk that had taken place before the deposits were made: The appellant is a developer. Did the respondent show interest as an investor or was he interested in owning a residence and settling in Seychelles.

[28] We are, accordingly, unable to accept the submission of the appellant that the learned judge erred in his appreciation of the evidence.

GROUND 3

[29] On ground 3, the judgment is questioned for the reason that the Learned Trial Judge found that the agreement between the Plaintiff and the Defendant was caught by the prohibition contained in the Immovable Property (Transfer Restriction) Act.

[30] What was the date of the meeting and the date of the deposits? The meeting took place between the agent and the respondent in April/May 2008 and the deposits were made immediately after for the purchase of an immovable property. At that time, the project was still embryonic. No agreement could be reached under article 1101 of the Civil Code which requires that for the formation of a contract the cause should be licit. The cause could not be *licite* when there was a legal restriction under the Immovable Property Act (Transfer Restriction) Act Cap 95 which still applied to the contract formation. That should have been enough to dispose of this appeal. The learned judge was correct in addressing this issue in the manner he did in support of the submission made to that effect by the respondent.

Ground 3 fails.

GROUND 4

[31] Ground 4 relates to the issue whether the Learned Trial Judge was correct in law when he awarded the Plaintiff 7% interest on the judgment sum merely at the request of the Plaintiff and without basing himself on any evidence that this was the agreed applicable rate.

We read in the transcript what the learned Judge had heard from the horse's mouth under oath on this issue. The plaintiff had asked for 7% interest on the deposits he had made. There was no rebuttal on this aspect in evidence. The learned Judge gave him 7% - no doubt on the lesser side – when he must have compared it to what the appellant had asked in his counter claim, which was 14.5%. We find Ground 4 frivolous and it fails.

[32] All the grounds have been adjudged as lacking in merits, the appeal is dismissed with costs.

S. Domah (J.A)

I concur:. M. Twomey (J.A)

I concur:. J. Msoffe (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 28 August 2015