

**IN THE SEYCHELLES COURT OF APPEAL**

**[Coram:** S. Domah (J.A), A. Fernando (J.A), M. Twomey (J.A)

**Civil Appeal SCA04/2013**

**(Appeal from Supreme Court Decision 370/2005)**

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Zena Entertainments (Pty) Ltd

Appellant

Versu  
s

Philip Lucas

1st Respondent

John Renaud

2nd Respondent

Charles Lucas

3rd Respondent

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Heard: 11 December 2015

Counsel: Frank Ally for Appellant

Charles Lucas for 1<sup>st</sup> Respondent and in person for himself, 2<sup>nd</sup> Respondent absent and unrepresented.

Delivered: 17 December 2015

**JUDGMENT**

M. Twomey (J.A)

[1] This appeal emanates from events that took place in 1992 and which has given rise to several court actions. Part of the transcript of the court proceedings together with the audio recording of the court proceedings are missing but an order has been made by this court to proceed nonetheless with the appeal on the available transcripts and on affidavits produced by the parties to this case.

[2] The 1<sup>st</sup> Respondent transferred Parcel B 329 at La Misere, Mahé, to the Appellant on the 24<sup>th</sup> June 1992 with the deed of sale being witnessed by the 2<sup>nd</sup> Respondent who acted as

Attorney for the Appellant. In consideration of the said transfer, the sum of SR 350,000 was paid to the 1<sup>st</sup> Respondent, as recorded in the transfer document. The Appellant took possession of the property.

[3] Exhibited documents produced by the Appellant attest to the fact that three cheques drawn on Barclays Bank by the Appellant and/or its director John Dudley were made out to the following persons:

1. A cheque for SR250, 000 to the 2<sup>nd</sup> Respondent on 6<sup>th</sup> December 1991.
2. A cheque for SR200, 000 to Angie Maurel for SR 200, 000 on 4<sup>th</sup> December 1991.
3. A cheque for SR35, 000 to the 2<sup>nd</sup> Respondent on 6<sup>th</sup> December 1991.

[4] The registration of the said transfer was not made after the signature of the parties. There is exhibited a letter from the 2<sup>nd</sup> Respondent to Norman Weber, then Principal Secretary for Finance which is here reproduced *in extenso*, for reasons which will be become obvious, in which the 2<sup>nd</sup> Respondent, Mr. John Renaud states that :

“On or about 24<sup>th</sup> June, 1992, [Zena Entertainment Pty) Ltd] purchased a portion of land at La Misere, belonging to one Philip Lucas. The same portion of land was to have been purchased by Miss Lydia Camille. In this respect a Promise of Sale had been prepared and registered in the Land Registry on 13<sup>th</sup> August, 199. Stamp duty of R47, 600 had been paid upon registration, in excess of the stamp duty payable on the Promise of sale. This was so because on the actual transfer of the property, no further fees would have been paid.

The stamp duty at the time was exactly the amount that would have been paid on the actual transfer of land. It is now less owing to amendments in the law.

Miss Camille did not wish to proceed with the purchase of the land. In order for the company to complete its purchase of the land and its eventual registration, the Company refunded Miss Camille the stamp duty which she had paid for the registration of the

transfer of land, in advance of its transfer, that is at the time the Promise of Sale was registered by Miss Camille.

Now, the Registrar of Land seeks to levy stamp duty on the transfer the land to Zena Entertainment (Pty) Ltd. This means that the Land Registrar would have levied two separate and distinct amounts in respect of the one transfer. The sum of R47, 000 paid on 13<sup>th</sup> August 1991 has not been utilised on any transfer.

The purpose of this letter is, initially, to seek your permission to waive the stamp duty of SR32,010 on the transfer of the parcel of land to Zena Entertainment (Pty) Ltd given the fact that the Land Registrar has already received a higher sum in respect of stamp duty...”

- [5] Nothing further seems to have happened as far as registration of title in the name of the Company is concerned, but on 31<sup>st</sup> January 1994 the Appellant registered a caution against title B389 on the Land Register, claiming an interest in the said property.
- [6] In May 1995, the Appellant filed a case against the 1<sup>st</sup> Respondent in which it claimed that it had purchased Parcel B389 for SR450, 000; being SR350, 000 for the land and house thereon and SR100, 000 for the furniture, fittings and fixtures contained therein. It further claimed that it had been a condition of the agreement between itself and 1<sup>st</sup> Respondent that the sum of SR250, 000 was to be paid to the 1<sup>st</sup> Respondent’s attorney, that is the 2<sup>nd</sup> Respondent in Seychelles and the sum of SR 200, 000 to an account of the 1<sup>st</sup> Respondent in Canada and the sum of SR35, 000 again to the 2<sup>nd</sup> Respondent for the payment of stamp duty for the transfer of the property. The payment of SR200, 000 to the 1<sup>st</sup> Respondent’s account in Canada was effected by Angie (Angelika) Maurel on behalf of the Appellant and is proved by a document exhibited and dated 6<sup>th</sup> December 1991 for the amount of Swiss Francs 54,798.00.
- [7] The Plaintiff further alleged that in breach of the agreement between the parties the 1<sup>st</sup> Respondent had not registered the transfer of land despite repeated requests of the Appellant.

- [8] In a judgement given on 13<sup>th</sup> November 1995, the learned trial judge Amerasinghe having found that the 1<sup>st</sup> Respondent had transferred Parcel B 389 to the Appellant ordered that the Registrar of Lands register title B389 in the name of the Appellant on the 1<sup>st</sup> Respondent paying the registration fees and costs of the deed of transfer.
- [9] There is then a hiatus in court proceedings with the title of B389 remaining in the name of the 1<sup>st</sup> Respondent and with possession of the land and house in the Appellant.
- [10] On 27<sup>th</sup> October 2004, the 3<sup>rd</sup> Respondent acting as Attorney for the 1<sup>st</sup> Respondent wrote to the Appellant serving it notice to vacate the house on Title B389 and threatening eviction and repossession should it not abide by the notice.
- [11] The Appellant through its then attorney, Phillipe Boullé duly answered on 26<sup>th</sup> January 2005 informing the 3<sup>rd</sup> Respondent that it had no intention to vacate the property which it had purchased in June 1992. It unequivocally informed the 3<sup>rd</sup> Respondent that the sale was complete. It did so by both attaching a copy of the transfer signed by the 1<sup>st</sup> Respondent and the Appellant and by stating that the sale between them had been complete at all material times.
- [12] On 14<sup>th</sup> March 2005 the 1<sup>st</sup> Respondent transferred to the 3<sup>rd</sup> Respondent Title B 389 in consideration of SR300, 000, registration of the same effected on 31<sup>st</sup> March 2005.
- [13] On 21<sup>st</sup> October 2005, the Appellant filed a Plaint, amended in 2006, against the three Respondents in which it claimed that the transfer made on 14<sup>th</sup> March 2005 from the 1<sup>st</sup> Respondent to the 3<sup>rd</sup> Respondent was unlawful and a fraud, made to trick it in abandoning its right, that it had acquired title since June 2002 for value and in good faith, that the occupation of the property was continuous, uninterrupted, peaceful, public and unequivocal and that it has so acted in the capacity of owner.
- [14] It further claimed an overriding interest in the said title and prayed for a judgement and declarations that the sale from the 1<sup>st</sup> Respondent to the 3<sup>rd</sup> Respondent was null and void, that it was the owner of Title B389, that the Land Registrar register the title of B389 in the name of the Appellant and that the 2<sup>nd</sup> Respondent return the sum of SR32, 000 with interest from 24<sup>th</sup> June 1992 and costs.

[15] Attempts to have a hearing of this matter failed miserably for the best part of five years. The hearing took place in fits and starts for another three years with judgement finally delivered by Gaswaga J on 8<sup>th</sup> March 2013. From the start of the allied case in 1992 to the conclusion of this case in the Supreme Court in 2013 twenty one long years have elapsed. It is without doubt an appalling indictment of the justice system in Seychelles, one for which both the Bar and Bench must bow its head with shame and resolve not let happen again.

[16] In his judgment the learned trial judge Gaswaga stated that the matter was *res judicata* and an abuse of process and dismissed it. It is from this decision that the Appellant has now appealed on the grounds summarised as follows:

1. The findings of the trial judge that the matter is *res judicata* is erroneous.
2. The findings of the trial judge that the matter is an abuse of process is wrong.
3. The learned trial judge erred by failing to appreciate and find that the transfer of land parcel B389 by the 1<sup>st</sup> Respondent to the 3<sup>rd</sup> Respondent constituted a fraud on the rights of the Appellant giving rise to new causes of action for the Appellant to prosecute in respect of its ownership or title or right or entitlement to land parcel B389 or to enforce the judgement of the Supreme Court in CS 251/1995.

[17] The 1<sup>st</sup> and 3<sup>rd</sup> Respondents have jointly filed written submissions. The 2<sup>nd</sup> Respondent has filed no submission and has not put in an appearance. We assume that he is therefore not contesting this appeal.

[18] We shall now deal with the first two grounds. They relate to the finding by the learned judge that:

“the plaintiff is now asking the court ... to transfer and register the same land (B389) in the name of the plaintiff, which order had already been given to the plaintiff 10 years ago [and] ...would result in the same position which the plaintiff obtained in the earlier judgment.”

The learned judge also found that the plaintiff was “trying to have a second bite at the

cherry” and that “it had sat on the judgement and its rights...”

- [19] We respectfully disagree that CS 370/2005 is a replica of CS 251/1995 and hence *res judicata* and an *abuse of process*. We only need to briefly state that the trial judge has misinterpreted the judgement of this Court in *Gomme v Maurel* (2012) SLR 342. *Gomme* is authority that *res judicata* as expressed in Article 1351(1) of the Civil Code is a subset of *abuse of process* and that both are designed to “ensure that one is debarred from rehashing the same issue in multifarious forms.” *Res judicata* involves a reiteration of the same subject matter between the same parties in their same capacities. Hence a matter that has been litigated and judged cannot be relitigated.
- [20] CS 251/1995 was between the Appellant and the 1<sup>st</sup> Respondent and involved a judgment in which the 1<sup>st</sup> Respondent was ordered to pay the registration fees and costs of the transfer of parcel B389 and the Registrar of Land to effect the registration of the same in the name of the Appellant. CS 370/2005 is a whole different kettle of fish. It calls for a finding of fraud on the rights of the Appellant by the 1<sup>st</sup> and 3<sup>rd</sup> Respondents and a declaration that the transfer of Parcel B389 from the 1<sup>st</sup> Respondent to the 3<sup>rd</sup> Respondent is null and void.
- [21] We are therefore at a loss to see how that these could be equated with *res judicata* or an *abuse of process* by the trial judge. This appeal therefore succeeds on the first two grounds.
- [22] We now have to consider the third ground of appeal, a ground in our view that is most serious in the inference it makes not least for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, both lawyers and members of the Bar Association of Seychelles.
- [23] The 3<sup>rd</sup> Respondent has argued that the burden of proof is on the party who alleges *dol* (fraud) to prove it. He has relied on the case of *Michel v Standard Bank* (1983) SLR 198. He submitted that the Appellant had to prove that the 1<sup>st</sup> Respondent intended to deceive and deprive it of its right to Title B389.
- [24] Mr. Ally for the Appellant has submitted that this not a case of *dol* (fraud) under Article 1116 of the Civil Code but rather an *action paulienne* (paulian action) under Article 1167

of the Civil Code. The legal regimes for a finding of fraud and for a paulian action are different but before these may be examined the issue that must be solved concerns the Appellant's right in the property is. Does the Appellant have ownership of Parcel B389? The Appellant contends that it has and the Respondents claim it doesn't.

[25] Mr. Ally for the Appellant has proffered no less than three different ways in which the Appellant has acquired title over the property:

4. By deed of sale signed in June 1992.
5. By continuous, uninterrupted, peaceful and public ownership.
6. By having an overriding interest in the property.

[26] We need only consider the first proposition. In terms of the deed of sale, there is certainly a binding agreement between the Appellant and the 1<sup>st</sup> Respondent for a transfer of the property to the Appellant. Article 1583(1) of the Civil Code provides that:

“A sale is complete between the parties and the ownership passes as of right from the seller to the buyer as soon as the price has been agreed upon, even if the thing has not yet been delivered or the price paid.”

And Article 1603 stipulates that there is an obligation on the seller to deliver. Further Article 1604 in defining what delivery is provides that:

“[It] is the transfer of the thing sold to the control and possession of the buyer.”

[27] Article 1605 is also instructive on the issue as it provides that :

“The obligation to deliver immovable property on the part of the seller shall be performed when he hands over the keys, if it is a building, or when he passes the documents of title to the property to the other party. “

This certainly took place as the Appellant has occupied the house since the sale.

- [28] Conversely, it is the obligation of the buyer to pay the price agreed upon by the sale (Article 1650). The evidence on this issue is not seriously contested by either of the parties to this appeal. The buyer paid and the seller received the contract price as stipulated in the agreement dated June 1992. Any dispute as to the price of the property is raised almost ten years later in the prosecution of the second suit and which is the subject of this appeal where it is argued by the Respondents that one of the Appellant's directors, John Dudley, owed a debt to the 1<sup>st</sup> Respondent and allegedly told Mr. Juliette, the attorney for the Appellant not to go ahead with the registration of the transfer document. No evidence of such debt has been produced.
- [29] It must be noted that no one has sought to make a distinction between the Appellant and its minority shareholder John Dudley. But we do. Evidence was led as to his alcoholism and how in the days before his eventual demise he cadged a few rupees even from his then lawyer Mr. Juliette. That is all very well but it fails to explain why the transfer of the title from the 1<sup>st</sup> Respondent to the Appellant was not completed.
- [30] The fact remains nonetheless that a contract of sale and transfer of property between the Appellant and the 1st Respondent was concluded. It was never challenged and its effect is corroborated by another document, the letter by the 2<sup>nd</sup> Respondent to the Ministry of Finance which we have reproduced substantially above. There is also the evidence of the Land Registrar that the transfer document was lodged for registration but a decision as to the payment of stamp duty was being awaited. If there was a payment outstanding for the transfer of the property this is certainly not borne out by the evidence.
- [31] On the contrary, there is more evidence to support the Appellant's contention. There is the judgement of Amerasinghe J given in 1995 in which he orders the registration of title B389 in the name of the Appellant. He goes further; he orders the 1<sup>st</sup> Respondent to pay the registration fees. Mr. Lucas has submitted, quoting the trial judge, that it is a wonder why the sale was never registered. We do not need to wonder. The evidence is there for all to see. An order was made for the 1<sup>st</sup> Respondent to pay the registration fees. He has not done so to this day. In the circumstances it was never incumbent on the Appellant to register the sale. The onus was on the 2<sup>nd</sup> Respondent who had been paid the money for

such registration to do so and subsequently after the order of Amerasinghe J on the 1<sup>st</sup> Respondent himself to do so. They both have failed in this endeavour.

[32] It is submitted by the 3rd Respondent that the failure to complete registration under the Land Registration Act is fatal to the Appellant having title to the property. We disagree. Section 20 (a) of the Land Registration Act states that:

“the registration of a person as the proprietor of land with an absolute title shall vest in him the absolute ownership of that land, together with all rights, privileges and appurtenances belonging or appurtenant thereto;”

Section 46 of the Act also provides:

“(1) A proprietor may transfer his land, lease or charge with or without consideration, by an instrument in the prescribed form:

Provided that where a charge is transferred the instrument shall also be executed by the charger to signify that he agrees to the transfer.

(2) The transfer shall be completed by registration of the transferee as proprietor of land, lease or charge and filing the instrument.”

The above provisions if met would have given the Appellant absolute title, a right in rem in the property.

[33] Article 1583(1) of the Civil Code states:

“A sale is complete between the parties and the ownership passes as of right from the seller to the buyer as soon as the price has been agreed upon, even if the thing has not yet been delivered or the price paid.”

We have on various occasions explained the relationship between the Land Registration Act and the provisions of the Civil Code as concerns the sale of land. Both in terms of promises of sale (article 1589) and sales (article 1583) registration completes the sale between the buyer and third parties (*right in rem*).

- [34] In *Charlemagne Grandcourt and others vs Christopher Gill* SCA 7/2011 we stated that the breach of the statutory provisions in the transfer documents in sales of property does not vitiate the agreement between the parties. In *Hoareau v Gilleaux* (1982) SCAR 158, a case which concerned a promise of sale under Article 1589 of the Civil Code, the Court of Appeal held that the sale was complete between the parties to the agreement but would be complete as between the purchaser and third parties in terms of section 46 of the Land Registration Act after registration. Similarly, in terms of Article 1583, the sale was complete as concerns the Appellant and the 1<sup>st</sup> Respondent and the Appellant is in rightful occupation of the property.
- [35] The judgment of Amerasinghe J confirmed this position and an order was made for the registration of the transfer document in order to complete the sale between the Appellant and third parties. Contrary to the submissions made by the 3<sup>rd</sup> Respondent, that judgement is still operative and its effect not statute barred. The provisions of Article 2257 that prescription shall not run with regard to a claim which is subject to a condition until that condition is fulfilled applies to the present case. The condition to be fulfilled was the registration of the sale by the 1<sup>st</sup> Respondent.
- [36] The right of the Appellant in relation to the property subsists. The 1<sup>st</sup> Respondent was still under an obligation to register the transfer; instead he transferred and registered the property in the name of a third party, that of the 3<sup>rd</sup> Respondent. They now both seek protection of the court in asserting the rights of the 3<sup>rd</sup> Respondent by using the provisions of the Land Registration Act both as a sword against the Appellant and a shield for the subsequent purchase of the property by the 3<sup>rd</sup> Respondent.
- [37] The 3<sup>rd</sup> Respondent submitted that he made a search on the Land Register and there were no encumbrances registered against the said property and that suffices to satisfy him that the land was free for sale. He stated that he was therefore a bona fide purchaser for value without notice. We are flabbergasted by such a brazen assertion given both the documentary evidence in this case and the fact that the 3<sup>rd</sup> Respondent, an attorney-at-law and a cousin of the 1<sup>st</sup> Respondent had been informed about the transfer of title to the Appellant by his client and cousin.

[38] How could the assertion of the 3<sup>rd</sup> Respondent that he was a bona fide purchaser hold water when he had notice of the Appellant's title both in the form of the court judgment, the letter and a copy of the transfer? Notice to third parties in relation to title to land is not only provided by the encumbrance section of the Land Register but also in terms of specific notice given by the party to a transfer of title. A check of the Land Register is certainly necessary as it is indeed a title mirror but it does not mean that physical inspection or pre-contractual enquiries of the seller and buyer are not required.

[39] The Appellant has submitted that the documentary and oral evidence clearly indicate a fraud on the rights of the Appellant by the 1<sup>st</sup> and 3<sup>rd</sup> Respondents. In a paulian action (revocatory action) the creditor asks the court to revoke a fraudulent act. Article 1167 provides:

“A creditor may also, in his own name, take up proceedings relating to any transactions concluded by his debtor which constitute a fraud upon his rights.”

Paulian actions have been extended to property (see Civ 3<sup>e</sup> 6 oct. 2004, Bull. Civ. III, N°163, D. 2004, p. 3098). Although the Code itself remains silent as to the conditions for the paulian actions, jurisprudence has generally established that the creditor must prove that he has suffered a loss, that he has a “*créance certaine, liquide et exigible*” and that there is a fraud (see Terré, Simler, Lequette *Droit Civil: Les Obligations*, 10<sup>e</sup> edition, p1155 – 1170).

[40] The first two conditions have been easily satisfied in this case but the 3<sup>rd</sup> Respondent has submitted that there has been no fraud. The Appellant has submitted, relying on Terré, Simler, Lequette (supra) that the fraud must have occurred through the act of the third party who has benefitted from the fraud. We agree. Complicity between the debtor (1<sup>st</sup> Respondent) and the third party (the 3<sup>rd</sup> Respondent) in such cases is also sufficient. When there is evidence of fraud provided by the plaintiff, the burden shifts to the defendant to show that he was a purchaser in good faith and for value. (*Labonté and anor v Bason* SCA14/2005). The 3<sup>rd</sup> Respondent has not discharged this burden.

[41] In *Controller of Taxes v Lawrence* (1989) SLR 239, the Court annulled a sale of land at the instance of a creditor where the defendant had purportedly contracted with his cousin to sell land for SR 200,000 when it was worth much more and clearly for the purpose of

putting it out of the reach of the Controller of Taxes to whom he owed income tax in excess of SR2 million. Similarly, in the present case we have no difficulty in finding that this is a blatant fraud by the 1<sup>st</sup> and 3<sup>rd</sup> Respondents.

[42] As we have stated, the 3<sup>rd</sup> Respondent has not been able to show that he was either a purchaser in good faith nor for value. The 1<sup>st</sup> Respondent was not only his cousin but also his client. The 3<sup>rd</sup> Respondent had knowledge and notice of the transfer of B329 from the 1<sup>st</sup> Respondent to the Appellant. The transfer between himself and his cousin was for a consideration of SR 300,000, SR 150, 000 less than what the Appellant had paid for it thirteen years previously.

[43] It is clear from the documentary evidence (see letter of 2<sup>nd</sup> Respondent to the Ministry of Finance at paragraph 4 supra) and the evidence of the Land Registrar that at the time the transfer document was signed on 24<sup>th</sup> June 1992, that it was the intention of the Appellant that the 2<sup>nd</sup> Respondent pay the stamp duty due for registration of the land transfer. A cheque for SR35, 000 that was given to him for this purpose. It may well have been the intention of the 1<sup>st</sup> or 2<sup>nd</sup> Respondent to benefit from a waiver of the stamp duty fee on the transfer between the Appellant and the 1<sup>st</sup> Respondent given the fact that stamp duty had been paid on a previous promise of sale of the property. That however did not obviate their duty to pay the stamp duty on the transfer document as had been agreed and subsequently ordered by the Court.

[44] This appeal is therefore allowed and we make the following declarations and orders:

1. The sale and transfer of Title B389 from the 1<sup>st</sup> Respondent to the 3<sup>rd</sup> Respondent is null and void.
2. The Registrar of Land is to register Title B389 in the name of Zena Entertainment (Pty) Ltd notwithstanding the non-payment of stamp duty.
3. The 2<sup>nd</sup> Respondent is ordered to pay the Appellant the sum of SR32,000 with interest from 24<sup>th</sup> June 1992.

4. The Respondents are to jointly pay the costs of this suit.

M. Twomey (J.A)

**I concur:.** .....

S. Domah (J.A).

**I concur:.** .....

A. Fernando (J.A).

.Signed, dated and delivered at Palais de Justice, Ile du Port on 17 December 2015