IN THE SEYCHELLES COURT OF APPEAL

[Coram: F. MacGregor (PCA) , S. Domah (J.A) , M. Twomey (J.A) **]**

Civil Appeal SCA 14/2013

(Appeal from Supreme Court Decision CS 111/2003)

Opportunity International General Trading LLC — Appellant

Versus

Krishnamart & Company (Pty) Ltd — Respondent

Heard: 11 December 2015

Counsel: Mr. Basil Hoareau for Appellant

Mr. S. Rajasundaram for Respondent

Delivered: 17 December 2015

JUDGMENT

S. Domah (J.A)

[1] The record of this civil case of May 2003 spans over three volumes of documents and proceedings and involved several counsel and a number of judges over the past 12 years. Yet the issue is so simple. And the facts so minimal: the legal effect of an acknowledgment of debt arising out of goods sold and delivered.

[2] Opportunity International General Trading LLC ("OIGT") is an exporter of goods based in Dubai. Krishnamart & Company (Pty) Ltd ("KMC") is an importer, wholesaler and retailer based in Seychelles. OIGT had been sending goods to KMC since 1994 and short payment for goods exported had reached an unacceptable limit. Amicable requests made

for payment had only met with promises, excuses and apologies. On legal advice obtained, OIGT obtained from the then Director of KMC, Nelson Aubrey Pillay, an acknowledgment of debt dated 25th July 2002 under the company letter-head for the consolidated sum of USD1,600,373.36 cents for and on behalf of the company. KMC undertook to pay by March 2003. The undertaking was not honoured.

[3] On 2 May 2003, OIGT brought a case against KMC for the amount stated in the acknowledgment of debt together with interest at the rate of 12% p.a. to be calculated from the end of each period of 30 days commencing on 25th July 2002 on the sum due and owing.

[4] KMC, in its plea, admitted both the consideration of sale and the indebtedness to OIGT. It added, however, that the acknowledgment of debt had been given as a comfort and was not intended to be of legal consequence. The averment that it was a comfort does not make sense and takes nothing from the legal status of the acknowledgment of debt. But that is not the issue for the moment.

[5] There was a happy outcome to the case. It did not proceed to trial. OIGT and KMC came to mutual agreement before Court with an agreed payment schedule, the details of which need not bother us. Suffice it to say that the legal acknowledgement of debt was given judicial force and became executory by the following court processes. A consent judgment was drawn up between the parties. It was duly signed by them and filed in court. The Court, thereafter, made that consensual agreement a formal judgment and ordered the KMC to abide by the terms whereby KMC had to pay OIGT USD1,964,992.30 in 4 instalments as follows:

a. USD 470,334.38 on or before 30th March 2004;
b. USD 512,084.61 on or before 30th June 2004;
c. USD 498,167.87 on or before 30th August 2004; and
d. USD 484,405.77 on or before October 2004.

[6] Needless to say, KMC's second nature of reneging on its obligations "revint aux gallops." Even for the initial payment, KMC prevaricated. OIGT was forced to issue execution process. At one stage, KMC made payment of a meagre sum of R500,000 in the hands of OIGT's counsel. This sum was for a reason which defeats common sense but made some strange sense to some of the lawyers and a couple of the Judges who ordered it to be returned to KMC. Thirteen years down the line, despite an acknowledgment of debt, followed by a consent judgment and an order by the court, the judgment still stays unsatisfied. This a classic case of abuse of court process by the KMC which would not have reached this stage had it not been for the indulgence of counsel and lack of vigilance of the court. This is not the first case where we make such comments in the recent past: see **Jason Arrisol v Irene Jeanny SCA 2 of 2009.**

[7] Courts should be wary that their processes are not abused by parties. And all counsel have a duty to ensure that they are not led by the nose by their clients. Their professional credibility is at stake. Unless courts assume full control of their processes and ensure border control, it will start telling on the integrity of the legal and judicial system. Foreign traders and investors avoid jurisdictions to the same extent as clients avoid counsel who give in to the temptation of litigation for litigation sake at their expense.

[8] Be that as it may, in this case, a critical look at the court process shows how badly it was hi-jacked when PK Pillay, the other Director of KMC, entered the scene. The consent judgment had been given by one Director of KMC, Nelson Aubrey Pillay, the son of PK Pillay who was at the time ill disposed. When PK Pillay woke up from his sick bed, he started a collateral attack on the judgment by consent. Such collateral attacks are simply not permissible and vexatious litigants are shown the door: see the Privy Council case of **D. Hurnam v K. Bholah and S. Bholah [2010] UKPC 12** where Lord Roger delivering judgment cited Lord Halsbury in the case of **Reichel v Magrath (1889) 14 App. Cas 665 at 668**:

> *"I think it would be a scandal to the administration of justice if, the same question having been disposed of by one case were to be permitted by changing the form of the proceedings to set up the same case again."*

[9] To PK Pillay a consent judgment, albeit based on acknowledgment of debt, is an acknowledgment of defeat. That is not his style of doing business. Nelson Pillay was a fraudster in collusion with the judgment creditor. To launch his collateral attack, he ousted Nelson Pillay from the KMC and sued both of the signatories of the judgment by consent on the ground of fraud and collusion. It would be fair to say that he would not have obtained such an inordinate extent of litigation mileage was due to lack of professional due diligence by counsel and court. The stage was set for the long and vicious process of senseless litigation, characterised by a plethora of irregularities. We shall enumerate just some of them in due course. But now for the grounds of appeal.

[10] There are 5 of them as follows:

1. *The learned Trial Judge failed to appreciate or take into consideration the Respondent's judicial admission of its indebtedness to the Appellant under the deed of acknowledgment of debt as per the Respondent's initial Statement of Defence (which admission had not been revoked in law) in his appreciation or consideration of the evidence in the suit.*
2. *The learned Trial Judge erred in law in failing to admit the deed of acknowledgment of debt as an exhibit, in that the Learned Trail Judge confused the issue of admissibility and weight.*
3. *The learned Trial Judge erred in law in calling Nelson Pillay as a witness, without the consent of both Appellant and Respondent, and consequently the evidence of Nelson Pillay ought not to have been considered.*
4. *The learned Trial Judge erred in failing to take into consideration the judicial admission of the acknowledgment of debt by the Respondent in favour of the Appellant contained in the initial Statement of Defence in that that amendment of the Respondent's Statement of Defence or the evidence or the application to amend the Statement of Defence does not contain and disclose any averment, or prove that the said judicial*

admission was a mistake of fact and thus did not amount to a revocation of the judicial admission.

5. *The learned Trial Judge erred in law in allowing the amendment to the Respondent's Statement of Defence to the effect that the Respondents denied the execution of the deed of acknowledgment of debt (when in its initial Statement of Defence, it had accepted the existence of the said deed of acknowledgment of debt and the Respondent's indebtedness to the Appellant thereunder) when there was no proof of any mistake of fact thereto in view that such judicial admission could not be revoked unless, it was proven to the trial court by the Respondent that, the judicial admission resulted from a mistake of fact in terms of Article 1356 of the Civil Code.*

[11] Learned counsel for the KMC resists the appeal and, unlike learned counsel for the OIGT, has submitted no authorities for any of his contentions.

[12] Learned counsel for the OIGT has submitted on the 1st, the 4th and the 5th grounds together. That makes sense.

GROUNDS 1, 4 AND 5

[13] The appellant raises issue with the judgment of the learned judge under these grounds as a matter of law in that once there was a judicial admission on the part of the defence, that judicial admission may not be revoked unless the defence came to demonstrate that the judicial admission was made by a mistake of fact; and no such error of fact had been adumbrated or canvassed. Accordingly, to the extent that the learned trial judge allowed the amendment without ascertaining its compliance with section146 of the Seychelles Code of Civil Procedure and article 1356 of the Seychelles Civil Code, he was in error both by allowing the amendment and by acting on the evidence thereby admitted on behalf of the respondent.

[14] These grounds must succeed. A judicial admission or *aveu judiciaire* is a statement made in court process whereby a person recognises the truth of an averment of fact made against him which is taken to be binding upon him and is of such a nature as to produce legal consequences:

> *«une déclaration par laquelle une personne reconnaît pour vrai et comme devant être tenu pour avéré à son égard un fait de nature à produire contre elle des conséquences juridiques* (Aubry et Rau, t. XII par P. Esmein, §751).

[15] An *aveu judiciaire* is a method of proof which is governed by rules autonomous to itself. Its overrides all other methods of proof in civil law , even where article 1341 would be applicable. In the words of the authorities:

> *« L'aveu est un mode de preuve autonome qui obéit à des règles propres sans relation ni interférence avec les autres modes de preuve. Cela explique que l'aveu est admissible en toute matière même au-dessus de 375 euros. (ibid).»*

[16] Three consequences flow from such a judicial admission. It is good against the person making it. It is irrevocable and it is indivisible.

> *« Trois effets sont reconnus à l'aveu judiciaire par la loi: il fait pleine foi contre son auteur, il est irrévocable et indivisible. (ibid).»*

[17] It may be revoked for error except that such revocation is subject to the strict condition that the aveu must have been due to an error of fact :

> *« L'aveu, judiciaire ou extrajudiciaire, peut être révoqué pour cause d'erreur. L'erreur substantielle vicie tout acte, qu'il s'agisse d'un contrat ou d'un acte unilatéral. (ibid)»*

[18] It may be revoked for fraud or violence, on the application of the general rule relating to free will under the law of obligations :

> *« Bien que non prévu expressément par la loi, l'aveu peut être rétracté s'il a été obtenu suite à un dol ou suite à la violence. Il s'agit de l'application du droit commun des nullités pour vice de consentements.(ibid). »*

[19] Thus, to the extent that it is consensuality which forms the basis of a judicial admission, it is a patent contradiction in terms to say that a consent judgment before

court was given without consent of the parties. We note in this case that the new trial was applied for and granted on a judgment by consent. The application was as irregular as the order for new trial was ill-motivated.

[20] There arises a need to adhere to the proper procedure where a person having made a judicial admission intends to revoke it. He should make a motion to the Court for the purposes of the revocation on the specified ground under the law and usher in evidence in support. A revocation may not be made as a matter of course as if it was a mere amendment under the Rules of Court relating to amendment but under the special regime proper to an *aveu judiciaire*.

[21] Learned counsel for the appellant referred to the Mauritian case of **Beeharry v Dilmohamed 1987 MR 118**. In that landlord and tenant case, the tenant had admitted that the landlord required the dwelling for her own use but later sought to amend the plea by denying that averment. The learned Magistrate had allowed the amendment under the general powers of amendment under Rule 48 of the District and Intermediate Court Rules which gives wide powers of amendment to the Court. The Court then heard evidence on that amended plea – as in this case - and eventually found that the landlord did not require the premises for her own use. The Appellate Court held: (a) that the amendment to an *aveu judiciaire* under the general powers of amendment instead of under the special law applicable to such an issue under article 1356 of the Code Civil should not have been granted; (b) that as no error of fact had been proved or even attempted to be proved; and (c) the Court had erred I n relying on the evidence admitted by a breach of the rules relating to an *aveu judiciaire*. It, accordingly, allowed the appeal and reversed the order of eviction.

[22] The submission of learned counsel for the Respondent is, therefore unsound that the amendment stands good because it had been effected without any objection from the Appellant. The reason is that an amendment which has the effect of revocation of an *aveu judiciaire.*is a matter of law and there should be due compliance with the specific regime relating thereto. In this case, it cannot be gainsaid that no error of fact had been canvassed, let alone averred, before the court. None of the imperatives of the law relating to a judicial admission had been complied with.

[23] There is merit under Grounds 1, 4 and 5. They must succeed.

GROUND 2

[24] Under Ground 2, the decision of the learned judge is challenged on the ground that the learned judge failed to admit the deed of acknowledgment of debt as an exhibit in that he confused the issue of admissibility and weight.

[25] We take it as a misreading of the record by both counsel who have made submissions on this issue. In actual fact, the learned trial Judge did admit the acknowledgment of debt as an exhibit: see Exhibit Item 1 in Volume 1. Our decision on this matter is that it was not in order for the Court to take into account evidence admitted not by the parties to the case but by the court itself of its own bat in a civil dispute, even it had criminal overtones according to the judge.

This ground, accordingly, is simply ignored on account of the misapprehension of fact by both counsel. As regards the singular conclusion singularly reached by the learned judge on whether Nelson Pillay who was questioned by Court on the matter had signed it or not, we shall deal with it below.

GROUND 3

[26] Ground 3 raises an issue of fundamental importance. The learned trial judge, *proprio motu*, in a civil case calls a citizen for him to come to depose before him. This is the contention of learned counsel for the Appellant under this ground. Learned counsel for the respondent has responded to this argument by submitting that under section 156 of the Seychelles Code of Civil Procedure (Cap 213), it is open to a court to require anyone present in court to give evidence and/or to produce a document.

[27] The above issue arises from the fact that the acknowledgment of debt was allegedly signed by Nelson Pillay. Now Nelson Pillay was not called as a witness either by the Appellant to the case nor by the Respondent. He deposed following a decision taken by

the learned Judge himself. As to the reasons and circumstances, this is what we read before the Court questions the witness:

> *"Q. I have called you here as a witness of the court and we want you to answer few questions. Your name kept coming up during the hearing of this case, yet the plaintiff did not call you and when I looked at the list of witnesses filed by the defendant you name was not there. In the interest of justice, I want you to answer few questions. You were one of the directors.*
>
> *A. Yes."*
>
> ...
>
> ...

[28] There followed proceedings which comprise over 27 pages of typescript of questions from the court followed by questions from both counsel which the witness gave. One is unable to make sense of whether the questions were in examination in chief, in cross examination or in re-examination. They were just questions as would be asked in an inquisitorial procedure by an inquisitorial judge of the continental system of law but very foreign to the procedure obtaining in an adversarial system such as ours. This was simply unheard of. The learned judge had no conceivable authority known to law to adopt the course of action he did and require Nelson Pillay to answer his questions for the purpose of making or unmaking the case for either party to the proceedings.

[29] The questioning of witnesses through the three stages of examination-in-chief, cross-examination and re-examination is central to our adversarial system of justice. The role of the Judge in a hearing is to hear and observe and not participate. While he may seek some clarity on some of the answers given, excessive questioning as took place in this matter interferes with the work of counsel: see **R V Gunning (1994) 98 Cr App Rep 303n, CA.**

[30] This is what he stated in his judgment:

> *"It is important to note that Mr Nelson Pillay was never called as a witness by either of the parties yet each party and the witnesses kept*

mentioning his name and referring to him as the main actor in the whole transaction. Being at the centre of this case, also with the allegation by the Defendant that Nelson Pillay colluded with the Plaintiff' company's representatives to extort money from the Defendant company in the matter now before court and others reported at the Central Police Station and therefore prejudicing the interests of the defendant company, Nelson Pillay was, in the interest of justice, called as a witness by the court to clarify on the issues under litigation. Counsel for each party had opportunity to cross examine him."

[31] The learned Judge simply mistook his role as a judge and assumed the role of counsel. He was under no obligation to watch the interests of the defendant company under the guise of the interest of justice. The company had its own counsel present in court to do so. By taking such a measure, the learned judge left the unmistakeable perception in the eyes of a hypothetical observer, all the more so of OIGT, that OIGT was not having a fair hearing before an impartial and independent court for the determination of its civil rights as guaranteed by Article 19(7) of the Constitution.

[32] There were other irregularities in the case, most of them serious. But this one was very serious. True it is that a civil court is entitled to seek clarification on a matter but, as a rule, only after the witness has deposed in examination-in-chief, cross-examination and re-examination. Exceptionally, he may seek one clarification or two in between. But where he takes control of the case, calls a citizen in a civil case and starts questioning him extensively, he stops being a judge on the Bench but becomes Counsel at the Bar. And that cannot be. Learned counsel submitted an authority for this elementary distinction between a civil case and a criminal case. In civil proceedings, a judge has no right to call witnesses against the will of the parties: see **Re Enoch and Zaretzky, Bock & Co's Arbitration [1910] 1 KB 327** where even an arbitrator was held to be in the same position.

Ground 3 has merit. It succeeds.

[33] In the circumstances we allow the appeal. However, it is befitting that we make some comments on certain other overtures in the case.

[34] The application for new trial should not have been allowed in the first place. Application for new trials are made by parties to the case. Krishnamart & Company (Pty) Ltd as represented by its Director P.K. Pillay was not *stricto sensu* party to the case. The party to the case was Krishnamart & Company (Pty) Ltd as represented by Nelson Pillay. As per sections 195 of the Seychelles Code of Civil Procedure, an application for new trial may be granted by either party to the suit.

[35] The other reason for which the application for new trial should have been refused in law is that there had been no trial at all for a new trial to be ordered. There had been a consent judgment on an acknowledgment of debt followed by an *aveu judiciaire* which was irrevocable and indivisible.

[36] If PK Pillay had an issue with his son Nelson Pillay for the reason that the latter had defrauded the company during his directorship, it was an internal matter of the company: see **Vista Do Mar Ltd v France Bennette SCA 7 of 2001.** It could not have an incidence on the contract between the company and a third party, namely OIGT. If collusion was averred between Nelson Pillay and the representative of OIGT, PK Pillay should have brought an action against the representative of OIGT, Xavier Mani. But that did not give him the locus to challenge the judgment by consent.

[37] In this regard, section 34 (2) of the Companies Act provides for the powers of the directors of companies to act on company's behalf makes it very clear:

> *"Each director of a proprietary company and each managing director of any other company shall have power to do acts mentioned in subsection (1) without the concurrence of any other director."*

What subsection (1) covers is "*to do all acts on its behalf which are necessary for and incidental to the promotion and carrying on of its business as stated in the memorandum,*

or the achievement of the purposes there stated, and all persons dealing with the company, whether shareholders or not, may act accordingly."

[38] Since most of the Grounds raised by the Appellant have succeeded, we allow the appeal. We are left with the type of order that should be given in the light of the above decision to quash.

[39] In the exercise of our powers under Rule 31(5) of the Seychelles Court of Appeal Rules 2005 we order as follows: We reverse the judgment of the learned judge. We hold that the respondent, for all intents and purposes, stands bound by the consent judgment dated 6 day of January 2004 and shall abide by the terms thereof.

[40] We order the amount stated therein, i.e. USD1,964,992.30 to be paid, with interests at the rate of 12% starting from the 1st day of January 2004. We could have ordered the payments to be made forthwith on account of the chequered history of the case. However, we would administer justice with mercy. We order KMC had to pay to OIGT USD1,964,992.30 in 4 instalments as follows:

a. USD 470,334.38 on or before 30th March 2016;
b. USD 512,084.61 on or before 30th June 2016;
c. USD 498,167.87 on or before 30th August 2016; and
d. USD 484,405.77 on or before October 2016.

[41] The above order is made with the stated interests and costs.

S. Domah (J.A)

I concur:. **…….** F. MacGregor (PCA)

I concur:. **…….** M. Twomey (J.A)

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