

# IN THE SEYCHELLES COURT OF APPEAL

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

## **Civil Appeal SCA 9/2014**

**(Appeal from Supreme Court Decision CC 16/2012)**

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Tree Sword (Pty ) Ltd

Appellant

Versus

Daniele Puciani

Respondent

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Heard: 03 August 2016

Counsel: Basil Hoareau for the Appellant

Lucie Pool for the Respondent

Delivered: 12 August 2016

### **JUDGMENT**

M. Twomey (J.A)

[1] The Appellant is aggrieved by a decision of the then Chief Justice Egonda-Ntende delivered on 21<sup>st</sup> February 2014 in which he found that the Appellant had been unjustly enriched in the sum of Euro 54,000 to the detriment of the Respondent.

[2] The case arose out of an agreement between three Italian investors, one of whom was the Respondent, to buy two parcels of land at Bougainville, Mahé. As Seychellois law precluded them, without government sanction, from purchasing immovable property, they placed their trust and expectations in a nominee company, the Appellant, to do the necessary transactions.

- [3] It was the Respondent's case in the court below that in breach of its undertakings the Appellant (nominee) company not only received his investment money but purchased the properties only to sell it off to a third party and to the detriment of the Respondent.
- [4] The learned Chief Justice relying on the provision of Article 1381-1 of the Civil Code of Seychelles found a case for unjust enrichment was made out and ordered the Appellant to reimburse the Respondent the cost of his investment with interest and cost.
- [5] From this decision the Appellant has appealed on three grounds namely:
1. The learned Chief Justice erred in law in not holding that the Respondent had failed to plead all material particulars in his Complaint, in respect of the claim for unjust enrichment;
  2. The learned Chief Justice erred in law and on the evidence in holding that the Respondent had proved on a balance of probabilities, the claim for unjust enrichment.
  3. The cause of action based on unjust enrichment is prescribed in terms of Article 2271 of the Civil Code
- [6] We propose to deal with the last ground of appeal first relating to prescription first.
- [7] Mr. Hoareau for the Appellant has submitted that the right of action by the Respondent was triggered in April 2007 and exhausted in April 2012 by virtue of the five year limitation rule contained in Article 2271. Since the present action was only filed in June 2012, the Respondent was out of time, albeit that prescription was raised for the first time on appeal.
- [8] Ms. Pool for the Respondent has conceded that prescription started running in 2007 but submits that it was interrupted when the Respondent applied for a restriction to be placed on the properties in August 2009. She relies for this proposition on the case of *Becker v Hackle* (1992) SLR 13.

- [9] In that case, prescription was interrupted by a letter amounting to an admission of a debt by the defendant. The court held that since this was a case of extinctive prescription, Article 2271 would not apply given the provisions of article 2248 which provide for interruption of prescription where there is “an acknowledgment by a debtor or possessor of the right of the person against whom the prescription was running.”
- [10] Mr. Hoareau for the Appellant has submitted, rightly in our view, that this is not the case in the present appeal. All that has happened in the instant case is that the Respondent upon learning of an intended transfer of the property he had wanted to purchase, and for which he had deposited monies, registered a restriction against its sale at the Land Registry. In his submission this does not satisfy the provisions of article 2248 to interrupt prescription. We agree with this submission.
- [11] However, we accept Ms. Pool’s submission that the right of action in this case did not arise on the payment of the sums of money in April and May 2007 and hence prescription was not triggered at that point. Rather it was only when the purpose of the investment was frustrated, that is, when the Respondent became aware in 2009 that the Appellant was attempting to alienate the properties in which the Respondent had invested in 2007 and entered a restriction on the properties that prescription was triggered.
- [12] The appeal on the prescription of the action is therefore not sustainable and is dismissed.
- [13] In regard to Ground 1 of the appeal, Counsel for the Appellant has submitted that the material facts as submitted in the Plaint do not disclose a cause of action based on unjust enrichment but rather one of contract. In his submission, if we understand him correctly, the Plaint has to disclose all the material facts relating to the five conditions necessary to prove unjust enrichment, that is, an enrichment, a corresponding impoverishment, a connection between the two, the lack of an alternative remedy in contract, quasi contract, delict or quasi delict and the absence of lawful cause.
- [14] Insofar as what should be contained in a Plaint section 71 of the Seychelles Code of Civil Procedure provides:

**Particulars to be contained in plaint**

71. *The plaint must contain the following particulars:*

- (a) the name of the court in which the suit is brought;*
- (b) the name, description and place of residence of the plaintiff;*
- (c) the name, description and place of residence of the defendant, so far as they can be ascertained;*
- (d) a plain and concise statement of the circumstances constituting the cause of action and where and when it arose and of the material facts which are necessary to sustain the action;*
- (e) a demand of the relief which the plaintiff claims;*
- (f) if the plaintiff has allowed a set off or has relinquished a portion of his claim, the amount so allowed or relinquished.*

[15] The Seychelles Code of Civil Procedure provides no other rules in this regard and does not expone on what should be contained in the plain and concise statement of the facts as required in section 71 (d) supra. In the circumstances we have consulted the applicable Supreme Court Rules of England (White Book ) in this regard.

[16] Rule 13 of Order 18 of the Supreme Court Rules of England applicable at the time of Seychelles' independence in 1976 provide that the every pleading must contain necessary particulars of any claim. In explaining the function of the rule the following note is made:

*The function of the particulars is to carry into operation the overriding principle that the litigation between the parties, and particularly the trial, should be conducted fairly, openly and without surprises and incidentally to reduce costs... This function has been stated in various ways as follows:*

*(a) to inform the other side of the nature of the case they have to meet as distinguished from the mode in which the case is to be proved (per Lindley L. J. in Duke v Wisden (1897)77 L.T. 67, 68;... Aga Khan v Times Publishing Co. 91924) 1 KB 675, 679)*

*(b) to prevent the other side from being taken by surprise at the trial (per cotton LJ in Spedding v Fitzpatrick (1888) 38 Ch. d. 410...)*

(c) to enable the other side to know what evidence they ought to be prepared with and to prepare for trial per Cotton LJ. *ibid.*)... (See Supreme Court Practice (Sweet and Maxwell 1991)18/12/12, 299).

- [17] These authorities are supported in Seychelles. In *Gallante v Hoareau* (1988) SLR 122, G. D de Silva J stated:

*The function of pleadings is to give fair notice of the case which has to be met and to define the issues upon which the court will have to adjudicate in order to determine the matters in dispute between the parties.*

- [18] Having examined the pleadings, we are of the view that the submissions of Mr. Hoareau in this respect cannot be supported. The averments in the pleadings are in our view set out with sufficient particularity that Euro 54,000 was paid out by the Respondent to the Appellant for the purchase of properties and that the said monies were used by the Respondent to purchase the properties. And that the properties were then sold on to a third party and that therefore the Plaintiff has been enriched to the detriment of the Defendant and is bound to refund the money.

- [19] Insofar as ground 2 of the appeal is concerned Mr. Hoareau has submitted that the Respondent's claim for unjust enrichment is unsupported by evidence. In his expounding of this ground he has however raised a different ground of appeal, that is, that there is a duplicity of cause in this case, namely that since the basis of the Respondent's claim is one of contract, the law forbids that an alternative cause of action is pleaded, namely that of unjust enrichment.

- [20] Derived from French jurisprudence (see Julien Patureau c. Boudier Cass req. 15 juin 1892 (D.P. 92.1. 596; Soc. Lutetia c. Dambrin Civ. cass., 28 févr. 1939., (D.P. 940. 1. 5); Ville de Bagnères-de-Bigorre c. Brianhaut Civ. cass., 2 mars 1915 (D.P. 1920. 1. 102). See Henri Capitant, Alex Weill Francois and Francois Terré, *Les grands arrêts de la jurisprudence civile* (7th edn, Dalloz 1976) 546. 310), Article 1381-1 of the Civil Code of Seychelles, on the action of *de in rem verso* provides as follows:

*If a person suffers some detriment without lawful cause and another is correspondingly enriched without lawful cause, the former shall be able to recover what is due to him to the extent of the enrichment of the latter. Provided that this action for unjust enrichment shall only be admissible if the person suffering the detriment cannot avail himself of another action in contract, or quasi-contract, delict or quasi-delict; provided also that detriment has not been caused by the fault of the person suffering it. (Our emphasis)*

[21] It is clear therefore that an action for unjust enrichment is a subsidiary action. If a claim can be made under contract or delict, a claim under unjust enrichment cannot be entertained. Even when there is a *cumul de responsabilités* the plaintiff has to choose the type of action to bring (see Article 1370 (2) of the Civil Code in relation to actions that can be founded on both contract and delict). Further, the court itself is not permitted to find a case for the plaintiff based on unjust enrichment when the plaintiff had chosen to bring an action under a different head (see *Charlie v Françoise* SCA No 12/1994 (unreported))

[22] In examining the pleadings and the proceedings, we are not however convinced that there has been duplicitous actions in this case. The Respondent in his albeit inelegant and infelicitous pleadings states:

*10. The 1<sup>st</sup> Defendant is bound to refund the sum of Euro 54,000 to the Plaintiff before the 1<sup>st</sup> Defendant transfers and registers the land.*

*11. Alternatively, the Plaintiff avers that the 1<sup>st</sup> and 2<sup>nd</sup> Defendant have been unjustly enriched to his detriment. (Emphasis ours)*

*Wherefore the Plaintiff prays this Honourable Court to be pleased to*

*a) order the 1<sup>st</sup> Defendant to refund the sum of Euro 54,000 ...*

*b) alternatively order the 2<sup>nd</sup> Defendant to pay the proceeds of sale of T2395 and T1752  
to the Plaintiff.*

*c) alternatively declare that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have been unjustly enriched and order both defendants to refund the sum or Euro 54,000...*

[23] Despite the use of the word “alternatively”, it is clear that the only cause of action pleaded is that of unjust enrichment. The evidence adduced is also not based on contract but rather on the fact that monies were transferred to a nominated account of the Appellant on the understanding that it would be invested in the purchase of properties. Although the trial judge did consider the fact that there could not have been a case brought for breach of contract for the reason that the nominee agreement could not have been proved, it does not take away from the fact that the Respondent chose to bring his case under unjust enrichment.

[24] The action for unjust enrichment was proved by evidence adduced by the Respondent which reunited the five conditions necessary as outlined above. There is overwhelming evidence that the money was transferred by two cheques in the nominated account of the Appellant and that therefore there was a corresponding enrichment and detriment in respect of the Appellant and the Respondent and a causal link between the two. There was no justification for such enrichment on the part of the Appellant. Such absence of cause is defined as one where :

*Il n'existe aucun mécanisme juridique, aucun titre juridique - légal, conventionnel, judiciaire - qui puisse justifier, le flux des valeurs du patrimoine de l'appauvrit celui de l'enrichi. (Terré, Simler Lequette, Droit civil: Les obligations (10<sup>e</sup> édition, Dalloz 2009) p1062.)*

[25] We are persuaded that this is indeed the case. Ground 3 therefore also fails.

[26] For these reasons, the appeal is dismissed in its entirety and the decision of the learned trial judge maintained.

[27] We therefore order the Appellant to pay the Respondent the sum of Euro 54,000 with interest at the legal rate for the filing of this suit together with costs.

[28] We are concerned by a fact that arose in this case, namely that a Seychellois notary and Attorney, Serge Rouillon, not only set up the Appellant company with his wife Lisa Rouillon as the majority shareholder but also provided a nominated account for the deposit of the Respondent's money. Further, he acted as Counsel for the Appellant in the case below. We are therefore referring this matter to the Office of the Chief Justice to consider whether conflicts of interest and ethical and professional rules were breached in this respect.

M. Twomey (J.A)

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

F. MacGregor (PCA)

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

S. Domah (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 12 August 2016