

**IN THE SEYCHELLES COURT OF APPEAL**

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

**Civil Appeal SCA37/2013**

**(Appeal from Supreme Court Decision CS 246/2008)**

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Barry Mathiot

Appellant

Versu  
s

Bradline Rose

Respondent

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Heard: 13 April 2016

Counsel: Mr. Basil Hoareau for Appellant

Mr. John Renaud for Respondent

Delivered: 22 April 2016

**JUDGMENT**

F. MacGregor (PCA)

[1] The Respondent in this case approached the Supreme Court claiming that the Appellant had been unjustly enriched at her expense. She described herself as common law wife of the Respondent, having lived together for a continuous period of 24 years. Within that period, they had acquired a piece of land upon which they had constructed a house, their home.

[2] Her plaint was filed on the 5<sup>th</sup> September, 2008 and the Appellant filed his defence on 19<sup>th</sup> October, 2009. He denied that the Appellant was his wife, and averred that he solely owned the property in issue. He went on to generally deny every statement made by the Respondent in the plaint.

- [3] At the hearing, the Respondent gave evidence that she had lived with the Appellant since 1984. They had started off without a house of their own. In 1990, they had applied, and were granted licence to develop a Government property. She took loans in 1990 and 1991 to help build the house. In 1998, the land, now with a house was transferred by the Government to the Appellant, in his sole name.
- [4] The Appellant had shifted to work in Praslin around 1998/9, and would come to Mahe occasionally, and spend nights in the house. The Appellant always lived in the house. Their relationship deteriorated and in 2008, after various unsuccessful attempts to get her share in the house, the Respondent moved to the Supreme Court for relief that the Appellant pay her the sum of SRs 350,000 being her considered share in the house. One day in 2009, the Respondent went out to spend a night at her friend's place. When she returned, the Appellant had changed the locks to their house and thus the Respondent was rendered homeless. She now lives at the home for the elderly.
- [5] In a twist of events, on 27<sup>th</sup> January, 2012, while the proceedings were still pending before the Supreme Court, the Appellant transferred the property to one Zung Yian Zu, for a consideration of SRs 750,000. The Appellant, after filing his defence did not testify in Court and did not call any witness to testify on his behalf.
- [6] On 4<sup>th</sup> October, 2013, the Supreme Court found that the Respondent indeed suffered detriment without lawful cause and the Appellant was correspondingly enriched without lawful cause. It determined that the Respondent was entitled to 30% of the market value of the property. It considered the market value to be not less than SRs 750,000 and ordered the Appellant to pay the Respondent SRs 225,000 with interest and costs.
- [7] Aggrieved, the Appellant appealed the finding of the Supreme Court, on four grounds. The grounds of Appeal are;
- i The learned trial judge erred in law, in holding that the law in respect of "unjust enrichment" is that; "it is not the actual contributions that were*

*made towards the acquisition of the assets that forms the basis of what needs to be adjusted, but the value of the assets in issue”.*

- ii The learned trial judge erred in law in failing to apply the principle of ‘unjust enrichment” and instead applied and relied on the principles and factors, relevant to the adjustment of matrimonial property, in divorce proceedings.*
- iii The learned trial judge erred in law and on the evidence, in failing to hold that the contribution of the Respondent in the property was only in the sum of SRs 25,888.*
- iv The learned trial judge erred in law and on the evidence in holding that Exhibit P10 was evidence that the market value of the property was SRs 750,000.*

[8] In his argument on ground 1, the Appellant’s counsel submitted that it is the actual contribution that must be adjusted but not the value of the assets. He referred us to the case of ***Edmond v/s Bristol [1982] S.R.L 353***, where it was held that the Plaintiff was entitled to recover on such contributions to the extent of which the Defendant had been unjustly enriched. He submitted that the value of the assets is irrelevant in a case of unjust enrichment. The Respondent on the other hand submitted that the trial Judge was right in taking into account the value of the assets.

[9] Ground 1 of the appeal will be handled alongside ground 3. The Appellant contends that the contribution of the Appellant in the property was SRs 25,880 and seeks the order of this Court to pay the Respondent as much. We consider the amount of SRs 25,880 to refer to the two loans, being SRs.7880 and SRs.18,000 taken by the Respondent in 1990 and 1991 respectively.

[10] This dispute is largely on how the quantum for unjust enrichment should be calculated. We are faced with a situation where the Respondent invested her resources in a piece of land and for 24 years and did not consider her investment to be at risk.

- [11] The definition of land according to the Land Registration Act Chapter 107, is “land” *includes land covered with water, all things growing on land **and buildings and other things permanently affixed to land** and also an undivided share in land*” The property in issue was only transferred to the Appellant in 1998, long after the house had been constructed and the parties were already living in it. The land that was transferred by the Government to the Appellant fell under the description of the land as described by the Act. The Appellant therefore was registered as the owner of land whose value included input of the Respondent, which he does not deny.
- [12] We consider this to be an action based on the advantage the Appellant obtained, to the disadvantage of the Respondent, in relation to the property V6529.
- [13] Article 1381-1 of the Civil Code provides that:  
*“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....” [emphasis added].*
- [14] Does the Court award her the exact amount she gave, the enhanced value that grew from her or peg her disadvantage on the advantage that the Appellant has obtained at her expense? The Court must consider the disadvantage suffered by the Respondent, contrasted to the corresponding advantage obtained by the Appellant. Article 1381-1 supra provides for a recovery “to the extent of the enrichment of the party enriched.” 34 years have elapsed since 1982 when *Edmond v Bristol* [supra] was decided. The world has undergone major transformations since, including the Seychelles society. The mores of that time, rightly or wrongly, are not the ones of today. Even the learned counsel for the Appellant conceded that *Edmond v Bristol* needs to be revisited.
- [15] In the Namibian case of *Paschke v Frans [(SA 30/2012) [2015] NASC 9 (30 April 2015)]*, Kate O’Regan AJA, writing a unanimous judgment, had an opportunity to

compare the different views of various scholars on the Dutch-Roman Law on unjust enrichment,<sup>1</sup> especially the time of determination of quantum, as adopted and developed by various countries including South Africa. We agree with her conclusion that; *“In my view, the appropriate date for the determination of the quantum of damages is when the stage of litis contestation is reached.... it seems to me that the approach is both practical and principled.”* She further goes on to say *“the shifting quantum of the claim arises because the amount of unjustifiable enrichment recoverable by a plaintiff at any time depends in large part on the extent of enrichment of the defendant. Accordingly, if the defendant is no longer enriched, no claim will lie. Unlike in the law of delict, **the focus is not on the plaintiff’s loss. It is, in the first place, on the extent of the defendant’s enrichment.**”*

[16] The following extracts from Terré, Sincler and Lequette, D’aloz, Précis, Droit Civil, les obligations 10<sup>th</sup> Edition, para.1074 and 1074-1 are worth reproducing for guidance:

*“Lorsque l’obligation de restitution est reconnue dans son principe, comment calculer les sommes que l’enrichi doit restituer a l’appauvri?”*

*La restitution est limitée par une double mesure. D’une part, elle ne peut pas dépasser le montant de l’enrichissement effectif, c’est-à-dire de la plus-value procurée au patrimoine du défendeur, même si l’appauvrissement est plus fort, car l’action de in rem verso ne doit pas appauvrir le défendeur. D’autre part, elle ne peut pas dépasser l’appauvrissement du demandeur, la valeur dont son patrimoine s’est*

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<sup>1</sup> See S Eiselen and G Pienaar Unjustified Enrichment, Prof J C Sonnekus on *Unjustified Enrichment in South African Law and Roman law of obligations* as described by Prof Reinhard Zimmermann in; *The Law of Obligations* at 896 and 899

*trouvé privé, même si l'enrichissement est plus élevé. L'intérêt étant la mesure de l'action, l'appauvri ne saurait réclamer davantage que l'appauvrissement qu'il a subi. L'indemnité sera donc la plus faible de ces deux sommes."*

[17] Reference is made here to a Rappr. en matière de récompense dans les régimes communautaires, l'art. 1469, al. 1 C. civ.

[18] The authors further make a distinction between the affairs in a common law relationship and those in business:

*"L'enrichissement sans cause se distingue sur ce point de la gestion d'affaires. Le gérant a droit au remboursement de ces dépenses utiles, même si le profit subsistant leur est, en définitive, inférieur (supra, no 1041). Il se distingue également de la responsabilité civile délictuelle qui indemnise en principe la victime de la totalité de son dommage."*

[19] They apply a cut-off date for the evaluation of the accrued assets: it is at the date of the plaint. We read at para. 1074-1 the following:

*"1074-1 Date d'appréciation: À quelle date faut-il se placer pour apprécier l'enrichissement et l'appauvrissement? On a hésité entre le jour de l'appauvrissement et celui de l'enrichissement, celui de la demande en justice et celui du jugement. Ces solutions sont propres à conduire à des résultats différents."*

*Supposons qu'une personne ait réalisé des travaux sur le terrain d'autrui pour une dépense de 1 500, la plus-value étant à l'époque de 1 000. Dix ans plus tard, la plus-value est de 2,000, et il en coûterait désormais 3 000 pour réaliser ces*

*travaux. A supposer qu'une demande soit formée sur le fondement de l'enrichissement sans cause, le montant de l'indemnité variera considérablement selon la date retenue.*

*L'appauvrissement s'évalue, en principe, à la date où la dépense a été réalisé.*

[20] Reference is made here to Civ. 1re, 15 févr. 1973, Defrénois 1975.235 et J. Flour, Pot-Pourri autour d'un arrêt, Defrénois 1975.145 ; Civ. 3e, 18 mai 1982, Bull. Civ. III, no, p. 86.

[21] How do the French Courts mitigate the severity of the result where the contributions have been made in the past? By moving the date of the evaluation. We read as follows:

*“La jurisprudence l'atténue en reportant la date d'évaluation de l'appauvrissement au jour de la demande en justice, lorsque l'appauvri était dans « l'impossibilité morale » d'agir autrement.:*

[22] The authors refer here to an interesting case where the payment is calculated not as at the time the services were rendered but at the time the case was filed in court: *see Civ. 1er, JCP 1983.II.19992, note Terre, DEfrenois 1983.474, note Champenois.*

[23] Thus, there is no fault that can be ascribed to a claimant if by moral obligation or otherwise, she does not act at the time the services were rendered or the contributions made:

*“Il n'a alors commis aucune negligence en n'agissant pas plus tôt.”*

[24] The Respondent filed her claim in Court in year 2008. The Appellant filed his statement of defence a year later and ignored to come to Court to tender evidence that the sums claimed were beyond his unjust enrichment. In between the

proceedings, in 2012, he disposed of the property at a price quoted in the Deed of Transfer, executed by himself and tendered to the Registrar of Lands for Registration. The price quoted therein cannot be taken to be far from the value of the property as at 2008 when the claim was filed. Other than the money paid by the Respondent for the construction of the house, there was no evidence brought to court of any corresponding money, paid by the Appellant or anyone else for the construction of the house. And we cannot demean the value of SRs 25,000 in the years 1990-1991. We consider the court to have been lenient to reduce the claim of adjustment sought by the Respondent.

[25] We therefore find no merit in grounds 1 and 3 of the appeal.

[26] On Ground 2, the Appellants submitted that in his judgment, it is clear that the learned trial judge has applied and relied on division of property, in divorce proceedings. He submitted that the statement by the learned trial judge that he has been “guided” by such cases is proof that these cases very much influenced his judgment. The Respondent on the other hand submitted that the trial Judge was only guided and not influenced by matrimonial property proceedings.

[27] It is apparent from the pleadings in court that the parties lived together. The Appellant claims they lived together for 4 years, yet the Respondent claimed they had lived together for 24 years. Be it as it may, they lived together, in a concubinage arrangement. The underlying relationship of the parties was the concubinage. No need to stress the point that such arrangements can no longer be ignored in our society. The legislature is however yet to catch up with the obtaining reality and we hope in its time, it will enact laws to cater for situations of concubines and their partners. We are however not persuaded that matrimonial law influenced the trial Judge.

[28] This ground has no merit as well and shall fail also.

[29] On ground 4 of the appeal, the Appellant submitted before us that the learned trial Judge relied on the document of transfer by which the Appellant had sold parcel



V6527 to a third party, on the 19<sup>th</sup> of January 2012 for the consideration price of SRs 750,000 as proof that the value of the property was SR750,000. He submitted that the market value of the property could only have been established by an expert witness. Further that as a matter of fact it is uncontroverted that the Respondent did not contribute to the acquisition of parcel V6527 but only towards the construction of the house situated thereon. The Respondent on the other side submitted that the selling price indicated the increased value of the property and also its market value.

[30] We have already indicated the definition of land as provided by the Act. We further wish to repeat that in an action of unjust enrichment, the plaintiff can only be successful if they can show that the defendant was enriched, and he was so enriched to the disadvantage of the plaintiff, and that there was no just cause to such enrichment and disadvantage to the plaintiff. As we have said in the preceding paragraphs, the value to be contrasted with shall be the value at the time the claim is instituted in Court.

[31] The fluctuation of prices in the country within 4 years is small. We would consider that the purchase price quoted in the Deed of Transfer signed by the Appellant and registered at the Lands Registry was likely to be, in the circumstances, a fast-riddance underhand sale at a giveaway price of SRs 750,000. However, there is no cross-appeal for us to determine this and, if found true, to increase the award. This ground also fails.

[32] We further find it prudent to mention that for quite some time the cause of concubines in the country has been a cause of concern for the courts. As the Chief Justice rightly observed in a recent paper,  
*“Legal remedies are not provided in statute directly for unmarried parties... The remedies are as clear as mud - uncertain, unclear and unfair.” (Right to equal protection of the law or equality before the law).*

[33] Our hope is that in the new revised Civil Code, there will be a provision for equity in the management of assets that accrue when parties live together in concubinage relationships.

[34] We find no merit in any of the grounds of the appeal, and the submissions of the Appellant. We consequently dismiss the appeal with costs and interest to the Respondent.

F. MacGregor (PCA)

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

S. Domah (J.A)

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

M. Twomey (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 22 April 2016