

IN THE SEYCHELLES COURT OF APPEAL

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

Civil Appeal SCA 07/2014

(Appeal from Supreme Court Decision CS 315/2010)

Thomas Johnathan Searles

Appellant

Versu
s

Winsel Dominica Pothin

Respondent

Heard: 10 April 2017

Counsel: Mr. Frank Ally for the Appellant

Mr. Charles Lucas for the Respondent

Delivered: 21 April 2017

JUDGMENT

J. Msoffe (J.A)

[1] In the amended plaint filed in the Supreme Court on 30th September 2011 the Appellant brought an action against the Respondent seeking a return or restitution of money and properties he had given to the Respondent. Of particular interest to this case is paragraph 17 of the Amended Plaint which reads thus:-

17. Further, and in the alternative, the Plaintiff avers that the Defendant has been unjustly enriched in the sum of SR 7,718,500 and he has been unjustly impoverished in a like sum by the actions of the Defendant and that the Defendant is bound to reimburse him this sum of money.

[2] Then, under item (g) of the prayers he averred:-

(g) In the alternative to the above an order that the Defendant pays the Plaintiff the sum of SR 7,718,500.

- [3] It will be observed at once that under item (g) above and paragraph 17 of the amended plaint, the claim for unjust enrichment was only pleaded in the alternative. Yet, in his Judgment dated 31st January 2014, as per paragraphs 1, 13 and 22 thereof, the trial Judge treated the case as if it was solely a claim for unjust enrichment. With respect, this was an error because as per the above averment and prayer, the claim was not solely based on unjust enrichment. A look at the other paragraphs in the amended plaint will show that essentially the Appellant herein was claiming a return or restitution of money and properties he had given to the Respondent. Anyhow, we can only speculate that perhaps all this happened because no issues were framed by the court and agreed upon by the parties at the commencement of hearing. If issues had been framed the court would have been in a better position to appreciate the case before it and thereby focus itself on the crucial issues at stake in the case.
- [4] Be it as it may, a look at the evidence in its totality will show that the bottom line in the parties' minds or thinking at the trial was focused on whether or not there was unjust enrichment as claimed by the plaintiff (the Appellant herein). With that view in mind, we propose to dispose of the appeal on that major basis of whether or not the Respondent was unjustly enriched in the circumstances of this case.
- [5] It was common ground at the trial that the parties met each other in 1993 and since 1995 they had a relationship which lasted for a few years before it broke down. After a couple of years they reconciled and renewed the relationship in 2004. The relationship led to the birth of two children, Jake Searles and Bijoux Searles, a boy and a girl, respectively.
- [6] Essentially, and in a nutshell, the Appellant's case was that during the first part of the relationship he was still married and he was involved in divorce proceedings in Australia. Given this fact coupled with the other fact that he had a son from that marriage, in order to protect the Respondent, he bought parcel T477 and placed the bare ownership in her name so as to safeguard her interests. Since he loved and trusted her he also gave her a

total sum of SR3,000,000. This money was given at different intervals and it was to be used as an investment in an apartment for the parties' children.

- [7] Yet again, according to the Appellant, in a spirit of love and trust he bought three vehicles which he had registered in the name of the Respondent as well as two other parcels of land. He did so with the purpose of protecting not only the Respondent but in order that the Appellant's ex-wife and son would have no claim to these assets. Also he did so on the understanding that the assets would remain his property and that of his two children.
- [8] On the other hand, the Respondent admitted to have received properties and money from the Appellant. Her main contention was, and indeed still is, that the money and assets both movable and immovable which have been registered in her name were outright gifts which were given to her without any conditions. In addition, she was of the view that if the Appellant thought that the assets were for his benefit or that of the children he ought to have taken steps to protect his investments or even register them in the names of the children. The Respondent has all along been adamant that she will never return any of the money or assets to the Appellant.
- [9] From the available evidence it is therefore clear that the Appellant's claim at the trial was for the return of everything he gave to the Respondent while the latter's contention was that they were all outright gifts given to her without any conditions attached thereto. Therefore, the determination of this appeal hinges on whether or not the money given to the Respondent and properties given and transferred to her and registered in her name were gifts. In a similar vein, the crucial issue is whether or not the money and properties so given amounted to unjust enrichment.
- [10] It is instructive to observe from the outset that in this appeal the Appellant is essentially asking this Court to contradict or upset the findings of fact made by the Court below which had the opportunity of hearing the evidence at first hand. The law on this aspect is as stated in **Akbar v R** SCA 5/1998 where this Court held:-

An Appellate court does not rehear the case. It accepts findings of facts that are supported by the evidence believed by the trial court unless the trial judge's findings of credibility are perverse.

- [11] The law as stated in **Akbar** (supra) also finds support in the recent decision of the Judicial Committee of the Privy Council in **Beacon Insurance Co. Ltd v Maharaj Bookstore Ltd** [2015] 1 LRC 232, where when dealing with an appeal from Trinidad and Tobago on the principle regarding an appeal based on findings of fact it stated:-

The rule that an appeal court would only rarely even contemplate reversing a trial judge's findings of primary fact was traditionally and rightly explained as being because the trial judge had the benefit of assessing the witnesses and actually hearing and considering their evidence as it emerged, so that where a trial judge had reached a conclusion on the primary facts it was only in a rare case, such as where that conclusion was one which there was no evidence to support, or which was based on a misunderstanding of the evidence, or which no reasonable judge could have reached, that an appellate court would interfere with it. Further grounds for appellate caution were that the trial judge had sat through the entire case and his ultimate judgment reflected that total familiarity with the evidence; the insight gained by the trial judge who had lived with the case for days, weeks, or even months, could be far deeper than that of the appeal court whose view of the case was more limited and narrow, often being shaped and distorted by the various orders and rulings being challenged. An appellate court should also be slow to reverse a trial judge's evaluation of the facts because the specific findings of fact, even by the most meticulous judge, were inherently an incomplete statement of the impression made upon him by the primary evidence. His expressed findings were always surrounded by imprecision as to emphasis, relative weight, minor qualification and nuance of which time and language did not permit exact expression, but which could play an important part in judge's overall evaluation. Where a judge drew inferences from his findings of primary act

which had been dependent on his assessment of the credibility or reliability of witnesses who had given oral evidence, and of the weight to be attached to their evidence, an appellate court might have to be similarly cautious in its approach to his findings of such secondary facts and his evaluation of the evidence as a whole.

[12] In this regard, with the decisions in **Akbar** and **Maharaj** in mind, the question that arises is this:- Is there any basis for this Court to upset or overturn the findings of fact by the trial Judge which essentially were that on the available evidence the claim for unjust enrichment was not proved by the Appellant on the balance of probabilities. As shall be shown hereunder, our short answer to this basic question is in a categorical negative.

[13] This Court is not here to retry the case based on a transcript. Its job is to consider the decision of the trial Judge and determine whether or not he has made an error of law. If he has made an error it will be our duty to say so; but reversing a trial Judge's findings of fact is a different matter altogether.

[14] In this jurisdiction a claim for unjust enrichment is brought under Article 1381-1 of the Civil Code of Seychelles which provides as follows:-

If a person suffers some detriment without lawful cause and another is correspondingly enriched without a 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.

[15] It can be discerned from the above Article that unjust enrichment arises where one person receives a benefit or value from another at the expense of the latter without any legal cause for such receipt or retention of the value or benefit by the former. Its aim is to balance the interests of individuals and provide restitution where necessary.

[16] The following statement by L. Smith, “Unjust Enrichment”, in A. Popovici and L. Smith, eds., *McGill Companion to Law*, online at <http://www.mcgill.ca/companion/list/unjust-enrichment> is a very good exposition on the subject of unjust enrichment, thus:-

The law of unjust enrichment is something of a lost child in every legal system. In a wide range of situations, the law requires that a defendant, who has been enriched at the expense of a plaintiff, make restitution to that plaintiff, either by returning the very substance of the enrichment, or, more often, by repaying its monetary value. But only if the enrichment is unjust, or unjustified: a gift, for example, is a justified enrichment. This generic description of the scope of the subject can hardly give an inkling of the range of situations in which it plays a role. Some examples include the payment of money by mistake, as when a debtor pays more than he actually owes; improvements to another person’s property, whether or not caused by a mistake regarding ownership; the payment of another’s debt; and the work done by a partner, perhaps over many years, in a cohabitational relationship.

[Emphasis added.]

[17] The American case of **Fowler v Taylor**, 554 P-2d 205, 209 (Utah 1976) also provides useful guidance on Gift Law to the effect that unjust enrichment occurs when a person has and retains money or benefits that in justice and equity belong to another, however, “*the fact that a person benefits another is not itself sufficient to require the other to make restitution.*” Money or benefits that have been “*officially or gratuitously furnished*” are not returnable. A person acts gratuitously when, at the time he conferred the benefit “*there was no expectation of a return benefit, compensation, or consideration.*”

[18] In Gift Law the donor’s intent is an important element that has to be taken into consideration in deciding the parties’ rights in a particular case. In other words, it is important to ascertain from the available evidence as to whether or not in giving the

gift the donor intended, or gave on condition, that it would be returned to him by the donee in future.

[19] Going back to Article 1381-1 (supra) it is pertinent to observe that the case of **Antonio Fostel v Madalena Ah-Tave and Another** SLR [1985] 113 which was cited by both parties in their respective submissions to the Supreme Court and also by the Respondent's Counsel in this appeal, lays out five conditions which must be satisfied if a claim for unjust enrichment is to succeed, namely:- (i) an enrichment; (ii) an impoverishment; (iii) a connection between the enrichment and impoverishment; (iv) an absence of lawful cause or justification; and, (v) an absence of other remedy which in French law is referred to as "caractère subsidiaire". In other words, the action is available only where there is no other cause of action in contract or other laws.

[20] Having stated the law governing appeals based on findings of fact and the law regarding unjust enrichment it is now opportune and instructive to address the grounds of appeal, *albeit* briefly.

[21] The first and third grounds of appeal allege essentially that the trial Judge failed to explain his reasoning as to why he came to the conclusion that the Respondent had not been unjustly enriched. In his Heads of Argument learned Counsel for the Appellant has tried to fault the trial Judge on this aspect and has alleged that the trial Judge did not review the case on the basis of cohabitation and unjust enrichment. In arguing this point learned Counsel has also stated that the trial Court could have invoked its equitable powers under sections 4 and 5 of the Courts Act read together with section 5(2) of the Civil Code of Seychelles and decide in favour of the Appellant.

[22] We will come back to the issue of equity later in the course of this Judgment. In the meantime, it will be fair to say that the complaint that the trial Judge did not explain himself in deciding against the Respondent has no merit. On the contrary, the trial Judge explained himself and assigned reasons for arriving at the conclusion that the Respondent was not unjustly enriched. His reasoning is borne out by his analysis of the parties' respective positions in the case as can be discerned from a reading of paragraphs 13, 14, 15, 16 and 17 of the Judgment and then at paragraph 21 thereof he

gave his reasons as to why he was deciding in favour of the Respondent. Admittedly, his reasoning is fairly brief but that would be far from saying that no reasons were given at all in ruling in favour of the Respondent.

[23] It is noted from the Heads of Argument filed by the Appellant's Counsel that ground 2 has been abandoned. We therefore propose not to say anything on this ground.

[24] The fourth ground alleges that the trial Judge erred in taking into account exhibit D1 and basing his decision on a past case to find that the Appellant had failed to prove his case. In arguing this ground it is evident from the Heads of Argument that the gravamen or thrust of the complaint lies under paragraph 36 of the said Heads which reads:-

[36] It is very clear that the Learned Trial Judge allowed the previous case which had never been heard to sway him in coming to a decision that the Appellant had gifted the Respondent with all the subject-matter of the later Plaint. This it is submitted the Learned Trial Judge was not empowered to do as he had not heard the evidence in the previous case and all he was empowered to do was take judicial notice of the case and the reason why it was withdrawn. Nothing more. The parties reconciled and evidently during their cohabitation one cannot be enriched at the detriment of another as both would be enjoying the properties, funds and vehicles. Thus to base a finding on past conduct which does away with a cause of action totally cannot be sustainable in law. It cannot be denied that when the Respondent walked away with everything placed in her name by the Appellant for her protection, that of her children and for the joint enjoyment of these assets by the parties then the Respondent would have been unjustly enriched and the Appellant correspondingly impoverished.

[25] Yet again, this complaint has no merit because the claims in the previous case were incorporated in the Appellant's claim against the Respondent. As said earlier, the

amended plaint was filed on 30th September 2011 presumably in order to answer some of the queries sought by learned Counsel for the Respondent in his “Request For Further And Better Particulars” (Exhibit D1) dated 3rd March 2011. So, once they were incorporated in the new claim the trial Judge was duty bound to adjudicate on all heads of claim based on the pleadings and the evidence before him. In that respect, there was nothing wrong for the Judge to take Exhibit D1 into account.

[26] At this juncture, it is pertinent to address other issues in the case some of which arose in the course of the hearing of this appeal.

[27] As already stated, learned Counsel for the Appellant has urged that this was a fit case for the trial court to invoke its equitable powers under sections 4 and 5 of the Courts Act. In arguing the point learned Counsel has cited excerpts from **Weill et Terre** to show the closeness between unjust enrichment and equity. In this respect, paragraph 4 of his Heads of Argument reads:-

[4] An action *de in rem verso* or unjust enrichment emanates from the exercise of the equitable powers of the court in France that has become a source of obligations under our law (quasi-contrats). According to *Weill et Terre (Droit Civil – Les Obligation – 4^{eme} edition)* quoting Marty et Raynaud “*Il’ s’agit d’une creation jurisprudentielle élaborée grâce à la généralisation de solutions légales particulières, et reposant sur le pouvoir du juge de combler les lacunes du droit.>>* In the famous l’arrêt de marchand d’engrais the French Courts affirmed “*que cette action dérivant du principe d’équité qui defend de s’enrichir au detriment d’autrui et n’ayant été réglementée par aucun texte de nos lois, son exercice n’est soumis à aucune condition déterminé.* Weill et Terre further quotes Aubry Rau 4^{eme} edition <<*que l’action de in rem verso fondée sur le principe d’équité qui défend de s’enrichir aux dépens d’autrui>>*

[28] Some of the excerpts in the above paragraph can loosely be translated as follows:-

According to Weill et Terre (Droit Civil – Les Obligation – 4^{eme} Edition) quoting Marty et Raynaud,

“Unjust enrichment is a creation of the courts and finds its source in jurisprudence whereby the judges have the power to fill up the gaps in the law when general propositions fail to do justice to particular facts of a case.

In the famous case of Marchand d’Engrais, the French Courts affirmed:

“that this action deriving from the principles of equity which prohibit anyone from enriching himself at the expense of others and which is not found in any text of the law is not subjected to any pre-condition.”

Weill et Terre further quotes Aubry et Rau, 4^{eme} Edi. “that the action de in rem verso based on the principle of equity prohibits anyone from enriching himself at the expense of others.”

- [29] With respect, while it is true that there may be a closeness between unjust enrichment and equity this was not a fit case for the Supreme Court to invoke equity. We say so for a couple of reasons.
- [30] To start with, the Appellant urges this Court to adopt the position that any gift given during the period of their cohabitation carries an implied condition that it was meant for the children’s security. We decline to do so. If we were to adopt his reasoning, every gift would be recoverable regardless of the size, cost, significance, or nature of the gift, and without regard to the surrounding circumstances under which the gift was given. Surely, in a relationship, a person such as the Appellant herein, would give some gifts during the period the parties have been cohabiting together that are intended as outright gifts.
- [31] The Appellant asserted that the properties given to the Respondent were on a condition that once the divorce proceedings between him and his wife were over, he would get back the properties. It has to be noted that a person asserting the delivery of a gift was made on some condition has the burden of establishing such condition as a requirement of

recovery. In other words, in the law of evidence the principle has always been that he who asserts must prove. The Appellant failed to do so. There is no evidence to support the allegation that the gifts were conditional.

[32] Whether or not a gift is conditional or absolute is a question of the donor's intent, to be determined from any express declaration by the donor at the time of the making of the gift or from the circumstances of the case. The Appellant's complaint failed to include any facts that could demonstrate, either expressly, by the circumstances, or by the nature of the gifts that his intent was to condition the gifts upon the determination of his divorce proceedings. First, the Appellant did not allege that he expressly conditioned the gifts when he gave them to the Respondent. Second, the alleged circumstances existing at the time the gifts were given did not imply that the gifts were conditional. The Appellant before the suit at hand had sued the Respondent for the return of his properties and later on withdrew the suit. With this in mind, he ought to have been forewarned and savvy when giving his properties to the Respondent if they were not intended to be outright gifts.

[33] Furthermore, the court proceedings do bring to light the fact that the ex-wife was given permission to pursue the case further in the 2003 case where she applied as intervener but she never pursued the intervention. This perhaps goes to show that the Appellant had no reason to be apprehensive and thus did not have to put all those other properties in the Respondent's name.

[34] Further, as decided in the American case of **Cooper v Smith**, 15 Ohio App. 3d 218, 2003-Ohio-6083 "*many gifts are made for reasons that sour with the passage of time. Unfortunately gift law does not allow a donor to recover/revoke an inter vivos gift simply because his or her reasons for giving it have "soured"*". The general principle is that a person who confers a benefit upon another manifesting that he does not expect compensation or restitution therefor, is not entitled to restitution merely because his expectation that an existing relationship will continue or that a future relationship will come into existence is not realized, unless the conferring of the benefit is conditioned thereon. In this case, the Appellant gave the money and other properties to the Respondent without attaching any conditions. While the law is that a gift lawfully given cannot be returned the Appellant is himself to blame for being so gratuitous. It is too late in the day for him to claim restitution in the name and spirit of equity.

- [35] While on the subject of equity, it may as well be worthwhile to point out here that the maxim has always been that “*He who comes to equity must come with clean hands*”. In this case, it cannot be safely said that the Appellant’s “hands” were all that “clean” if the evidence that he gave some of the properties to the Respondent in order to conceal them from the knowledge of his ex-wife, is anything to go by. A person with “clean hands” would not have engaged in the alleged concealment.
- [36] At the hearing of the appeal learned Counsel for the Appellant urged as an alternative ground that in this case an analogy could be drawn to Article 1096 of the Civil Code and accordingly prayed that the Court make an order for return of the properties or at least some of them. To this end, he cited a number of authorities i.e. **Payet v Larame** SLR [1987], **Michel Larame v Neva Payet** [1987] SCA 4, just to mention a few, to the effect that in a claim based on ‘en menage’ relationship an *action de in rem verso* is the correct cause of action.
- [37] It is a seductive analogy. But to equate a marriage relationship with a common law relationship would require the intervention of the legislature under the doctrine of Separation of Powers.
- [38] In conclusion, we wish to reiterate that it is very rare and in exceptional circumstances that an appellable court will disturb or interfere with findings of fact made by the trial court. In this case, there is no basis for this Court to reverse the findings of fact made by the trial Judge. An action under Article 1381-1 of the Civil Code does not lie in this case because the Appellant did not meet the conditions stipulated therein. The available evidence does not show that the Respondent was unjustly enriched. Under Gift Law gifts freely given with no conditions attached are not returnable. In giving the money and properties to the Respondent the Appellant did not attach any conditions. Further, applying the principle laid out in the case of **Taylor** (Supra) to the facts of this case, it is clear from the evidence on record that when the Appellant gave the money and properties to the Respondent “there was no expectation of a return benefit, compensation, or consideration.” He cannot, therefore, claim that they be returned to him. Contrary to what learned Counsel for the Appellant urged us to hold, this was not a fit and proper case for the Supreme Court to invoke its equitable powers under sections 4 and 5 of the Courts Act.

[39] In the result, and for the above reasons, we hereby dismiss the appeal with costs.

J. Msoffe (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 21 April 2017