

IN THE SEYCHELLES COURT OF APPEAL

[Coram: MacGregor (PCA), Robinson (JA), Tibatemwa-Ekirikubinza (JA)]

Civil Appeal SCA 21/2017 (Appeal from Supreme Court Decision CS No. 246/06)

Peter Lesperance

Appellant

Versu
s

Benny Bastienne

Respondent

Heard: 03 December 2019

Counsel: F. Elizabeth for Appellant
K. Domingue for Respondent

Delivered: 24 January 2020

JUDGMENT

F. Robinson (J.A) **Background facts**

1. The respondent (the plaintiff then) acts as the executor of the estate of Jaochim Roger Lesperance (the "*deceased*").
2. Evangeline Payet was the owner of a parcel of land at Anse Reunion, La Digue, transcribed in volume No 73, No 248 and registered in Register A 39 No 2125. At the time she became the owner of the parcel of land, it was unsurveyed and of an undetermined extent.

3. Evangeline Payet is the mother of Rossy Lesperance (the second defendant then). The second defendant is the only child and sole heir of Evangeline Payet. The second defendant is the mother of the deceased and the appellant (the first defendant then). The second defendant died during the course of this case.
4. The deceased is the father of the respondent and three other children. On the 4 December 1985, Evangeline Payet sold her parcel of land to the deceased for 20,000 rupees, exhibit P1. According to exhibit P1, *"Transcriptions - [...] a house about 16 metres by about 13 metres stands on the portion of land conveyed and which belongs to Mrs Rosie Lesperance born Payet which is not included in the present sale"*.
5. Evangeline Payet died in 1996. The second defendant was appointed as executrix of her estate and succession in March 2004. The deceased died in 1997, and the appellant was appointed executor of his estate the same year.
6. In 2003, per CS 112/2003, Rossy Lesperance, eventually acting as executrix of the estate of Evangeline Payet, brought a case against the deceased's estate, represented by the appellant, seeking annulment of the sale by Evangeline Payet to the deceased on the ground of lesion (the *"lesion action"*). In March 2004, the Supreme Court rescinded the sale of the parcel of land by Evangeline Payet to the deceased, subject to the return of 20,000 rupees consideration to the deceased's estate.
7. In the meantime, in 1997, the respondent and three siblings applied for a declaration that they were the children of the deceased per CS 175/97. A fourth sibling did not join in the application. The Supreme Court made the declaration in November 2001, per judgment by consent.
8. In July 2004, the respondent applied to be appointed executor of the deceased's estate. The Supreme Court appointed him and Noelline Sophola as joint executors. In December 2004, the respondent, acting as executor of the estate of the deceased, applied for a new trial of the lesion action, case number CS 112/03. The Supreme Court granted the

application in October 2006. The second defendant appealed against the decision, but the Court of Appeal of Seychelles upheld the new trial in August 2007. The new trial was not pursued. Instead, the respondent filed the present case, CS 246/06.

The plaintiff's / respondent's case

9. The plaintiff alleges that the first defendant, in breach of his duties as executor, failed to defend the lesion action, or colluded with the second defendant, to allow it to succeed, thereby deliberately ensuring that the estate of the deceased lost the parcel of land. In his plea the plaintiff alleges that the sale of the three parcels of land (LD 1783, LD 1784 and LD 1785) by the first defendant without reference to the plaintiff and his siblings and after the appointment of the plaintiff as a joint executor of the deceased's estate, supports the allegation of collusion between the first and second defendants and an overall desire to deal with the estate of the deceased quickly.

10. The prayers of the plaintiff are as follows —
 1. an order that the first defendant gives an inventory and renders an account of his duties as executor;
 2. a declaration that the judgment given in CS 112/2003 was obtained as a result of the first and second defendants acting fraudulently and in concert in order to deprive the plaintiff and the estate of the deceased of the property transcribed in volume No 73, No 248 and registered in Register A 39 No 2125;
 3. an order that the first and second defendants are jointly and severally liable to the plaintiff in the sum of 500,000 rupees as damages;
 4. an order that the estate of the deceased revert to the status quo prevailing prior to the judgment given in case number CS 112/2003;

5. an order that the first and second defendants pay the costs of this action;
6. any other order that the court may deem fit.

The first defendant's / appellant's and the second defendant's case

11. The first and second defendants deny the claims of the plaintiff. They deny collusion between themselves and allege that the lesion action was not defended because the basis of the action was true. The first and second defendants ask the Supreme Court to dismiss the action with costs.

Arbitration

12. The Supreme Court referred the action to arbitration under section 205 of the Seychelles Code of Civil Procedure. No terms of reference were indicated by the Supreme Court.
13. The plaintiff and the first and second defendants agreed that the arbitrator would determine whether or not the plaintiff should succeed in his action and whether or not his prayers, or any of them, should be granted, or whether or not the plaintiff's action should be dismissed.
14. The awards of the arbitrator were made in two stages: the Interim Award on the 27 July 2016, and the Final Award on the 16 January 2017 (collectively the "*Arbitration Awards*").
15. The awards made by the arbitrator (as contained in the Arbitration Awards) are the following —
 1. **the sale of the land of Evangeline Payet to the deceased was valid;**

2. **the sale of parcels LD 1783, LD 1784 and LD 1785 to third parties were valid.**
These were subdivisions of parcel LD 1869. The remainder of parcel LD 1869 was to be returned to the estate of the deceased, of which the plaintiff is the executor;
3. the second defendant having died during the course of this case, the **land** and reasonable curtilage around the house she occupied **is to be transferred to her estate** (as she had acquired a "*droit de superficie*" thereon);
4. the plaintiff was invited to seek his rights by litigation or negotiation with Alvis Waye Hive who has built his house astride parcels LD 1704 and LD 1705;
5. costs to be awarded by the Supreme Court when converting the Arbitration Awards into a judgment. Emphasis supplied

16. The arbitrator did not award any damages to the plaintiff.

Opposition to the Arbitration Awards by the plaintiff and the first defendant: section 206 of the Seychelles Code of Civil Procedure

17. The plaintiff and the first defendant oppose the Arbitration Awards under section 206¹ of the Seychelles Code of Civil Procedure.

18. The plaintiff claims that the arbitrator had left undetermined certain issues referred to him for arbitration and had determined issues not referred to him for arbitration namely —

1. the issue of damage;

¹ "*Objections to award*

206 – When the award of the arbitrators or umpire has been filed in court, the Registrar shall give notice to the parties. If no objection to the award be filed in the registry within 10 days from the receipt of such notice by either party, the court shall give judgment in accordance with the award."

2. the issue of bad faith;
 3. the rights of Alvis Waye Hive who was not a party to the case;
 4. the rights of the second defendant to a "*droit de superficie*".
- 19.** Moreover, the plaintiff claims that the audited accounts concerning his grandmother's estate (Evangeline Payet) are not satisfactory as he was not able to peruse them.
- 20.** The first defendant opposes the Arbitration Awards on the following grounds —
1. the evidence referred to in the Final Award was not made available to him;
 2. the "*award*" is factually incorrect in that LD 1868 and LD 1869 are subdivisions of LD 1785. Further, these subdivisions were carried out by the subsequent owner of LD 1785, namely Anna Tirant;
 3. the "*award*" does not take into consideration the judgment by consent in CS 175/97, dated the 27 March 2001;
 4. the decision by the arbitrator to order that the remainder of the surveyed portion of LD 1869 be transferred to the estate of Joachim Roger Lesperance is erroneous since it emanated from an invalid judgment by consent.
- 21.** The learned Chief Justice considered the objections, which stemmed from the proviso to section 207 of the Seychelles Code of Civil Procedure. The learned Chief Justice found that the objections of the first defendant were not supported by the evidence on record and in the reasoned decision of the arbitrator. As regards the opposition by the plaintiff, the learned Chief Justice found that it was properly made. The learned Chief Justice in

the exercise of her discretion to modify the obvious errors described in her judgment, proceeded to make the following orders —

"1. [...] that the Defendant pays the sum of SR50,000 as damages, which [she] believe[s] is a reasonable sum in the circumstances, to the Plaintiff for the heirs to the Estate. These are to be paid by the First Defendant to the Plaintiff in addition to the sums realised from the sale of Parcels LD 1783, LD1784 and LD1785 if he has not already done so.

2. [...] that all the land, namely LD188 and the unsurveyed portion of land remaining after the subdivisions resulting in Parcels LD1783, LD1784 and LD1785 (now LD1868 and LD1869) including the land on which the Second Defendant's house stands, be registered as the property of the Estate of Joachim Roger Lesperance.

3. [...] the First Defendant to pay the costs of these proceedings".
Emphasis supplied

Moreover, the learned Chief Justice affirmed the award in respect of the sales to third parties as contained in para 14.1² of the Final Award and entered it as part of her judgment.

The appeal

22. The appellant, dissatisfied with the judgment, has raised nine grounds of appeal —

"Ground 1

1. The Chief Justice erred in law when she substituted the award of the arbitrator with another and substantially different award instead of modifying the said award.

Ground 2

² "14. IN VIEW OF THE CONCLUSIONS IN MY INTERIM AWARD, AND THOSE HEREINABOVE, I MAKE THE FOLLOWING ADDITIONAL AWARDS: 1. The sales to third parties of parcels LD 1783, LD 1784 and LD 1785 (now LD 1868 and LD 1869) are affirmed [...]."

2. *The Chief Justice erred in law when she proceeded to interfere with the arbitration award on the basis of "obvious error" committed by the Arbitrator when there was none in law or in fact.*

Ground 3

3. *The Chief Justice erred in law when she equates a failure to discharge a duty as Executor to a delict in law.*

Ground 4

4. *The Chief Justice erred in law when she made a finding that the Appellant in the dereliction of his duties as Executor commits a fault for which damages are due.*

Ground 5

5. *The Chief Justice erred when she made a finding that the part of the Arbitrator's award which deals with the "droit de superficie" acquired by the 2nd Defendant was an obvious error and therefore must fall.*

Ground 6

6. *The Chief Justice erred when she overlooked the fact that the house of Rossy Lesperance was excluded from the sale of land from Evangeline Payet to Joachim Lesperance.*

Ground 7

7. *The Chief Justice erred when she ordered the Appellant to pay SCR 50,000 damages to the Respondent as there was no evidence before her to support such an award in law.*

Ground 8

8. *The Chief Justice exceeded her powers when she substituted the award of the Arbitrator instead of modifying the same and ordered all the land, including the land on which the 2nd Defendant's house stands, to be registered as the property of the estate of the late Joachim Roger Lesperance.*

Ground 9

9. *The Chief Justice erred in fact when she states that Evangeline had four children and one of her sons Joachim also died in 1977."*

23. The appellant is seeking the following reliefs from the Court of Appeal —

"1. [s]et aside the order of the Chief Justice and order a hearing proper of the case.

2. [a]llow the Appeal". verbatim

The law

24. The proviso to section 207³ of the Seychelles Code of Civil Procedure specifies that after hearing both parties, the court may modify an award in three instances —
1. if the award has left undetermined any of the matters referred to arbitration; or
 2. if the award has determined any matter not referred to arbitration; or
 3. if the award contains some obvious error.
25. In *Padayachy v Bedier Civ App 2/2001, (2000-2001) SCAR page 187*, the Court of Appeal opined that an *""obvious error""* [section 207] *would be an error on the face of the award [...]*".

Grounds 1, 2, 5, 6, 7 and 8 of the grounds of appeal

26. With respect to grounds 1, 2, 5, 6, 7 and 8, Counsel for the appellant submits fundamentally that the Arbitration Awards do not contain any obvious error, and that, therefore, the learned Chief Justice had substituted the Arbitration Awards with a new one. This submission relates to the first and second orders made by the learned Chief Justice in her judgment, referred to in para 21 hereof. In her judgment the learned Chief Justice considered the following issues —
1. the issue of damage;
 2. the rights of the second defendant to a *"droit de superficie"*;
 3. the rights of Alvis Wayne Hive, who was not a party to the case.

³*"An award shall not be objected to and shall not be set aside except on one of the following grounds —*

- (a) *corruption or misconduct of an arbitrator or umpire;*
- (b) *either party having been guilty of fraudulent concealment of any matter which ought to have been disclosed or of wilfully misleading or deceiving the arbitrator or umpire:*

Provided however that an award may be modified by the court after hearing both parties, if it has left undetermined any of the matters referred to arbitration or if it has determined any matter not referred to arbitration, or if the award contains some obvious error; or, in any such case, the court may send the award back to the arbitrator or umpire to be modified. Emphasis supplied

27. Counsel for the respondent submits that the learned Chief Justice did not substitute the Arbitration Awards, but instead modified them as she is empowered to do under section 207 of the Seychelles Code of Civil Procedure. In that regard she submits that the arbitrator did not have the mandate to determine whether or not the second defendant had obtained a "*droit de superficie*" on a portion of the land and whether or not Alvis Waye Hive has rights on the parcels LD 1704 and LD 1705. As regards the issue of damage, Counsel for the respondent submits that, having found that the actions of the appellant were not faultless, and that there were disregard for the rights of the respondent and his siblings in the manner in which the appellant acted, the arbitrator should have awarded damages against the appellant and second defendant. Thus, she submits that the learned Chief Justice was correct to award damages against the appellant under the proviso to section 207 of the Seychelles Code of Civil Procedure.

28. The Interim Award singled out the following three principal issues on which a decision was required —

"1. [i]s the plaintiff's case herein competent, or should the plaintiff have pursued the new trial of the lesion case?"

2. [d]id the First Defendant act properly in not opposing the case in lesion?"

3. [i]f not, what relief should the plaintiff obtain?"

29. In the light of the three issues on which a decision was required, which issues are essentially raised by the respondent's pleadings, we observe that no such questions as those answered by paras 10⁴ and 11⁵ of the Final Award were specifically submitted to the arbitrator for his decision. In view of the conclusions in his Interim Award, the arbitrator made the following additional awards (the Final Award) —

"3. The estate of the Second Defendant, Rossy Lesperance, is declared to own rights over that part of the unsurveyed portion of land on which the

⁴ (the rights of the second defendant to a "*droit de superficie*")

⁵ (the rights of Alvis Waye Hive, who was not a party to the case)

house of the Second Defendant stands. Such rights are to be determined by the parties. Being unable to make a clearer determination of these rights in the absence of more evidence, I recommend that the estate of the Second Defendant be granted a droit de superficie over the part of the land on which the house stands and reasonable curtilage enjoyed around".

4. I leave open the issue of the rights if any which Alvis Waye-Hive enjoys over parcels LD1704 and LD1705. In the absence of evidence, I am unable to ascertain whether Mr. Waye-Hive has rights on the parcels and, if he has, what these rights are. This matter, and the consequential matter of compensation, if any, due to the estate of Joachim Roger Lesperance arising from the determination of the possible rights of Mr Waye-Hive, will have to be settled between the owner of the land (the estate of the deceased, Joachim Roger Lesperance) and the owner of the constructions thereon (Mr Alvis Waye-Hive) either by negotiation or through further litigation".
Emphasis supplied

30. We turn to the recommendation of the arbitrator "**that the estate of the Second Defendant be granted a droit de superficie over the part of the land on which the house stands and reasonable curtilage enjoyed around".** (Emphasis supplied)
31. The learned Chief Justice was of the opinion that whether or not the second defendant had obtained a "*droit de superficie*" was not a matter the arbitrator could determine given that it was not part of the terms of reference before him. The learned Chief Justice also concluded that that part of the arbitrator's award was an obvious error and must also fall.
32. We hold the view that the conclusion as given by the learned Chief Justice is not erroneous for the reason that irrespective of whether or not we find that the determination as given amounts to an obvious error, the same is captured by the proviso to section 207 of the Seychelles Code of Civil Procedure, which allows for modification of an award if the award has determined any matter not referred to arbitration. It is plain that the learned

Chief Justice concluded that whether or not the second defendant had obtained a "*droit de superficie*" was not a matter the arbitrator could determine given that it was not part of the terms of reference before him.

33. Moreover, with respect to ground 6, the appellant contends that the learned Chief Justice erred when she ignored the fact that the house of Rossy Lesperance was excluded from the sale of land by Evangeline Payet to the deceased. We observe that the submission offered on behalf of the appellant in support of ground 6 is clearly at odds with the contention contained in ground 6. Counsel submits that the second order of the learned Chief Justice, referred to in para 21 hereof, is erroneous in law because the learned Chief Justice ignored the fact that the land on which the house of Rossy Lesperance stands was excluded from the original sale of the land by Evangeline Payet to the deceased. Regardless, we hold the view that the contention of the appellant is misconceived in the light of the second order of the learned Chief Justice, contained in para 21 hereof, which plainly did not overlook the fact that the house of the second defendant was excluded from the sale of land by Evangeline Payet to the deceased and our agreement with the conclusion of the learned Chief Justice that whether or not the second defendant had obtained a "*droit de superficie*" was not a matter the arbitrator could determine given that it was not part of the terms of reference before him.
34. We turn to the contention of the appellant contained in ground 8. It is fundamental that the sale of land by Evangeline Payet to the deceased was affirmed. The learned Chief Justice affirmed the award in respect of the sales to third parties as contained in 14.1 of the Final Award (see footnote 2 hereof) and entered it as a part of her judgment.
35. We observe that the second order of the learned Chief Justice, referred to in para 21 hereof, did not thoughtlessly concern "*all the land*" as contended by the written submissions offered on behalf of the appellant. The second order plainly provided for "***all the land, namely LD188 and the unsurveyed portion of land remaining after the subdivisions resulting in Parcels LD 1783, LD 1784 and LD 1785 (now LD 1868 and LD 1869) including the land on which the Second Defendant's house stands, be registered as the property of the estate of the deceased***". (Emphasis supplied).

36. We hold the view that the conclusion as given by the learned Chief Justice is not erroneous for the reason that the learned Chief Justice made the second order in the exercise of the power to modify the portion of the award under section 207 of the Seychelles Code of Civil Procedure. Thus, we conclude that the contention of the appellant contained in ground 8 is also misconceived.
37. As regards the rights of the estate in respect of Alvis Waye Hive to the land on which he has built (parcels LD 1704 and LD 1705), the learned Chief Justice found that: *"it is clear from the evidence adduced in the arbitration and from the findings of the Arbitrator that the sale of land from Evangeline Payet to Joachim Lesperance was valid. Therefore, that land remains part of his Estate (the deceased). Mr. Waye Hive was not joined to the proceedings and the Court cannot make any order in relation to him"*. We hold the view that irrespective of whether or not we find that the determination as given amounts to an obvious error, the same is captured by the proviso to section 207 of the Seychelles Code of Civil Procedure - if the award has determined any matter not referred to arbitration.
38. We turn to issue of damage. We note that the arbitrator did not find damages payable to the respondent by the appellant and the second defendant for any fault. The learned Chief Justice found that the arbitrator did consider the issue of damage, and that the payment of damages was warranted. The learned Chief Justice in her judgment explained —

*"[32] [...]. The Arbitrator in the Interim Award actually states that —
" [...] I am satisfied that on the evidence adduced the First Defendant failed to discharge his duty to the Estate of the Deceased [...]"
(Paragraph 53 Page 13).*

[33] Moreover, the Arbitrator also finds that in terms of his fiduciary duty under Article 1027 of the Civil Code the First Defendant did not:

"hold, manage and administer the Estate honestly, diligently and in a business-like manner as if he were the owner of the property..." (Paragraph 58 Page 14).

[34] He goes on to state:

"I am unable to find that the First Defendant acted properly as a family member in his actions relating to the land. Insofar as concerns his duties as the executor of the deceased, I have stated above that I consider his actions to have been at the very least in breach of his fiduciary duties owed to the Estate of the deceased." (Paragraph 64 Page 16)."

[35] The Arbitrator therefore finds that a delict is committed and further that the First Defendant breached his fiduciary duties. However, he then conflates two prayers of the Plaintiff into one: a declaration that the judgment in respect of lesion in CS 112/2003 was obtained as a result of fraud on the parts of the First and Second Defendants and an order that the First and Second Defendants are liable for loss to the Plaintiff and should pay damages. In so doing he finds that no damages are due as there was no bad faith on the part of the Defendants. This is clearly an obvious error as the prayers emanate from the Plaintiff which clearly outlines both the alleged fraud but also the First Defendant's breach of his fiduciary duties. Even if there is no fraud, the First Defendant in the dereliction of his duties as Executor and a family member commits a fault for which damages are due".

39. We hold the view that the conclusion as given by the learned Chief Justice is not erroneous for the reason that the learned Chief Justice made the second order, referred to in para 21 hereof, in the exercise of the power to modify an obvious error in the portion of the award under the proviso to section 207 of the Seychelles Code of Civil Procedure. We agree that the error is plain on the face of the award; it is apparent from nothing more than the four corners of the Arbitration Awards and the contents of the arbitration record. We note that the learned Chief Justice did not look to evidence beyond the face of the Arbitration Awards or the record. Thus, we reject the contention of the appellant contained in ground 7 of the grounds of appeal.

40. For the reasons given above, we reject the contentions of the appellant contained in grounds 1, 2, 5, 6, 7 and 8 of the grounds of appeal. Accordingly, grounds 1, 2, 5, 6, 7 and 8 of the grounds of appeal fail and are dismissed.

Grounds 3 and 4 of the grounds of appeal

41. As regards grounds 3 and 4 of the grounds of appeal, Counsel for the appellant contended essentially that the action is based on breach of duties as executor and fraud and not based on delict. In that regard he contended *inter alia* that the award of damages by the learned Chief Justice is *ultra petita*. We fail to understand the contention of Counsel for the appellant. Suffice it to say that an executor is responsible for his "*fautes*" or for his negligence.

42. Grounds 3 and 4 of the grounds of appeal fail and are dismissed accordingly.

Ground 9

43. In relation to ground 9, although the learned Chief Justice noted that one Joachim Roger Lesperance died in 1977, exhibit P2, an extract from the record in CS No. 207 of 1997, reveals that he died in 1997. The error is likely a simple typographical error, and has no bearing on the outcome of the case. Whether or not Evangeline Payet had one child or four is also not a material error that could have a bearing on the outcome of the case. In any event, the learned Chief Justice deferred to the family tree at page 19 of the Interim Award in her judgment.

44. Ground 9 of the grounds of appeal fails and is dismissed accordingly.

Decision

45. We, therefore, agree with and affirm the Chief Justice's orders.

46. The appeal fails in its entirety.

F. Robinson (J.A)

I concur:-

F. MacGregor (PCA)

I concur:-

L. Tibatemwa-Ekirikubinza (J.A)

Signed, dated and delivered at Ile du Port on 24 January 2020