

**IN THE COURT OF APPEAL OF SEYCHELLES**

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**Reportable**

[2020] SCCA ... 18 December 2020  
SCA 20/2018  
(Appeal from CS 89/2018)

In the matter between

**LAURENCE FRESLON**  
*(rep. by Miss Alexandra Benoiton)*

**Appellant**

and

**VISHRAM JADVA PATEL**  
*(rep. by Miss Vanessa Gill)*

**Respondent**

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**Neutral Citation:** Freslon v Patel (SCA 20/2018) [2020] SCCA 18 December 2020

**Before:** Robinson, Tibatemwa-Ekirikubinza, Dingake JJA

**Summary:** Contracts and obligations – The interpretation of contracts – Written Loan Agreement between the Respondent and the Appellant – Article 1156 of the Civil Code of Seychelles – Search for the common intention of the Appellant and the Respondent – Violates by wrong application of Article 1156 of the Civil Code of Seychelles the decision which, after having stated that the common intention of the parties should prevail over the literal meaning of the written words of the Loan Agreement, is restricted, for this purpose, to determining the sole intention of the Appellant without in any way indicating either the will or the acceptance of the Respondent – The effect of obligations towards third parties – Stipulation for the benefit of a third party under Articles 1165 and 1121 of the Civil Code of Seychelles having regard to Article 1156 of the Civil Code of Seychelles not made a live issue in the pleadings – The court is bound by the pleadings of the parties as the parties are themselves bound – If the appeal were to be entertained on the state of the pleadings, it would lead to a miscarriage of justice – Appeal allowed. With costs in favour of the Appellant before the Supreme Court and this Court.

**Heard:** 4 December 2020

**Delivered:** 18 December 2020

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**ORDER**

- (i) The appeal is allowed.
  - (ii) The orders of the learned Judge are set aside.
  - (iii) With costs in the Supreme Court and this Court.
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## JUDGMENT

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### **ROBINSON JA (TIBATEMWA-EKIRIKUBINZA, DINGAKE JJA concurring)**

[1] This is an appeal against a decision of a learned Judge of the Supreme Court who found that the Respondent, (the Plaintiff then), had made out his case on a balance of probabilities and entered judgment in the sum of SCR400,000 with costs against the Appellant, (the Defendant then).

#### **The Respondent's claim**

[2] The Respondent claimed that he had on the 27 September 2012, by a written agreement, loaned the sum of SCR400,000 to the Appellant, that the said sum of SCR400,000 was refundable by eight consecutive monthly repayments of SCR50,000 as from the 31 January 2013, and that despite several requests, the Appellant had failed to repay that sum.

#### **The essence of the Appellant's case**

[3] In her plea, the Appellant denied being indebted to the Respondent and also denied receipt of any notice from the Respondent to settle any outstanding debt.

#### **The evidence in brief**

[4] The Respondent, Mr Vishram Jadva Patel, testified that the Appellant ran a spa at the Eden Island Commercial House, where he went for treatments and was attended to by the Appellant. In the course of the Respondent's spa treatments, the Appellant would talk to him about her business-related problems. The Appellant asked him for a loan of SCR100,000 to import a full container load of spa products. The Respondent disbursed the sum of SCR100,000 on the 15 March 2012, by way of a cheque from his bank account with Barclays Bank, drawn in favour of "ASD Pty Ltd". The Appellant told him

at the time of issuing the cheque that she was the owner of "ASD Pty Ltd".

[5] Six months later, the Appellant asked him for another loan in the amount of SCR300,000 to pay off her rent arrears. The Respondent agreed to loan the Appellant that sum. Hence, they entered into a written loan agreement on the 27 September 2012, exhibit P1, (hereinafter referred to as the "Loan Agreement").

[6] I find it appropriate to record the interaction below —

*"Q. Did you at any point formalise the loans that you were paying to the Defendant?"*

*A. When I issued the second cheque at that time I felt that now the amount is large so there should be some agreement and the agreement was made in the personal name because I did not know the company.*

*COURT TO WITNESS:*

*Q. You just mentioned you drew 2 cheques in the name of the company? You do not know that company?"*

*A. I did not know, I relied Laurence statement that this is my company.*

*Q. So you issued the cheque on the company?"*

*A. Correct.*

*Q. But you did not know the company?"*

*A. At did not know the company at the time." (verbatim)*

[7] Under the Loan Agreement, the Respondent granted a loan of SCR400,000 to the Appellant, out of which a sum of SCR100,000 represented the earlier loan contracted by the Appellant on the 15 March 2012. The loan amount was refundable by eight consecutive monthly repayments of SCR50,000 as from the 31 January 2013. The Respondent disbursed the sum of SCR300,000 on the 27 September 2012, by way of a cheque, from his bank account with Barclays Bank, drawn in favour of "ASD Pty Ltd".

[8] The Appellant defaulted on her payments and did not react to his requests to pay the amount due on loan. The Appellant told him on several occasions that she was in the course of selling her apartment in France, and would repay the loan amount from the proceeds of the sale.

[9] During the cross-examination of the Respondent, Counsel on behalf of the Appellant put to the Respondent that it was his client's case that the Respondent should have brought a case against "ASD Pty Limited" for the recovery of the sum of SCR400,000 since the Respondent had disbursed the loan amount by way of cheques drawn in favour of "ASD Pty Ltd", the payee beneficiary. The Respondent denied the allegations of the Appellant and testified that he granted the loan to the Appellant who, in both instances, asked him to disburse the money by way of cheques drawn in favour of "ASD Pty Limited". In this respect, I find it appropriate to record the interaction below —

*"Q. Good morning Mr. Patel. Now you have told the Court that you agreed to loan Mrs Laurence Freslon 400,000 rupees. Is that correct?"*

*A. Correct.*

*Q. However you have told the Court and it is clear from the items which you have produced that you did not loan Mrs Freslon any money did you? The money was loaned to a company, a company called ASD PTY Limited?*

*A. The money was loaned to Laurence but she is the one who asked the name to be written in the cheques as she wanted it.*

*Q. Mr. Patel if you had loaned 400,000 rupees to the company ASD Pty Limited, should you not have brought a case against the for the money which you claimed is owed to you?*

*A. No because I explained that because I did not know much about the company, the agreement was made in person and she accepted that I will personally accept the loan. That is why the loan agreement was made in person and not in the company name.*

[...]

*Q. And therefore you would not have loaned a company 400,000 rupees without knowing what this company was or who owned it?*

*A. But I did not loan to the company.*

[...]

*Q. Mr. Patel I put it to you that you have brought this case against the wrong party. That you have loaned no money to Madam Laurence Freslon and the case should have been brought against the company ASD PTY Limited.*

*A. That is not correct. The money is loaned to the person." (verbatim)*

[10] On behalf of the Respondent, Mr Georges testified that the Respondent was a long time

client of his. The Respondent spoke to him about *inter alia* a debt issue between the Respondent and the Appellant. He viewed documents which appeared to show that the Appellant had borrowed a sum of SCR400,000 from the Respondent. The Respondent instructed him to recover that sum from the Appellant. Mr Georges sent a notice of "*mise en demeure*" to the Appellant, which is dated 3 December 2013.

[11] Mr Georges could not recall whether or not the Appellant reacted to the notice of "*mise en demeure*". He recalled meeting with and speaking to the Appellant concerning a loan amount of SCR400,000, at the "*BoardWalk*" at Eden Island. At that meeting, the Appellant told him explicitly that she had received the sum of SCR400,000 from the Respondent, and that she recognised that she was indebted to the Respondent in that sum. The Appellant also told him that she was in the course of selling her apartment in France, and that she would repay the Respondent the loan amount out of the proceeds of the sale. The Appellant defaulted on her payments. The Respondent instructed his law chambers to institute legal proceedings against the Appellant.

[12] Miss Pillay is the head of "*Premiere Banking*" at Barclays Bank Seychelles Limited. The Respondent is a client of Barclays Bank. She confirmed that the Respondent issued a personal cheque number 185243, exhibit P4, on the 15 March 2012, in favour of "*ASD (Pty) Ltd*" for the amount of SCR100,000. That cheque, the payee beneficiary of which was a Mauritius Commercial Bank (Sey) Ltd client, "*ASD Pty Ltd*", was debited from the personal account of the Respondent on the 19 March 2012.

[13] She also confirmed that the Respondent issued another personal cheque number 185263, exhibit P5, on the 27 September 2012, in favour of "*ASD (Pty) Ltd*" for the amount of SCR300,000. The amount of SCR300,000 was debited from the personal account of the Respondent on the 1 October 2012. "*ASD (Pty) Ltd*", a client of the Mauritius Commercial Bank, requested for cheque clearance.

[14] When cross-examined, Miss Pillay testified that a third cheque number 185262, exhibit D1, was issued by the Respondent drawn in favour of "*ASD (Pty) Ltd*". The cheque was cleared on the Respondent's account on the 1 October 2012, and deposited at the

Mauritius Commercial Bank.

- [15] The Appellant, Laurence Freslon, is both a French and Seychellois national. She accepted having signed the Loan Agreement in her name but claimed she never received SCR400,000 from the Respondent. She went on to testify that she did not repay the loan amount of SCR400,000 because she never received the said sum from the Respondent in her name. While admitting that she had met with and spoken to Mr Georges at "BoardWalk", she denied having told Mr Georges that she had received SCR400,000 from the Respondent. She claimed that they had talked about other matters.
- [16] She knew of the three cheques for the total sum of SCR800,000 drawn in favour of "ASD (Pty) Ltd", the payee beneficiary. The Respondent gave "ASD (Pty) Ltd" the sum of SCR800,000 rupees in 2012, to buy products for the spa. She stated that "ASD (Pty) Ltd" was a company involved in the wholesale import and export of spa products, and that she was a shareholder of that company. She also testified that the Respondent gave her the sum of SCR800,000 as she "represented" "ASD Pty Ltd".
- [17] When cross-examined, she testified that the Respondent was one of her clients. She reiterated that she had asked the Respondent for a loan of SCR400,000 to buy products for the spa. Then she went on to say that "ASD (Pty) Ltd" needed the sum of SCR400,000 to buy the products. She confirmed that "ASD (Pty) Ltd" had received the sum of SCR800,000 in 2012, from the Respondent. She did not put the money to her personal use.
- [18] She reiterated that the loan of SCR400,000 was not discussed at the meeting between her and Mr Georges. She was adamant that "ASD (Pty) Ltd" was the party indebted to the Respondent.
- [19] When re-examined, she reiterated that she never received the sum of SCR400,000 from the Respondent in her name. She accepted that "ASD (Pty) Ltd" had received the sum of SCR800,000 from the Respondent. She also claimed that the Respondent gave "ASD (Pty) Ltd" the sum of SCR700,000 on the day of signature of the Loan Agreement by the parties.

## **The operative part of the judgment**

[20] The reasoning of the learned Judge leading to her conclusion that the Respondent had made out his case against the Appellant appeared in the following extracts in paragraphs [21] to [25] of her judgment —

*"[21]...the court in (Dogley v Renaud (1982)), explained that in the interpretation of a contract, the predominant consideration is the true intention of the parties. Moreover, in the event of a conflict between their true intention and their intention as expressed in a contract document, the former must prevail. [...]. While the obligation arising from the written agreement was for the Plaintiff to loan SR400,000/- to Laurence Freslon, the oral evidence presented at trial suggests that the true intention of the parties was otherwise."*

*"[22] Based on the totality of the evidence adduced at the hearing (supra), it appears that the Defendant contracted with the Plaintiff in her personal capacity, as evidenced in writing in the agreement (Exhibit P1), but stipulated that the benefits were to be directed to ASD PTY LTD a third party. Given the Defendant's instructions, the true intention of the parties was for the Plaintiff to make SR400,000/- available to ASD PTY LTD ..., which would have been fulfilled when ASD PTY LTD had received this sum ...*

[23] Article 112 1of the Code provides that:

*"a person may stipulate for the benefit of a third party. Such stipulation shall not be revoked if the third party has declared that he wants to take advantage of it"*

*[24] In this case, the Plaintiff satisfied his obligations, as he issued cheques totalling SR400,000/- to ASD PTY LTD and the Barclays Bank representatives confirmed that ASD PTY LTD had received the cheques. Therefore, the Defendant had an obligation to reimburse Plaintiff.*

*[25] The Court finds thus, that on a balance of probabilities, the Plaintiff has met the burden of proof required of him this civil litigation and fulfilled his obligation to reimburse Plaintiff".*

## **The grounds of appeal**

[21] The Appellant has raised twelve grounds of appeal to challenge the decision of the learned Judge as follows —

- 2.1. *The Learned trial judge erred in law and on the evidence in relying on the Respondent's evidence as to why he did not contract with ASD (Pty) Ltd.*
- 2.2. *The Learned trial judge erred in law in relying on oral testimony which was against and beyond the written agreement.*
- 2.3. *The Learned trial judge erred in law and on the evidence in failing to address his mind to all the payments made by the Respondent to ASD (Pty) Ltd totaling SCR 800,000/-.*
- 2.4. *The Learned trial judge erred in law and on the evidence in holding that by paying ASD (Pty) Ltd in lieu of the Appellant, the obligation of the Respondent was discharged without proof of the Appellant instructing the Respondent to pay the money to ASD (Pty) Ltd.*
- 2.5. *The Learned trial judge erred in law and on the evidence in relying on the oral testimony of the Counsel for the Respondent in all circumstances of the case, most notably in respect of the professional and/or personal nature of the conversation. In addition to not taking into account the fact that the Counsel stated that the only reason he came to give evidence was because his client informed him that he thought that they were going to lose the case.*
- 2.6. *The Learned trial judge erred in failing to take into consideration that the Appellant's evidence was taken in French and the translation was compromised by the interpreter who did not manage to accurately translate questions to the Appellant.*
- 2.7. *Based on the above miscommunications, the Learned trial judge would have come to a different conclusion in respect of the intention of the parties and the capacity that the Appellant was contracting.*
- 2.8. *The Learned trial judge erred in law and on the evidence in holding that:-*
  - 2.8.1. *The Loan was paid to the Appellant under article 1121;*
  - 2.8.2. *There were applicable exceptions to article 1341*

*As neither were raised by Counsel for the Respondent and as such the Learned trial judge ought not to have considered them.*
- 2.9. *The Learned trial judge erred in law in relying on oral testimony which was against and beyond the written agreement.*



2.10. *The Learned trial judge erred in law and on the evidence in ruling that the true intention was to make funds available to ASD (Pty) Ltd and that the obligation de resultat had occurred.*

2.11. *The Learned trial judge erred in law and on the evidence in finding that the Respondent met his burden of proof.*

2.12. *The Learned trial judge erred in law and on the evidence in giving any relevance to the fact that the Appellant was also a shareholder and that the proceedings stated she signed in the capacity as a shareholder* ".

[22] Counsel on both sides offered skeleton heads of argument and made additional oral remarks thereon. Counsel for the Appellant in her skeleton heads of argument reduced the twelve grounds of appeal to three grounds. At the hearing of the appeal, Counsel for the Appellant argued the grounds of appeal in the order contained in the skeleton heads of argument. The Respondent did not comment on the combination of the grounds of appeal by the Appellant to formulate the three grounds.

### **Observations on the combination of grounds of appeal**

[23] It is not clear which grounds of appeal have been combined in the skeleton heads of argument to formulate grounds one, two and three of the grounds of appeal. It appears that some grounds of appeal have been dropped. It is my view that the formulation of a contention as a ground of appeal indicates that the argument is one which is raised adequately on its own. Where two or more contentions are so inextricably linked that they form one single argument, the correct drafting technique is to formulate that argument in a single ground of appeal. When this has not been done, the combination of grounds in skeleton heads of argument or in oral submissions is tantamount to an admission that the grounds have not been correctly drafted. Counsel should not thus assume that the Court of Appeal will sanction their decision, subsequent to the drafting of the grounds, to combine certain grounds. The Court of Appeal may well find such combination wrong, or even unacceptable and choose to deal with the grounds individually or to treat two or more grounds as in effect amounting to one precise contention.

[24] The Mauritian case of *Rostom v D. Bheenuck & Ors* [2013 SCJ 464] which is of persuasive authority, illustrates the dangers of the combination of grounds. The following extract from that judgment may be appropriately cited —

*"In their respective skeleton arguments, both parties have combined by and large all the grounds together. They made their oral submissions along the same line. It would not be right, in our view, to adopt such a course of action for the very good reason that in choosing not to follow the order in the grounds of appeal, the Appellant has introduced new issues not covered in those grounds. The respondents ill-advisedly responded to them. We would create a bad precedent if we were to condone such a practice, the effect of which will be that novel issues not covered in the grounds of appeal would be introduced by the back door, outside the time limit for raising new issues, without leave of the Court and without the proper procedure being followed".*

[25] I have scrutinised the three grounds of appeal contained in the skeleton heads of argument and noted that they do not introduce new issues not covered in the twelve grounds of appeal.

**Ground 1 of the grounds of appeal**

[26] I have mentioned above that the Appellant did not follow the order of the grounds of appeal contained in her notice of appeal. I consider the grounds of appeal contained in the skeleton heads of argument.

[27] Ground one of the grounds of appeal essentially boils down to the argument that, having regard to Article 1156 of the Civil Code of Seychelles, the learned Judge was wrong to conclude that the Loan Agreement entered into by the Respondent and the Appellant bind "*ASD PTY LTD*", a third party, and benefitted it under Articles 1165 and 1121 of the Civil Code of Seychelles.

[28] I reproduce the Loan Agreement —

*"ITEM NO 2 29/11/16*

**V. J. PATEL**

*EXH. P1*

*18/7/17*

Tel: +2484373423

P.O. Box 501

MAHE SEYHELLES

Email: [v.j.patel@vijay.sc](mailto:v.j.patel@vijay.sc)

### **LOAN AGREEMENT**

27<sup>th</sup> September 2012

We hereby agree to loan RS 400,000.00 to Laurence Freslon of address P.O. Box 1134, Mahe, Seychelles. 8 repayments of Rs 50,000.00 per month to begin from 31<sup>st</sup> January 2013.

SD

V. J. Patel

Witness

Name AARTI KERAI

SD

sign.

SD

Laurence Freslon

Witness

Name Vish Kidoo

SD

sign"

[29] In invoking Article 1156 of the Civil Code of Seychelles, the learned Judge concluded, based on the oral evidence that the common intention of the Respondent and the Appellant had shaped the meaning borne out by the Loan Agreement.

[30] What is Article 1156 of the Civil Code of Seychelles intended to convey? Article 1156 of the Civil Code stipulates —

*"Article 1156*

*In the interpretation of contracts, the common intention of the contracting parties shall be sought rather than the literal meaning of the words."*

[31] The interpretation of Article 1156 is well explained in notes 456, 457 at p. 722 CHAP. 4. — *Interprétation des conventions. CONTRATS ET CONVENTIONS EN GENERAL DALLOZ RÉPERTOIRE PRATIQUE DE LÉGISLATION DE DOCTRINE ET DE JURISPRUDENCE– TOME TROISIÈME Commune — Contrôle de l'administration de l'Armée —*

*"456. Il appartient aux juges d'interpréter les conventions... Il n'y a lieu à interprétation que lorsque les conventions ne sont pas absolument claires et précises. Le législateur a tracé quelques règles à suivre en pareil cas (art. 1156 à 1164). Ces règles n'ont pas un caractère impératif; elles ne constituent que des*

conseils donnés aux juges, et non des règles absolue dont l'inobservation entrainerait l'annulation de la décision".

[...]

458. — Première règle. — Aux termes de l'art. 1156, on doit, dans les conventions, rechercher q'elle a été la commune intention des parties, plutôt que de s'arrêter au sens littéral des termes. Ainsi, pour déterminer la nature du contrat intervenue entre deux parties, et rechercher si l'acte intervenue entre un credit rentier et un un débi-rentier ne dissimule pas un véritable contrat de rente à titre onéreux sous l'apparence d'une donation avec charges, il faut rechercher quelle a été leur véritable intention, sans trop s'arrêter à la qualification dont elles se sont servies : on pourra prendre en consideration la qualité des contractants et les circonstances dans lesquelles l'acte est intervenue (D.P. 1902. 1. 241, note 1-3). — Il faut tenir compte également de la nature du contrat, rapprocher et combiner entre elles les différentes clauses, étudier les motifs qui, de part et d'autre, ont pu déterminer les parties à contracté, s'inspirer en un mot de toutes les circonstances qui peuvent communiquer aux mots employés une signification particulière dont il faut tenir compte (Req. 22 nov. 1865, D.P. 66. 1. 108).

[...]

462. **Il a été jugé d'ailleurs que si l'on doit, dans les conventions, rechercher quelle a été la commune intention des parties contractantes, plutôt que s'arrêter au sens littéral des terme, cette règle n'est faite que pour le cas où le sens des clauses du contrat est douteux et exige une interprétation ; permettre au juge de substituer la prétendu intention des parties à un texte qui ne présente ni obscurité ni ambiguïté, ce serait l'investir du droit d'altérer ou même de dénaturer la convention (civ. 10 nov. 1891, D. P. 92. 1. 406).** Emphasis supplied

[32] The meaning of this principle in practice is also well explained in note 3 to Article 1156 of Dalloz, Code Civil (Édition Dalloz 1992-93) —

"Lorsque les juges du fond estiment, par une interprétation souveraine de la commune intention des parties, exclusive de dénaturation des termes de la clause litigieuse, que la mention d'un indice figurant dans la clause de révision d'un loyer était le résultat d'une erreur provenant d'une rédaction hâtive et maladroite, ils peuvent en écarter l'application Civ 3<sup>e</sup>, 8 oct. 1974: D.P 1975.189. Comp. Civ 1<sup>re</sup>, 5 mars 1968: Gaz. Pal. 1968. 1. 368 (cassation pour dénaturation de la décision ayant estimé que «le terme pour une durée illimitée (avait) été improprement employé (et) qu'il (fallait) comprendre pour une durée indéterminée») »

- [33] The reference to "dénaturation" in the excerpt referred to above is a reference to the following principle enunciated in note 7 to Article 1134 under the heading "CONTROLE DE DÉNURATION" in Dalloz, *Code Civil* (Édition Dalloz 2015) —

*"7. Admission du contrôle dénaturation par la Cour de Cassation.*

*Il n'est pas permis aux juges, lorsque les termes d'une convention sont clairs et précis, de dénaturer les obligations qui en résultent et de modifier les stipulations qu'elle renferme. Civ. 15 avr. 1872, Veuve Foucauld et Coulombe cl pringault: GAJC, 11e éd., no160 ; DP 1872. 1. 176 ; S. 1872. 1.232."*

- [34] Further light on the interpretation of Article 1156 of the Civil Code of Seychelles is shed in the following notes from *Jurisclasseur, Code Civil, article 1156 à 1164, Fasc. 10: CONTRATS ET OBLIGATIONS, Interprétation des Contrats* —

*"40. Méthode: volonté déclarée - Le principe est une chose, la méthode en est une autre: étant admis qu'il faut, par priorité, respecter l'intention des parties, comment les intentions peuvent elles être perçues par le juge? Si l'on raisonne sur l'hypothèse la plus commune, où il existe un écrit, il faut assurément scruter d'abord le contenu de l'acte. Aussi imparfait que soit le langage comme véhicule de la pensée, si la formulation est claire et dénuée d'ambiguïté, elle doit être tenue pour exacte, pour des raisons évidentes de sécurité du commerce juridique. Telle est la justification du contrôle par la Cour de Cassation de la dénaturation des clauses claires et précise.*

*Pourtant, l'article 1156 recommande de rechercher la commune intention plutôt que s'arrêter au sens littéral des termes. Cela ne signifie-t-il pas que l'intention profonde doit toujours l'emporter sur la lettre, celle-ci fût-elle claire et précise?*

*[...]Une volonté qui serait restée purement interne est à l'évidence hors d'atteinte du juge et, au surplus, rebelle à toute preuve par celui qui l'a prétendument conçue. Seule une volonté perceptible, donc extériorisée de quelque manière, peut produire des effets juridiques (sur les modes d'extériorisation, V P Godé, *Volonté et manifestations tacites*: PUF 1977, spécialement n 242 s).*

**41 Méthode: commune Intention - Au reste, l'article 1156 oppose au sens littéral des termes non la volonté interne, mais la 'commune intention' des parties (V Cas 1<sup>re</sup> civ, 20 jan 1970, cité supra n 36). Or, cette expression implique qu'il y ait eu accord des parties par un échange des consentements, qui requiert nécessairement une déclaration des volontés. Au minimum, l'intention de l'une des parties doit avoir été perçue, comprise et non contestée**

**par l'autre. En définitive, l'article 1156 n'oppose pas, dans ses deux propositions, une volonté interne à une volonté déclarée. Il envisage seulement l'hypothèse de la discordance entre la volonté effectivement déclarée, pour peu qu'elle puisse être prouvée, et son imparfaite expression écrite** (V pour un legs d'une certaine somme, interprété comme ne désignant pas des francs nouveaux, quoique le testament fût postérieur à leur instauration, mais des anciens francs, Cass 1<sup>re</sup> civ, 6 janv 1971 JCP G 1971, II, 16709, M D - Pour l'emploi du terme 'jour', alors que les autres clauses de l'acte révélaient clairement l'intention de constituer une servitude de 'vue', par la création d'une fenêtre, C A Rouen, 15 mai 2007, n 06/02490: JurisData n 2007-340509 - V aussi, à titre de pièce d'anthologie, à propos du sens de la conjonction 'copulative' 'et' et de celle, alternative, 'ou', C A Dijon, 26 oct 1988: JurisData n 1988-604259). L'esprit, en d'autres termes, doit l'emporter sur la lettre (V A Sériaux, op ci, n 43).

On ne peut totalement exclure l'hypothèse de l'interprétation d'une convention verbale (V JCI Civil Code, article 1156 à 1164, fasc 20, préc), mais l'économie générale des articles 1156 à 1164, comme aussi certaines formules précises (emploi répété du terme clause, référence à ce qui est ou n'est pas exprimé dans le contrat ...), indiquent que c'est à l'interprétation des écrits que le législateur a songé (V J Dupichot, article préc, n5).

Au total, la signification de l'article 1156 est assez simple. Dès lors qu'il est établi, par quelque moyen que ce soit, qu'il y a discordance entre la volonté réelle, par hypothèse exprimée, fût-ce tacitement, et la formulation – écrite ou même orale – de cette volonté, la première doit l'emporter. Il n'y a là aucune contradiction avec la théorie de la dénaturation. Une clause peut n'être claire et précise qu'en apparence. Tel est précisément le cas si la discordance ci-dessus décrite est établie. Rien ne justifierait que l'apparence l'emportât, dans cette hypothèse, sur la réalité (V Cass 1<sup>re</sup> civ, 18 févr 1986 : Bull civ, 1986, I, n 31 ; Defrénois 1987, article 33913, p 398, obs Aubert L'arrêt ajoute au contrat qui, par lui-même, n'avait rien d'ambigu, des obligations qui avaient fait l'objet d'un accord antérieur à la signature du contrat, resté muet sur ces obligations)." Emphasis supplied

Those notes were referred to in *Rivnu Investments Ltd and Anor v United Dock and Anor* [2017] UKPC 24, a judgment of the Privy Council Appeal No 0038 of 2015, in an appeal from the Supreme Court of Mauritius. The learned Law Lords after that made the following comment at paragraph 26 of their judgment —

"It is evident from these passages that, if a common intention is to shape the meaning which a written contractual clause would otherwise bear, it will have to have been in some way expressed and accepted by both parties, even if only tacitly."

- [35] Having regard to what Article 1156 of the Civil Code of Seychelles is intended to convey, I hold the view that the learned Judge has wrongly applied the principles of Article 1156 of the Civil Code of Seychelles to the evidence on record. The learned Judge, in this case, did not search for the common intention of the Appellant and the Respondent but restricted herself to determining the sole intention of the Appellant in contracting with the Respondent, without in any way addressing her mind either to the will or the acceptance of the Respondent: see paragraph [22] of her judgment repeated at paragraph [21] hereof. See, **Rivnu Investments Ltd and Anor**, *supra*, and the decision of the *Cour de Cassation, Chambre Civile 1, du 20 Janvier 1970, 68-11.420* (op. cit. paragraph [36]).
- [36] Has an "*accord des parties par un échange des consentements*" intervened in this case, as implied by this expression, the "*common intention*" of the parties?
- [37] It must be noted that the Respondent testified to the effect that he entered into the Loan Agreement with the Appellant in her name, that he was unaware of the company "*ASD Pty Ltd*" and, therefore, could not have contracted with it. Further, that he disbursed the money by way of cheques to "*ASD Pty Ltd*" because he was instructed by the Appellant to do so, and that he brought proceedings against the Appellant in her name for failure by the Appellant to pay the loan amount of SCR400,000.
- [38] On the other hand, it must also be noted that the Appellant testified under cross-examination that, although she signed the Loan Agreement in her name, the Respondent gave her the money in her capacity as a shareholder of "*ASD Pty Ltd*". The Appellant even suggested under cross-examination, that she signed the Loan Agreement in her capacity as a shareholder of "*ASD Pty Ltd*".
- [39] I hold the view that, had the learned Judge correctly addressed her mind to what Article 1156 of the Civil Code of Seychelles is intended to convey, she would have concluded

that there was nothing in the evidence placed before her which would indicate an "*accord des parties par un échange des consentements*". The intention of the Respondent and the Appellant *ex facie* the Loan Agreement must accordingly be construed as having been that the Respondent, on the 27 September 2012, by a written agreement loaned the sum of SCR400,000 to the Appellant in her name, that the said sum of SCR400,000 was refundable by eight consecutive monthly repayments of SCR50,000 by the Appellant as from the 31 January 2013.

[40] Consequently, I accept the contention of the Appellant by Counsel that the learned Judge has wrongly decided the case on the basis that the Loan Agreement was a "*stipulation pour autrui*", having regard to Article 1156 of the Civil Code of Seychelles.

[41] Notwithstanding my finding above, I hold the view that the learned Judge has wrongly decided the case on the basis that the Loan Agreement was a "*stipulation pour autrui*", having regard to Article 1156 of the Civil Code of Seychelles, on the ground that the substance of the "*stipulation pour autrui*" was not contained in the Loan Agreement between the Respondent and the Appellant: see *Kolsh v Lefevre [1993-1994] SCAR 54* in which the Court of Appeal stated: "[i]n the language of article 1121, the contract must contain a stipulation, as a term thereof, for the benefit of a third party". I note that Counsel for the Respondent had conceded that point in her skeleton heads of argument.

[42] For the reasons stated above, I allow ground one of the grounds of appeal.

### **Ground 3 of the grounds of appeal**

[43] Counsel for the Appellant contended in ground three that the learned Judge had delivered a judgment which violates the fundamental rules of civil procedure. In support of that contention Counsel for the Appellant submitted that no amount of evidence can be looked into, upon a plea which was never put forward in the pleadings, and that a court cannot make out a case not pleaded.



[44] I repeat the following extracts from the case of *Weller v Katz* (SCA 39/2017) [2020] SCCS 6 (21 August 2020) concerning the object, purpose and importance of pleadings —

"47. In *Gallante v Hoareau* [1988] SLR 122, the Supreme Court, presided by G.G.D. de Silva Ag. J, at p 123, at para (g), stated —

*"[t]he function of pleadings is to give fair notice of the case which has to be met and to define the issues on which the Court will have to adjudicate in order to determine the matters in dispute between the parties. It is for this reason that section 71 of the Seychelles Code of Civil Procedure requires a plaint to contain 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".*

48. In *Tirant & Anor v Banane* [1977] 219, Wood J, made the following observations —

*"[i]n civil litigation each party must state his whole case and must plead all facts on which he intends to rely, otherwise strictly speaking he cannot give any evidence of them at the trial. The whole purpose of pleading is so that both parties and the court are made fully aware of all the issues between the parties. In this case at no time did Mr Walsh ask leave to amend his pleadings and his defence only raised the question of plaintiff's negligence.*

*In Re Wrightson* [1908] 1 Ch. at p. 799 Warrington J. said:

*The plaintiff is not entitled to relief except in regards to that which is alleged in the plaint and proved at trial.*

*In Boulle v Mohun* [1933] M. R. 242 on an issue of contributory negligence, which had not been pleaded in the statement of defence, the Court found against the defendant, but held that such issue could not in any event have been considered as it has not been raised in the pleadings".

49. In *Elfrida Vel v Selwyn Knowles* Civil Appeal No 41 and 44 of 1988, the Appellate Court held —

*"[i]t is obvious that the orders made by the trial judge was ultra petita and have to be rejected. It has recently been held in the yet as unreported case of *Charlie v Françoise* (1995) SCAR that civil justice does not entitle a court to formulate a case for a party after listening to the evidence and to grant a relief not sought in the*

*pleadings. He was of course at pains to find an equitable solution so as to do justice to the Respondent but it was not open to him to adjudicate on the issue in particular re-conveyance which had not been raised in the pleadings".*

50. *In Lesperance v Larue SCA 15/2015 (delivered on the 7 December 2017), the Appellate Court reiterated the point that a court cannot formulate the case for a party. At paragraphs 11, 12 and 13 of the judgment, the Appellate Court quoted with approval the decisions of the English Court and the principle enunciated by Sir Jack Jacob in respect of pleadings —*

*"11. In his book "The Present Importance of Pleadings" by Sir Jack Jacob, (1960) Current Legal Problems, 176; the outstanding British exponent of civil court procedure and the general editor of the White Book; Sir Jacob had stated:*

*"As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by their pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice ..."*

*In Blay v Pollard and Morris (1930), 1 KB 628, Scrutton, LJ stated that: "Cases must be decided on the issues on record, and if it is desired to raise other issues they must be placed on record by amendment. In the present case, the issue on which the Judge decided was raised by himself without amending the pleading, and in my opinion, he was not entitled to take such a course."*

*In the case of Farrel v Secretary of State [1980] 1 All ER 166 HL at page 173 Lord Edmund Davies made the following observation:- "It has become fashionable these days to attach decreasing importance to pleadings, and it is beyond doubt that there have been many times when an insistence on complete compliance with their technicalities put justice*

*at risk, and, indeed, may on occasion have led to its being defeated. But pleadings continue to play an essential part in civil actions ... for the primary purpose of pleading remains, and it can still prove of vital importance. That purpose is to define the issues and thereby to inform the parties in advance of the case they have to meet and so enable to take steps to deal with it."*

*In the case of Nandkishore Lalbhai Mehta VS New Era fabrics Pvt. Ltd. & Ors. [Civil Appeal No 1148 of 2010] the Supreme Court of India said that the question before the court was not whether there is some material on the basis of which some relief could be granted. The question was whether any relief could be granted, when the Appellant had no opportunity to show that the relief proposed by the court could not be granted. When there was no prayer for a particular relief and no pleadings to support such a relief, and when the Appellant had no opportunity to resist or oppose such a relief, it certainly led to a miscarriage of justice. Thus it is said that no amount of evidence, on a plea that is not put forward in the pleadings, can be looked into to grant any relief". Emphasis supplied*

[45] Also in the persuasive authority of *Bachhaj Nahar (Appellant) vs Nilima Mandal & Anr (Respondents)* (AIR 2009 Supreme Court 1103), the Supreme Court of India in the Civil Appeal Nos. 5798-5799 of 2008, stated —

*"9. The object and purpose of pleadings and issues is to ensure that the litigants come to trial with all issues clearly defined and to prevent cases being expanded or grounds being shifted during trial. Its object is also to ensure that each side is fully alive to the questions that are likely to be raised or considered so that they may have an opportunity of placing the relevant evidence appropriate to the issues before the court for its consideration. This Court has repeatedly held that the pleadings are meant to give to each side intimation of the case of the other so that it may be met, to enable courts to determine what is really at issue between the parties and to prevent any deviation from the course which litigation on particular causes must take.*

*10. The object of issues is to identify from the pleadings the questions or points required to be decided by the courts so as to enable parties to let in evidence thereon. When the facts necessary to make out a particular claim, or to seek a particular relief, are not found in the plaint, the court cannot focus the attention of the parties, or its own attention on that claim or relief, by framing an appropriate issue. As a result the defendant does not get an opportunity to place the facts and contentions necessary to repudiate or challenge such a claim or relief. Therefore, the court cannot, on finding that the plaintiff has not made out the case put forth by him, grant some other relief. The question before a court is not whether there is some material on the basis of which some relief can be granted. The question is whether any relief can be granted, when the defendant*

*had no opportunity to show that the relief proposed by the court could not be granted. When there is no prayer for a particular relief and no pleadings to support such a relief, and when defendant has no opportunity to resist or oppose such a relief, if the court considers and grants such a relief, it will lead to miscarriage of justice. Thus it is said that no amount of evidence, on a plea that is not put forward in the pleadings, can be looked into to grant any relief".*

- [46] The learned Judge has ignored the above principles relating to the object and necessity of pleadings. Even though the issue of the "*stipulation pour autrui*" was not pleaded and even though the Appellant and the Respondent were at issue only concerning the Loan Agreement entered into between the Appellant and the Respondent (money claim), the learned Judge made out a case of "*stipulation pour autrui*", having regard to Article 1156 of the Civil Code of Seychelles and granted relief based on that case. This the learned Judge was not entitled to do: see, also, **Kolsh**, *supra*.
- [47] The above authorities convey the fundamental principle that, with respect to the law of civil procedure, the court is bound by the pleadings of the parties as they are, and not as the Judge would have liked them to be. If the Court were to uphold the Court's reformulation of the pleadings, it would lead to a miscarriage of justice.
- [48] For the reasons stated above, I allow ground three of the grounds of appeal.

#### **Ground 2 of the grounds of appeal**

- [49] Ground two of the grounds of appeal is titled "*The Payments*". That ground essentially pointed out that the Appellant conceded that "*ASD Pty Ltd*" had received the total sum of SCR800,000 disbursed by way of cheques by the Respondent to "*ASD Pty Ltd*". However, Counsel for the Appellant insisted that the Respondent has never given the Appellant in her name the sum of SCR400,000 and, therefore, has not proved the obligation.
- [50] On the other hand, Counsel for the Respondent suggested in her skeleton heads of argument that the Respondent has proved the obligation, and that the total sum of

SCR800,000 was the subject matter of another agreement, which had nothing to do with the pleadings in this case.

[51] I have found that the literal meaning of the words of the Loan Agreement prevails. Thus, the Respondent must prove the obligation under the Loan Agreement under Article 1315<sup>1</sup> of the Civil Code of Seychelles. There is no evidence on record to establish that the Respondent has given the Appellant in her name the loan amount of SCR400,000. Therefore, I do not accept the submission of Counsel for the Respondent that the Respondent has proved the obligation.

[52] For the reasons given above, I allow ground two of the grounds of appeal.

### **Decision**

[53] For the reasons given above, the appeal is allowed in its entirety. The orders made by the learned Judge are set aside. With costs in favour of the Appellant before the Supreme Court and the Court of Appeal.

Signed, dated and delivered at Ile du Port on 18 December 2020

Robinson JA

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<sup>1</sup>Article 1315 of the Civil Code of Seychelles provides that a person who demands the performance of an obligation shall be bound to prove it. Conversely, a person who claims to have been released shall be bound to prove the payment or the performance which has extinguished his obligation.

I concur

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Tibatemwa-Ekirikubinza JA

I concur

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Dingake JA