

IN THE COURT OF APPEAL OF SEYCHELLES

Reportable

[2022] SCCA 54 (19 August 2022)

SCA 4/2020

(Appeal from CS 112/2015)

In the Matter Between

Patrick Putz
(rep. by Mr. Camille)

Appellant

and

Sabrina De Souza-Jahnel
John Aubrey De Souza
(rep. by Mr. Serge Rouillon)

Respondents

Neutral Citation: *Putz v De Souza-Jahnel* (SCA 4/2020) [2022] SCCA 54 (19 August 2022)
(Arising in CS 112/2015)

Before: Twomey-Woods, Robinson, Tibatemwa-Ekirikubinza, JJA

Summary: Civil Code of Seychelles - *lésion* - immovable property - the transfer of property reserving a usufructuary interest to the Deceased for the remainder of her life - contingent contract - Article 1676

Heard: 2 August 2022

Delivered: 19 August 2022

ORDER

- (1) The appeal is allowed.
 - (2) The orders of the learned trial Judge are quashed.
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JUDGMENT

TWOMEY-WOODS JA,

(TIBATEMWA- EKIRIKUBINZA JA concurring)

1. This appeal concerns the sale by a property owner (Flory Fonseca-Larson, the Deceased) of a bare interest in a property (Parcel V17060) to her nephew, Patrick Putz

while reserving the usufructuary interest in the same to herself. Two years after the sale, the Deceased passed away. Her two children brought an action for rescission of the sale on the grounds that there had been *lésion* (unfair loss) of more than half of the property's value.

2. The detailed facts of the case and the consideration of the law regarding the present appeal are ably set out in our learned sister Robinson's dissenting judgment below. For this reason, they do not bear repeating.
3. We find that our learned sister's consideration of the applicable law to the facts concerning Article 1676 of the Civil Code is a fully accurate and fair consideration of the law regarding *lésion* with respect to the sale of dismembered land in the present appeal.
4. However, ultimately, we disagree with our learned sister's finding that although the learned trial judge did not address her mind to Article 1676, this fact was not adequately raised by Mr. Patrick Putz in his ground of appeal and that, therefore the appeal has to be dismissed.
5. We explain.
6. Ground 3 of the appeal states as follows:

"The learned trial judge erred in law in having wrongly applied the principles of law in regards to an action for lésion to the facts of the present suit before her."

7. When we read this ground of appeal, it appeared to us that the issue of the law relating to the facts of his case had been canvased. We were also firmly of the view that the appeal should succeed as indeed we all agreed, both Counsel included, at the hearing, that the learned trial judge had not addressed her mind to the fact that Article 1676 of the Civil Code stipulates that *lésion* does not apply to contingent contracts (*contrats aléatoires*).

8. In his skeleton heads of argument, learned Counsel for the Appellant, Mr. Camille, did not raise Article 1676 but merely contented himself with stating that:

"the learned trial judge had proceeded to consider and determined this matter on the basis of the validity of the sale, rather than having an appreciation of the principles involved in a determination of a claim for lesion."

9. He then went on to cite authorities regarding the necessity for making out a case of *lésion* at the preliminary stage of the hearing.
10. Nevertheless, we believe that these broad brushstrokes of the Appellant's dissatisfaction with the judgment include the necessity for this court to consider the failure by the learned trial judge to consider the import of Article 1686 and to decide whether the appeal succeeds on this ground.
11. The action for rescission for *lésion* is provided in Articles 1674 to 1684 of the Civil Code. In the event of a sale, it allows the seller or his successors to rescind the sale in question as soon as they have proved that the transfer price is less than half of the property's actual value. The *lésion* must therefore be more significant than half, i.e. more than two times the value of the property.
12. This action thus offers the seller of property the possibility of obtaining compensation in the event of a concrete imbalance between the respective performances of the parties, i.e., when the price received by the seller from the purchaser is too low in relation to the actual value of the property which is the subject of the contract.
13. There are exceptions to this rule, provided in Article 1676 of the Civil Code. The action for rescission on the grounds of *lésion* is not available in the case of a judicial sale (licitation) and a contingent contract such as a contract of sale with the provision of a usufructuary interest or life interest.

14. Barry Nicholas¹ explains:

“Where the contract is aleatory, there can, on the accepted view, be no rescission pour lésion, on the ground that the parties accepted the aléa or that the just price cannot be calculated....”

15. Nicholas explains that Article 1676 is the corollary of Article 1675, which stipulates that the property's value shall be calculated according to its condition at the time of the sale.

16. In the present case, at the time of the sale, there was no way of knowing how long the Deceased would live. This was a risk taken by Mr. Putz. Had the Deceased lived up to a hundred, the price he paid may well have been too much. In the event, she died within two years of the transfer, and his gamble paid off.

17. Aleatory or contingent contracts are risky. An insurance contract is a good example. You may well pay your insurance every year without receiving anything in return simply because nothing happens to you. But the day something serious happens to you, the insurance company may be forced to pay a large sum of money, even though your insurance fees are much lower.

18. These types of contracts are inherently unbalanced. This is why it is considered that the parties cannot invoke a contractual imbalance existing at the time of formation of the agreement, i.e., *lésion*. As the famous maxim goes, “l'aléa chasse la lésion” (hazard drives out lesion).

19. In the circumstances, this appeal must be allowed, and the orders of the learned trial judge set aside. We make no order as to costs.

¹ Barry Nicholas, *The French Law of Contract*, 2nd ed Clarendon Press Oxford, 2005) 138 .

Dr. M. Twomey-Woods, JA

I concur

Dr. L. Tibatemwa-Ekirikubinza

ROBINSON, JA (dissenting)

THE INTRODUCTION

20. I had the opportunity of reading in draft the majority judgment prepared by my learned sister Twomey-Woods JA. As stated in her judgment, we disagree with respect to the conclusion reached in this case.
21. I turn to this appeal. The Respondents, the Plaintiffs then, are the children of Mrs Therese Florianna De Souza, who died on the 20 November 2015, hereinafter referred to as the "*Deceased*". The Appellant is the nephew of the Deceased.
22. The Respondents brought proceedings against the Appellant for the rescission of the transfer of the land comprised in title number V17060 and the two-bedroom house situated thereon (hereinafter referred to as the "*Property*") for lesion of more than one half under Article 1674 and following of the Civil Code of Seychelles. The plaintiff averred that the Deceased transferred the bare ownership of the Property to the Appellant and retained the usufructuary interest for herself, exhibit P3, a transfer of land registered on the 19 January 2012.

23. In support of their claim that there was lesion, the Respondents averred in their plaint that the consideration of Euros Five Thousand (€5000) paid by the Appellant for the transfer of the Property was less than one half of the value of the Property at the time of the transfer, and that the Appellant took "*unfair advantage of the deceased who was desperate for cash and living on social security*".

24. To satisfy the Supreme Court that a *prima facie* case exists, the Respondents asked the Supreme Court to appoint three experts to value the bare ownership of the Property at the time of its transfer.

25. The Respondents asked the Supreme Court to make the following orders in their favour

—

"an order appointing three experts to establish the value of the bare ownership of Title V17060 at the time of the transfer and directing them to draw up a single majority report for the presentation to the Court; and

a judgment in favour of the Plaintiffs rescinding the Transfer of Title V17060 registered on 19th January 2012;

such ancillary consequential orders for the registration of Title V17060 into the names of the Plaintiffs;

an order for costs in favour of the Plaintiffs with costs from the filing of the Plaint".

26. In his statement of defence, the Appellant raised a *plea in limine litis* on the basis that the suit is not maintainable in law as the Respondents did not have *locus standi* to file the action.

27. Concerning the merits, the Appellant denied that the transfer of the bare ownership of the Property was for the consideration of €5000, and that the consideration paid for the transfer of the Property was less than one half of the value of the Property at the time of its transfer. In this respect, he denied that he took unfair advantage of the Deceased. Instead, the Appellant alleged that he paid the agreed price set out in an agreement dated 12 October 2011, which was over €5000. The Appellant moved the Supreme Court to dismiss the plaint with costs.
28. The learned Judge, having considered the pleadings, the evidence on record and the written submissions, concluded — *"[76] [o]n the basis of the difference between the value of the property and the consideration offered as set out in the admitted evidence, unfair advantage by the defendant is deemed proved to the required standard based on all the circumstances of this case"*.
29. Hence, the learned Judge gave judgment in favour of the Respondents and made the following orders in their favour —

- "(i) [t]he Transfer of Title No. V17060 of the 12 October 2011 and registered on the 19 January 2012, is rescinded accordingly, and the said property shall form part of the Estate of the deceased, the late Therese Flory Floriana De Souza is formerly known as Therese Floriana Larson; and*
- (ii) [t]he Respondent shall pay costs inclusive of the cost of the expert report for the valuation of the property in question."*

Miscellaneous issue: the disputed written agreement dated 12 October 2011

30. During proceedings before the Supreme Court, the Appellant by Counsel sought to rely on a written agreement dated 12 October 2011, which the Respondents by Counsel objected to on the basis that it ran afoul of Article 1321(4) of the Civil Code of Seychelles. I remark that the disputed written agreement of 12 October 2011 appeared to

vary or amend the registered transfer of the Property. It appeared to suggest *inter alia* that the Appellant and the Deceased had agreed that the consideration for the bare ownership of the Property would be €10000.

31. I observe that the learned Judge was correct *inter alia* to conclude that the disputed written agreement dated 12 October 2011, amounted to a back letter under the said Article 1321(4) and declare it null because it had not been registered within six months of the making of the apparent agreement under the said Article. See the cases of *Guy v Sedgwick & Ors SCA 54/2011* and *Ruddenklau v Botel (1996-1997) SCAR 85* referred to by the learned Judge in her judgment.
32. Hence, this judgment did not consider the evidence and issues relating to the disputed agreement dated 12 October 2012 and contentions raised in any ground of appeal concerning it.

The evidence

33. Before considering the six grounds of appeal, I set out the evidence relevant to this appeal.
34. The First Respondent testified that the Appellant paid only €5000 for the Property, and that the transfer reserved a usufructuary interest to the Deceased for the remainder of her life. The Deceased transferred the Property to the Appellant as she was desperate for money and was "*basically forced to sell it to them*". She was aware of the Deceased day-to-day affairs and knew that she had no income apart from social security after she stopped working in 2010. The Deceased's carer used to collect her social security; the Deceased died at 72. The Deceased was 70 years of age when the transfer of the Property was made. The three valuers valued the Property as at October 2011 for the sum of SCR2949000. The first Respondent asked the Supreme Court to rescind the transfer to the Appellant.

35. Mr Jacques Renaud, a quantity surveying expert, testified that he went on-site on the 11 October 2017 for his report and then on the 29 March 2018 with the two other surveyors, Miss Cecile Bastille, a quantity surveyor and Mr Joelane Sinon, a land surveyor. After the visit, they discussed the value of the Property. The figure agreed upon was backdated to October 2011, which included the land and the buildings, but excluded the furniture. The value reached by the three experts, Mr Renaud, Miss Bastille and Mr Sinon, was SCR2949000/-: see the "*COMMON VALUATION OF PROPERTY – (Parcel No V17060)*", dated 29 March 2018, exhibit P4.
36. It is not in dispute that the Appellant made one payment of €5000. He also stated that the Deceased continued to live on the Property until her death. The Appellant paid insurance on the Property, exhibit D1. The Respondents knew about everything at the time of the transfer of the Property and did not interfere then or at any time when the Deceased was living. They made a claim only after the Deceased died.

THE APPEAL

37. The Appellant has appealed against the judgment on the following grounds —
- "1. *The Learned trial judge erred in having concluded that the Respondents had locus standi to prosecute the suit in law, on the basis of lesion.*
 - 2.- *The learned Trial Judge erred in law and on the facts in having wrongly applied the principles enunciated in the case of Hoareau vs Houareau [1997]SCCA 12, to the facts of the present suit before her.*
 - 3 *The learned Trial Judge erred in law in having wrongly applied the principles of law in regards to an action for lesion, to the facts of the present suit before her.*

4. *The learned Trial Judge erred in law and on the facts in having failed to appreciate sufficiently or at all the Appellant's evidence before her, as regards to the Appellant's testimony that he is able and willing to make adequate contribution to the Respondents, in such manner as to restore a more equitable balance between the contracting party.*
5. *The learned Judge erred in law and on the facts in proceeding to award the rescission of the transfer relating to land title V17060, outrightly.*
6. *The learned Trial Judge acted ultra petita in awarding the rescission of the transfer relating to land title 17060 and in directing that the said property shall form part of the estate of the deceased, the late Therese Flory Floriana De souza."*

Analysis of the contentions of the Appellant and the Respondents

Grounds two, three and five of the grounds of appeal

38. These grounds of appeal contended essentially that the conclusions reached by the learned Judge were wrong, and that she ought to have found that the Respondents had not made out lesion of more than one half under Articles 1118 and 1674 of the Civil Code of Seychelles.
39. I conclude that grounds two, three and five are misconceived and give reasons.
40. At the hearing of the appeal, we brought to the attention of both Counsel that the transfer of the Property, subject to the usufructuary interest to the Deceased for the remainder of her life, is in the nature of a contingent contract. In this respect, we brought to the attention of both Counsel that Article 1676 of the Civil Code of Seychelles stipulates that the rules of Articles 1118 and 1674 do not apply to contingent contracts or aleatory

contracts unless it is clear that one of the contracting parties cannot expect to derive a reasonable benefit from the counter promise.

41. Both Counsel responded by stating they had overlooked Article 1676 of the Civil Code of Seychelles. Though the appeal hearing proceeded essentially on the basis of Article 1676 of the Civil Code of Seychelles, both Counsel were permitted to put forward their respective case as they deemed appropriate.

42. I have considered the contentions of both Counsel contained in their respective written and oral submissions with care.

43. Article 1964 of the Civil Code of Seychelles stipulates, in so far as relevant — “[a] *contingent contract is a mutual agreement the effects of which, with regard to the profits and losses, whether for all the parties or one of them, depend upon an uncertain event [...].*” In other words, a contract in which both parties take an uncertain risk.

44. Article 1676 of the Civil Code of Seychelles stipulates —

"Article 1676

The rules of articles 1118 and 1674 shall not apply to contingent contracts unless it is clear that one of the contracting parties cannot expect to derive a reasonable benefit from the counterpromise. [Emphasis supplied]

45. Article 1674 of the Civil Code of Seychelles stipulates —

"Article 1674

If the price paid by the buyer is less than one half of the value of the thing bought, whether it be movable or immovable, the seller shall be entitled to a rescission of the contract, even if he expressly waived his right to do so, and even

if he has declared his willingness to give up the surplus value of the property. Subject to the provisions of this article and articles 1675 and 1676, the rule of article 1118 of this Code shall have application."

46. Article 1118 of the Civil Code of Seychelles stipulates —

"Article 1118

1. If the contract reveals that the promise of one party is, in fact, out of all proportion to the promise of the other, the party who has a grievance may demand its rescission; provided that the circumstances reveal that some unfair advantage has been taken by one of the contracting parties. The loss to the party entitled to the action for lesion shall only be taken into account if it continues when the action is brought.

2. The defendant to an action for lesion as in the preceding paragraph shall be entitled to refuse rescission if he is willing to make an adequate contribution to the other party in such manner as to restore a more equitable balance between the contracting parties.

3. The rules of paragraphs 1 and 2 of this article relate to the policy, and shall not be excluded by the agreement of the parties. They may, however, be excluded or restricted in specific cases laid down in this Code".

47. I have not seen any Seychellois judgment dealing with lesion concerning a contingent contract under Article 1676 of the Civil Code of Seychelles.

48. Neither the French *Code Civil* nor the *Code Civil Mauricien* contains a provision similar to Article 1676 of the Civil Code of Seychelles. I have turned to the French doctrine and jurisprudence for guidance in construing Article 1676 of the Civil Code of Seychelles.

49. In the case of *Civil Construction Company Limited v Leon & Ors* (SCA 36 of 2016) [2018] SCCA 33 (13 December 2018), the majority judgment stated —

"[27] [t]he Civil Code is derived from and to a large extent translated directly from the French Civil Code. We have developed our own jurisprudence but often refer to authorities or doctrinal writings from other civilist traditions such as Mauritius or France when we lack local jurisprudence on a particular issue. These jurisdictions have almost identical Civil Codes and therefore the underlying doctrines are the same. They are therefore better persuasive sources than legal systems from countries that do not share the same underlying doctrines."

50. I now read from *Henri et Léon Mazeaud, Jean Mazeaud LEÇONS DE DROIT CIVIL TOME DEUXIÈME, OBLIGATIONS THÉORIE GÉNÉRALE BIENS DROIT DE PROPRIÉTÉ ET SES DÉMEMBREMENTS* p 176, note 215 —

"215. — *Exclusion de la lésion dans les contrats aléatoires.* — la jurisprudence, approuvée par de nombreux auteurs, affirme qu'en principe les contrats aléatoires, échappent aux sanctions de la lésion [...].

On justifie cette exclusion de la manière suivante : en raison de l'aléa, il n'est pas possible d'apprécier si, au moment du contrat, les prestations étaient équivalentes; d'autre part, lorsque la rescission ou la réduction sont demandées, le contrat a été exécuté pendant un certain temps, le risque s'est trouvé modifié, de telle sorte qu'il n'est possible de replacer les parties dans la situation où elles se trouvaient lors de la conclusion du contrat; enfin, les parties ont volontairement accepté un risque, soumission à l'aléa qui constitue l'un des éléments du contrat (civ. 10 jan. 1913, D. 1913. 1. 216).

[...].

*La jurisprudence, qui abandonnera peut-être un jour le principe qu'elle a posé, y apporte des limites. [...]. On vient de préciser qu'elle le rejette lorsque les parties ont fixé expressément le prix de vente en capital correspondant à la rente viagère stipulée. D'autre part, « **lorsque des circonstances spéciales donnent au juge le moyen de déterminer la valeur des obligations soumises à l'aléa** », la vente n'est plus à l'abri de l'action en rescision (Civ. civ. 28 févr. 1951,[...] ; Civ. civ 1^{er} civ. 22 avril 1955 [...]).*" [Emphasis supplied]

51. I read from *Dalloz Contrats Civils et Commerciaux 4^e édition François Collart Dutilleul Philippe Delebeque*, p 140, note 162 —

*"162 **Exceptions** - Différents types d'opérations juridiques échappent à la rescision pour lésion en vertu de la loi ou de la jurisprudence. Tel est le cas tout d'abord, **des ventes aléatoires** comme la vente avec rente viagère [...]. **La raison en est que la prestation de l'acheteur n'est pas déterminable lors du contrat puisqu'elle est subordonnée à des circonstances fortuites comme le décès du vendeur. Il n'est donc pas possible d'établir une quelconque lésion puisqu'il n'y a pas de proportion exacte et chiffrée entre l'obligation de l'acquéreur et la valeur réelle de l'immeuble [...].**"* [Emphasis supplied]

52. I also read from *Petits Codes Dalloz Code Civil (1974-1975) 74^e édition*, Article 1674, pp 745 - 746, notes 3, 4 —

*"**Art. 1674.** Si le vendeur a été lésé de plus de sept douzièmes dans le prix d'un immeuble, il a le droit de demander la rescision de la vente, quant même il aurait expressément renoncé dans le contrat à la faculté de demander cette rescision, et qu'il aurait déclaré donner la plus value. — Civ. 6, 1118 468 s., 515 c., 581. [...].*

[...].

3. *En principe, les ventes aléatoires, notamment celles qui sont consenties avec réserve d'usufruit ou moyennant une rente viagère, ne sont pas rescindables pour lésion.* — Civ. 1^{re} sect. civ., 16 juill. 1956. [...]; toutefois, il ne suffit pas que le contrat contienne un élément aléatoire ; **la rescision peut être prononcée quand les circonstances permettent au juge de déterminer la valeur des obligations soumise à l'aléa.** — Req. 22 nov. 1937, D. P. 1939. 1. 81, note de M. Savatier. — Chambéry, 13 mars 1944, D. A. 1944. J. 80. — Amiens, 18 janv. 1950, D. 1950. 195. — Civ., sect. civ., 28 févr. 1951, D. 1951. 309. — V. conf., au cas d'un vente moyennant l'obligation d'entretenir et soigner le vendeur. — Req. 6 mai 1946, D. 1946. 287.

4. *Mais le caractère aléatoire ne peut être dénié à une vente avec réserve d'usufruit par cela seul que la valeur de l'usufruit, et par conséquent celle de la nue-proprété aliénée, est susceptible d'évaluation exacte au moyen d'un calcul de probabilités fondé sur des données des statistiques relatives à la durée moyenne de la vie humaine, ces statistiques, valables lorsqu'il s'agit de la durée de la vie d'un grand nombre de personnes, n'écartant pas l'aléa inhérent à la survie, toujours incertaine, d'un individu déterminé.* — Civ. 27 déc. 1938. D. P. 1939. 1. 81.[...]. — PARIS, 11 mars 1957. D. 1957. Somm. 85." [Emphasis supplied]

53. I read from François Terré Philippe Simler Yves Lequette *Droit Civil Les Obligations* 8^e edition, p 316, note 316 —

"316 **Les contrats aléatoires** L'appréciation de la lésion soulève des problèmes particuliers pour les contrats aléatoires. Certes, ceux-ci échappent en principe à la rescision pour cause de lésion: chacune des parties ayant accepté un aléa, aucune d'elles ne peut se prétendre lésée ; quoi qu'il adienne, elle a pris le risque d'un déséquilibre qui peut se réaliser à son détriment. Ainsi en va-t-il à l'évidence en cas de pari ou de jeu. Est aussi considérée comme aléatoires une vente d'immeuble avec réserve d'usufruit ou du droit d'usage ou d'habitation.

*Encore faut-il que la valeur du droit ainsi réservé ne soit pas trop minime. Encore faut-il aussi que le prix ne soit pas dérisoire. Mais l'esprit de spéculation est loin de sous-entendre tous les contrats aléatoires. Bien au contraire, certains d'entre eux, telle une vente à charge de rente viagère, peuvent avoir pour le vendeur un caractère alimentaire qui exclut toute acceptation d'un risque de déséquilibre. Une autre difficulté se fait alors jour. **Comment apprécier la lésion, étant donné l'incertitude relative à l'importance des prestations d'une des parties? Celle-ci peut être surmontée de deux façons: scientifiquement, grâce au calcul des probabilités; au cas par cas, lorsque la seule comparaison des prestations permet de déceler la lésion au moment de la formation du contrat. Aussi bien les tribunaux n'hésitent-ils pas, en ce dernier cas, à sanctionner la lésion, privant de la sorte le contrat de son caractère aléatoire.***

[...].

Mais jusqu'à présent du moins, la jurisprudence refuse de se placer sur un terrain purement scientifique; la Cour de Cassation déclare que «les résultats des statistiques, certains quand il s'agit de la durée moyenne de la vie d'un grand nombre de personnes, ne sauraient faire disparaître le caractère aléatoire d'un contrat aux termes duquel l'importance des prestations stipulées dépend de la longueur, toujours incertaine, de la survie d'un seul individu désigné». Cette position restrictive comporte toutefois des limites: la jurisprudence admet la possibilité de la rescision pour lésion bien que le contrat «ait une apparence aléatoire... lorsque des circonstances spéciales donnent au juge le moyen de déterminer la valeur des obligations soumises à l'aléa» ou encore lorsque l'acquéreur ne court aucun risque.»
[Emphasis supplied]

54. As I understand it, the French jurisprudence, approved by many authors (doctrine), affirms that, in principle, contingent contracts are not subject to rescission on the ground of lesion. This is mainly because of the difficulty posed concerning the evaluation of the

lesion, given the uncertainty in valuing the importance of the benefits to one of the contracting parties. However, the French jurisprudence has brought limitations to its principle. For example, in *Civ. civ. 28 févr. 1951*,[...]; *Civ. civ 1er civ. 22 avril 1955*, the *Cour de Cassation* decided that an action in rescission based on lesion would be possible when the special circumstances of the case permit the Judge, who appreciates sovereignly the influence of the *aléa*, to determine the value of the obligations submitted to the *aléa*.

55. In this respect, the common thread running through the French jurisprudence is that rescission based on lesion would be obtained in a case of a sale subject to a usufruct whenever the lesion could be established "*avec certitude*"; D. 1900.1.489; see also *Deeruthsing vs Munpla and Anor 1950 MR 26* in which D. 1900.1.489 was considered. In **Deeruthsing** [supra], the sale of a parcel of land was subject to a usufruct in favour of Sookdeo Deeruthsing, who was 43 years old when he died. In that case, the court found that the lesion could not be established with certainty given that the evidence was inadequate, namely the time Sookdeo Deeruthsing had to live and the report of the three valuers.
56. I consider this appeal based on the legal principles set out by the French jurisprudence, which are of persuasive authority and the provisions of the Civil Code of Seychelles.
57. I interpret Article 1676 of the Civil Code of Seychelles to mean in principle that contingent contracts are not subject to rescission on the ground of lesion — "[t]he rules of articles 1118 and 1674 shall not apply to contingent contract". Article 1676 sets out the following limitation to this principle — "**unless it is clear** that one of the contracting parties cannot expect to derive a reasonable benefit from the counterpromise." [Emphasis supplied]
58. In the present case, the learned Judge considered the alleged lesion based on Articles 1118 and 1674 of the Civil Code of Seychelles, which in my view, was the wrong approach. Hence, I hold that the learned Judge wrongly concluded that the Respondents

had made out lesion of more than one half under Articles 1118 and 1674 of the Civil Code of Seychelles.

59. Moreover, had the learned Judge applied Article 1676 of the Civil Code of Seychelles to the circumstances of this case, she would, in my view, have concluded that Articles 1118 and 1674 of the Civil Code of Seychelles did not apply. The issue of lesion did not arise in this case.
60. In any event, the pleadings, in this case, would not have permitted the learned Judge to come to a determination based on Article 1676 of the Civil Code of Seychelles. In this respect, we read from *Codes Dalloz Code Civil (1992-1993) 80^e edition*, Article 1674, p 1110, note 3, in so far as it is relevant —

"3 [...]. Cependant, les juges du fond n'ont ni le devoir, ni même la possibilité matérielle de rechercher, dans une espèce déterminée, les particularités [the particulars] non apparentes et non révélées à eux par les conclusions des parties [pleadings] qui seraient susceptibles de tenir exceptionnellement en échec la règle selon laquelle les ventes avec réserve d'usufruit constituent des contrats aléatoires et échappent comme telles à la rescision pour cause de lésion."
[Emphasis supplied].

61. I refer to *Gallante v Hoareau [1988] SLR 122*, in which the Supreme Court, presided by G.G.D. de Silva Ag. J, at p 123, at para (g), stated —

"[t]he functions 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."

62. 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."

63. 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.

64. In *Lesperance v Larue* SCA 15/2015 (delivered on the 7 December 2017), the Court of Appeal reiterated the fact that a court cannot formulate the case for a party. In paragraphs 11, 12 and 13 of the judgment, it 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 ..."

12. In Blay v Pollard and Morris (1930), 1 KB 628, Scrutton, LJ 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."

13. 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."

65. This appeal has been determined on the basis of issues which did not arise on the pleadings in this case. Hence, I have no option but to dismiss grounds two, three and five of the grounds.

Ground one of the grounds

66. Concerning ground one, the Appellant principally contended, based on Article 1674 of the Civil Code of Seychelles, that only the seller shall be entitled to a rescission of the transfer of the Property on the ground of lesion. Hence, he contended that the Respondents, in this case, should not be entitled to a rescission of the transfer as they had no *locus standi* to bring the action.
67. Given my conclusion with respect to grounds two, three and five of the grounds of appeal, I find this ground is misconceived and does not arise for consideration. Hence, it stands dismissed.
68. I state in passing that an action for the nullity of a contract of sale on the ground of lesion under Article 1674 of the Civil Code of Seychelles — *la nullité relative* — may be invoked only by the seller as well as the heirs of the seller "*ayants cause, créanciers chirographaires*": *Jean Carbonnier Droit Civil 4 — Les Obligations, I. A) b) — L'action en nullité*, p 166.

Grounds four and six of the grounds

69. Given my conclusion with respect to grounds two, three and five of the grounds, I find these grounds are misconceived and do not arise for consideration. Hence, they stand dismissed.

THE DECISION

70. I dismiss this appeal in its entirety.
71. Hence, I uphold the following orders of the learned Judge —

"81(i) The Transfer of Title No. V17060 of the 12 October 2011 and registered on the 19 January 2012, is rescinded accordingly, and the said property

shall form part of the Estate of the deceased, the late Therese Flory Floriana De Souza is formerly known as Therese Floriana Larson;

(ii) The Respondent shall pay costs inclusive of the cost of the expert report for the valuation of the property in question".

72. Each party shall bear his or their costs of these proceedings.

F. Robinson, JA

Signed, dated and delivered at Ile du Port on 19 August 2022.