

IN THE COURT OF APPEAL OF SEYCHELLES

Reportable

[2024] SCA 21 of 2023

SCA 21/2023

(Arising in CS 96/2021)

1. PIERRE RICHET

2. PASCALE RICHET

3. CHRISTELLE LEMORE-RICHET

(rep. by Basil Hoareau)

Appellants

versus

CHRISTOPHE PAYET

(rep. by Ryan Laporte)

Respondent

Neutral Citation: *Richet & Others vs. Payet (SCA 21 of 2023) [2024] (Arising in CS 96/2021).*
(3 May 2024)

Before: Twomey-Woods, Tibatemwa-Ekirikubinza, Andre, JJA.

Summary: **Agreement between parties against Public Policy – unjust enrichment.**

Unjust enrichment – restitution – where a party seeking restitution knowingly entered into an agreement against public policy the court will not grant them relief.

Section 5 of the Immovable Property (Transfer Restrictions) Act - Transaction effected contrary to section 3 - the immovable property purportedly transferred is forfeited to the Republic.

Heard: 16 April 2024.

Delivered: 3 May 2024.

ORDERS

1. The Appeal fails and it is hereby dismissed.
2. The prayer for restitution is declined.
3. Parcel PR 2465 shall be forfeited to the Republic.
4. No order is made as to costs.
5. A copy of this Court's Orders be served on the Attorney General.

JUDGMENT

DR. L. TIBATEMWA-EKIRIKUBINZA JA

The Facts

1. The Appellants sued the Respondent in the Supreme Court for orders that the latter refunds SR 6,657,000 and Euros 9,500 as well as for interest on the foregoing sums and costs of the suit.
2. The 1st and 2nd Appellants are husband and wife respectively of French origin. The 3rd Appellant is their daughter. The 1st and 2nd Appellants came to know the Respondent through his sister who is a good friend with their daughter (the 3rd Appellant). The 1st and 2nd Appellants decided to purchase parcel PR2465 but they could not register it in their names since the law of Seychelles bars non-citizens from purchasing immovable property without government sanction. However, they were advised by the Respondent's lawyer (Mr. Maurel) that they could circumvent the law by registering the parcel in the Respondent's names as he was Seychellois. The Respondent would thereafter execute a will in which he would bequeath the property to the Appellants.
3. Consequently, the Appellants concluded an agreement with the Respondent in which it was agreed as follows:
 - (i) The Appellants would jointly purchase parcel PR 2465, situated at Cote D'Or, Praslin, Seychelles, in the name of the Respondent, in light of the fact that they were all non-Seychellois nationals;
 - (ii) despite the fact that parcel PR2465 was to be bought and registered in the name of the Respondent, the Appellants would in equal portion, be the real, beneficial and ultimate co-owners of the said parcel;

- (iii) after the purchase of parcel PR2465, the Appellants would build a house thereon and be the sole, real and beneficial co-owners thereof;
 - (iv) the Appellants would at their own costs and expenses, effect all the necessary improvements and works in relation to parcel PR246;
 - (v) the Plaintiffs would at their own costs and expenses, furnish the house built on the said parcel; and
 - (vi) in order to protect and safeguard the Plaintiffs ' interest in parcel PR2465, the following documents would be executed by the Defendant:
 - (a) a testament by which the Defendant would give, devise and bequeath parcel PR2465 and any building situated thereon to the 3rd Appellant;
 - (b) a Power of Attorney, in terms of the Land Registration Act by which the Respondent would permanently and irrevocably appoint the 2nd and 3rd Appellants as his attorneys and agents in relation to parcel PR2465, to do, jointly and severally all acts in respect of parcel PR2465 including the power to transfer the said parcel.
4. Following the execution of the above agreement, Parcel PR2465 was acquired by the Appellants from Frederic Labuschagne and registered in the Respondent's name. As agreed, the entire purchase price for the land parcel was covered by the Appellants.
5. On 3rd March 2008, the Respondent executed a will transferring parcel PR2465 and any structures thereon to the 2nd Appellant.
6. On 19th August 2008, the Respondent executed a Power of Attorney under the Land Registration Act in favour of the 2nd and 3rd Appellants appointing them as permanent agents for parcel PR2465 with full authority to act jointly or individually, including the power to transfer the parcel.

7. The Appellants subsequently engaged Edley Enterprise (Pty) Ltd to construct a house on the said parcel and paid all the construction costs. The total cost for purchase of the land and construction of the house was SR 6,650,000.00. The costs incurred in relocating the beacons of the house and furnishing the house amounted to SR 7,000 and 9,500 euros.
8. However, in a turnaround of events, the Respondent maintained that he was the true owner of the house and the land. The Respondent's stance was that any contributions made by the Appellants were gifts to him due to his relationship with the 3rd Appellant as his girlfriend. He asserted that there was no valid Power of Attorney executed in favour of the Appellants and that his initial testamentary actions were gestures towards his then girlfriend (the 3rd Appellant). The Respondent maintained that he was neither legally obligated to make any testamentary provisions for the Appellants nor bore any intentions of doing so.
9. Regarding the Appellants' claim of being beneficial owners of Parcel PR2465 without proper government approval, the Respondent acknowledged that such assertions go against public policy. The Respondent argued that due to the Appellants' unauthorized claims of beneficial ownership, he has been deprived of control and access to his property, currently being rented out by the Appellants to tenants without his consent. He asserted that the Appellants were unlawfully benefiting from a property in which they have no legal stake. He denied that the Appellants suffered any unjustifiable harm to support their claim of reimbursement of funds expended to purchase the parcel of land and construct a house thereon.
10. On the other hand, the 1st Appellant's evidence was that the land was meant for himself and his family for constructing a house. That they contracted Edley Enterprise to build a four-bedroom house. The 1st Appellant stated that the land's purchase price of EUR 60,000 was paid via Barclays Bank to the seller. The dates on the Transfer of Land document indicated the date on which the money was transferred. Furthermore, the 1st Appellant testified that the Respondent made no financial contributions to the property. During cross-examination, the 1st Appellant revealed that, initially, they were unaware they could purchase a plot of land in their names. However, they were informed by Mr. Maurel (the Respondent's lawyer) that there was another way in which they could

acquire the land. The 1st Appellant however accepted that the agreement they signed with the Respondent was indeed against public policy.

11. Another witness who testified on the Appellants' behalf was Mr. Edly Sophola, a building contractor, who testified that the 1st Appellant was his client for whom he constructed a house in Souyav Estate, Praslin in 2008. He clarified that the 2nd Appellant engaged his services and handled the payments of the construction project. That the Respondent was not involved in the construction process although the building plan was under his name. Sophola also mentioned that he crafted all the furniture for the house and subsequently handed over the house keys.
12. After listening to the evidence presented by the parties, the Trial Judge found that the 1st Appellant's evidence was more credible than that of the Respondent. The Judge therefore accepted the evidence that it is the Appellants who paid for the land as well as the house built on Parcel PR2465.
13. The Judge nevertheless dismissed the Appellant's claim and prayer for the Respondent to refund the money used to purchase and construct the house on the premise that the agreement concluded between the parties was against public policy.
14. Dissatisfied with the Trial Judge's findings, the Appellants lodged an appeal in this Court on grounds that:
 1. **The learned Trial Judge erred in law and on the evidence in holding that the issue for determination by the court was whether a court can enforce an agreement, the object of which is against policy, as the Appellants were not seeking to enforce an agreement which was against public policy.**
 2. **The learned Trial Judge erred in law and on the evidence in failing to appreciate and hold that the cause of action of the Appellants was one of unjust enrichment as opposed to the enforcement of a contract.**
 3. **The learned Trial Judge erred in law and on the evidence in failing to hold that since the agreement was against public policy, the 1st, 2nd and 3rd Appellants had suffered detriments without lawful cause whilst the Respondent had correspondingly been enriched without lawful cause.**

Reliefs sought:

- i. That this Court be pleased to quash the judgment of the Trial Court and order the Respondent to pay to the Appellants -
 - (a) the sum of:
 - (i) Seychelles Rupees SR 6,657,000.00; and
 - (ii) Euros 9,500,00, to the Plaintiffs; and
 - (b) interests on the sum of Seychelles Rupees 6,657,000.00 and Euro 9,500.00, along with costs.

Parties' submissions

15. The Appellant submitted on grounds 1 and 2 together and ground 3 alone. In support of ground 1 and 2, the appellant faulted the Trial Judge for dealing with the case as if the Plaintiffs were seeking for enforcement of an agreement which was against public policy.
16. Counsel argued that having averred in the plaint that the agreement was against public policy, for contravening Section 3 of the Immovable Property (Transfer Restrictions) Act, what the Plaintiffs had sought for was that the agreement be declared as against public policy. And that the Plaintiffs having suffered detriment without lawful cause whilst the Defendant had correspondingly been enriched without lawful cause, a further prayer was for refund of the money reflecting the value of the land and developments they had made thereon.
17. That the crux of the appellants' case was outlined in paragraphs 5-7 of the plaint, which stated that:

"5. ... the agreement is in contravention of Section 3 of the Immovable Property (Transfer Restrictions) Act and is, therefore, against public policy.

6. The plaintiffs aver that the defendant has taken possession and control of parcel PR2465, the house situated thereon, and all other improvements made by the plaintiffs on the parcel, and has denied the plaintiffs access to and enjoyment of the said property.

7. On the basis of paragraphs 3, 4, 5, and 6 of the plaint, the plaintiffs have suffered detriment without lawful cause while the defendant has correspondingly been enriched without lawful cause ..."

18. Counsel pointed out that the cause of action had been brought under Article 1381 (1) which provides that: If a person suffers a detriment without there being a reason in law for that detriment, and another is correspondingly enriched, the former may recover from the latter the extent of the enrichment of the latter.
19. The suit was not under Article 1142 of the Code which provides that every obligation to do or to refrain from doing something gives rise to damages if the debtor fails to perform it. The latter would translate into a prayer that court awards damages to the Plaintiff arising out a default by the Defendant – in essence enforcement of a contract.
20. The Appellant’s dissatisfaction with the decision of the Trial Court was based on the court framing the issue for determination as follows: *essentially the issue for determination is whether a Court can enforce an agreement, the object of which is against public policy.* The court had gone ahead to pronounce itself as follows: *... the object of the arrangement was for the purpose of a purchase of ... for the benefit of the Plaintiffs who as foreigners could not purchase property ... without Seychelles government sanction. That ... was against public policy. The courts cannot order the Defendant to make the payments prayed for by the Plaintiffs as the Plaintiffs knew that the transaction was illegal to start with.*
21. The Appellants’ Counsel further contested the trial court’s reliance on authorities of this Court which dealt with causes of action on *enforceability of contracts* which were against public policy – cases which were not dealing with the principle of unjust enrichment.¹
22. In support of ground 3, the Appellants referred to statutory provisions that invalidate agreements that go against public policy. Counsel argued that since the impugned agreement violated the **Immovable Property (Transfer Restrictions) Act** and the Appellants had suffered detriment without a lawful cause and the Respondent had correspondingly been enriched without lawful cause, the trial court should have ordered

¹ Berard Monthy vs. Alex Buron [2015] SCCA 15 and DF Project Properties (Pty) Ltd vs. Fregate Island PVT Limited [2021] SCCA 28

the Respondent to refund the Appellants various sums expended on acquisition of the property under Article 1381(1) of the **Civil Code of Seychelles Act**. That what the Appellants had brought to court was a claim of unjust enrichment. The Article provides as follows:

If a person suffers some harm without just cause and another is correspondingly enriched without just cause, the former shall be entitled to recover what is due to him to the extent of the enrichment of the latter. Provided that this action for unjust enrichment shall only be admissible if the person suffering the harm cannot avail himself of another action in contract, or quasi-contract, delict or quasi-delict, provided also that the harm has not been caused by the fault of the person suffering it.

23. Counsel inferred that since the Appellant could not proceed under the law of contract (since the agreement was against public policy and thus null and void), the action had to be for unjust enrichment - the Appellant had no other remedy available/cannot avail himself of another action. Counsel argued that in light of the above provision of law, the authorities of **Berard Monthy vs. Alex Buron(Supra)** and **DF Project Properties (Pty) Ltd vs. Fregate Island PVT Limited (supra)** were distinguishable from the present matter in that the causes of action in the aforementioned cases were not based on Article 1381-1 of the Civil Code, the cases were based on the enforceability of contracts that were against public policy.

Respondent's reply

24. The Respondent argued all the 3 grounds of appeal together.

25. The Respondent submitted that the learned Trial Judge was correct to address the issue of whether the court can enforce an agreement the object of which was against public policy. Counsel argued that this was firstly, because the Plaintiffs specifically pleaded the illegality of the contract. Secondly the Plaintiff had unequivocally prayed for a

declaration by the court that the agreement was against public policy and for the judge to thereafter grant a monetary relief upon such declaration.

26. In counsel's view, the Appellants' prayer meant that the learned Trial Judge was correct to embark on the exercise of determining whether the Court was empowered to make the declaration sought by the Appellants.

27. Counsel further submitted that the defence of 'illegality' may apply even where neither party submitted pleadings. This is because once the illegality is brought to the attention of court, it cannot be ignored. In support of this submission, Counsel relied on the persuasive English decision of **Birkett vs. Acorn Business Machines Ltd**² wherein Justice Colman stated that:

"If a transaction is on its face, that is to say merely by looking at its terms and without additional evidence, manifestly illegal, the Court will refuse to enforce it, whether or not either party alleges illegality. "

28. The Respondent's counsel also submitted that the Appellants having admitted that the contract was illegal for going against public policy, they cannot turn around to vitiate the contract and at the same time seek a relief from the said illegal transaction. Counsel argued that the Appellants seek an equitable relief from this Court but with "unclean hands." This offends the equity maxim that, *he who comes to equity, must come with clean hands.*

29. It was also the submission of the Respondent that the Defendant had failed to file any written submissions which would substantiate their contention that the cause of action was based on unjust enrichment. That the Appellants' pleadings were derived from a cause of action namely contract and praying for nullity of the contract with no specific pleading in relation to a relief on unjust enrichment. That therefore the basis of the monetary relief sought is a money provided under a contract whose objective was admittedly against public policy.

² [1992] 2 AllER (Comm) 429.

30. Counsel further submitted that even if the cause of action was to be premised under Article 1381-1 of the Civil Code, which provides for a remedy for unjust enrichment, the said action would only be enforceable where there is a lawful cause. That in the instant matter however, there was no lawful cause since the agreement went against public policy. Thus, Counsel submitted that unjust enrichment claims should be denied if they are predicated on actions or agreements that the law considers to be dishonourable, illegal, or contrary to public policy. To buttress the foregoing argument, Counsel cited the following legal provisions:

i. Article 1108 of the Civil Code which stipulates the conditions which are essential for validity of an agreement. One of those conditions is that the agreement should not be against the law or public policy.

ii. Articles 6, 1131 and 1133 of the Civil Code, which state that: -

Article 6 - It shall be forbidden to exclude the rules of public policy by private agreement.

Article 1131 - An obligation which is against public policy shall have no legal effect.

Article 1133 - The object of an agreement is unlawful when it is prohibited by law or when it infringes the principles of public policy.

31. In Counsel's view, the principle of unjust enrichment applies where money is given for the benefit of someone under, or in anticipation of a contract and the basis for that transfer has failed. This could be as a result of frustration, total failure of consideration or want of contractual capacity by one of the parties to the contract.

32. Regarding the authorities of **Berard Monthy vs. Alex Buron (supra)** and **Project Properties Ltd vs. Fregate Island (supra)** which the Appellant attempted to distinguish from the present appeal, the Respondent's counsel submitted that the Appellant's analysis of the authorities was erroneous and aimed at circumventing the fact that the Appellants knowingly executed a contract which was against public policy law. That the trial court was correct in applying the **Berard Monthy** principle and finding that "because of the illegality of the contract and its being contrary to public policy, the court is unable to make a determination of the plaint".

33. Counsel for the Respondent argued further that the Appellants could not rely on Article 1381-1 because of the proviso therein that an individual cannot avail themselves of the remedy contained in the article if the detriment/suffering caused to them was caused by their fault. That the Appellant had knowingly entered into a contract that was against public policy.

34. Counsel also submitted that French jurisprudence³ follows the rule that the remedy of unjust enrichment cannot be invoked by those who have carried out work at their own risk and in their own interest.

35. In conclusion, the Respondent prayed that this Court dismisses the appeal with costs.

Court's consideration

36. The essence of ground 1 is that the learned Trial Judge erred by focusing on the issue - whether a court can enforce an agreement against public policy - despite the fact that the Appellants' suit was for purposes of declaring that the agreement reached between the parties was void for going against public policy.

37. To arrive at her decision, the Trial Judge framed the issue to be resolved as follows: *“essentially the issue for determination is whether a Court can enforce an agreement, the object of which is against public policy.”*

38. Thereafter, the Judge went on to cite three authorities of this Court⁴ whose *ratio decidendi* is that: *a court cannot endorse an agreement which is against public policy*. It is to be noted that each of the said authorities were based on disputes arising from breach of contract. I will set out **Berard Monthy vs. Alex Buron** in more detail because I consider it the *locus classicus* in Seychelles in regard to this principle.

³ Court of Cassation, Civil Chamber 3, of February 26, 1992, 90-18.042.

⁴ **Berard Monthy vs. Alex Buron** (Supra); **DF Project Properties (Pty) Ltd vs. Fregate Island PVT Limited** (Supra); **NSJ Construction (Pty) Ltd and Anor V F.B Choppy (Pty) LTD** (SCA 16 of 2019) [2021] SCCA 53.

39. **In Berard Monthy vs. Alex Buron** the parties entered a contract whose objective was the construction of a house for the Respondent by the Appellant. One of the terms of the contract was that the contract price would be paid in pound sterling and that the rate would be the one obtaining on the black market at the time and not the legal bank rate.
40. Along the way the Respondent terminated the contract. The Respondent had by that time transferred money at various times to the account of the Appellant and some work had been done although the house had not been completed.
41. A dispute arose as to what the pound sterling vs Seychelles Rupee rate was at the relevant times of the money being deposited on the account of the Appellant, The Appellant deponed that the rate of the rupee against the pound sterling agreed by the parties in 2005 was SCR23 whilst the Appellant maintained that it was SR12 or SR 14. The Central Bank confirmed to the Court that the average official rate for the year 2005 at the time was 1GBP = 9.6126 SR.
42. The learned trial judge preferred the evidence of the Respondent over that of the Appellant and found that £33,000 x 23 (black market rate in 2005) = SR759, 000 (about 88% of the contract price) was paid by the Respondent for the construction of the house. He accepted the surveyor's report that only 40% of the construction work on house had been completed. He concluded therefore that as the Appellant had received nearly 88% of the contact price but had only performed 40% of the building work, he should pay the value of the works left to be performed. He found that the sum of SR780, 000 was due together with moral damages of SR50, 000 and costs of the action.
43. The Appellant appealed against the decision on 7 grounds but the Court of Appeal held that there was no need to reiterate the grounds of appeal since the crux of the appeal was one issue and one issue alone - Can the court enforce an agreement, the *object* of which is against public policy? Twomey JA went on to hold as follows:

Whilst the object of the contract between the Appellant and the Respondent was the construction of a house, the reason that drove the parties to the agreement was that payment for the contract would be made in foreign

exchange at the black market rate. Both parties testified to this. What they now disagree on is the black market rate applicable in 2005.

44. Twomey, JA was emphatic that, *the Court would not be drawn into considering the merits and demerits of a contract that is against public policy thus: **We refuse to be drawn into considering the merits and demerits of a contract that is against public policy. (My emphasis)***

45. And in **DF Project Properties (Pty) Ltd vs. Fregate Island PVT Limited**⁵, also relied on by the Trial Court, this Court stated that:

... Our laws concerning the enforcement of foreign judgments enjoin the Court to make sure that any foreign judgment sought to be enforced is not contrary to any fundamental rules of public policy. The foreign judgment and its execution in this jurisdiction cannot be divorced. The corollary is that this Court cannot endorse the enforcement of a decision on a contract which had as one of its 'causes' the avoidance of the payment of taxes and other dues in Seychelles.

46. It is important to emphasize that indeed as argued by Counsel for the Appellant, the authorities cited did not deal with the concept of unjust enrichment founded on a contract which was against public policy but rather with breach of contract arising out of a contract which was against public policy.

47. I note that following an interrogation of the law cited above and the evidence adduced before the court, the trial judge first made a finding that all parties knew that the Plaintiffs (Appellants in this Court) could not purchase the property and the agreement they entered was for purposes of getting around the legal hurdle. Secondly the court held that since the agreement was against public policy, the courts cannot order the Defendant to make the payment prayed for by the Plaintiffs as the Plaintiffs knew that the transaction was illegal to start with.

⁵ [2021] ACCA 28,

48. It is however, my considered view that in the matter before us, what the Trial Judge found applicable was the *ratio decidendi* of the authorities to wit: *a court cannot endorse an agreement which is against public policy; a court will not be drawn into considering the merits and demerits of a contract that is against public policy.*

49. I will thus add that whether the claim is founded on breach of contract or unjust enrichment, this court will not be drawn into considering the merits and demerits of a contract that is against public policy.

50. I am in agreement with Counsel for the Appellant that, the court did not interrogate the conditions necessary for a litigant to succeed on a claim of unjust enrichment. However, implicit in the court's concluding paragraph is clear indication that the trial judge was alive to the fact that the relief sought was founded on unjust enrichment. In paragraph 33 of the judgment, the Trial Judge mused:

“... how can we allow a person to come to court of law and to say I broke the law well knowing it, and totally guilty ... I have broken the law but the consequences by breaking the law is that I have been impoverished and I am asking the court to say this impoverishment is unjust despite the fact that I have broken the law. This is not possible. “

51. What is even more important to consider however is that under Article 1381-1 of the Civil Code, which provides a remedy for unjust enrichment and pursuant to which Counsel for the Appellant has argued the appeal, the detriment suffered by a claimant must not have been caused by their fault. One of the conditions for a successful claim in unjust enrichment is that the detriment must not be caused by the fault of the person suffering it.

52. Does the Appellant qualify for a remedy under the Article 1381-1? To answer that question, I reproduce part of what transpired during cross examination of the first appellant below:

Counsel: ... you are telling me that at the beginning you were aware that the law stopped you from putting property on your name. Is that what you are telling me?

Appellant: No, but yes, at the beginning we did not know that we could buy a plot of land and this is why and then Mr. Morel told us that there were documents that could be made.

Court: There was a way around the system.

Appellant: there was a way around the system which could enable us to have a plot of land

Counsel: Mr. Richet I find it very hard to believe your contention that you were doing was in fact contrary to our law in Seychelles and obviously Public Policy.

Appellant: it is not that we did not know about the law but Mr. Morel and Mr. Payet told us that we could do it.

Counsel: So, you knew the law but you went ahead anyway?

Appellant: Yes

53. I find that the Appellant was the author of his own losses despite his efforts to establish that he was wrongly advised. Therefore, he does not meet one of the conditions necessary for an unjust enrichment case to succeed.

54. It is trite law that a court of law can consider an issue not directly raised by the parties. This principle allows the Court to address points of law on its own accord, even if they have not been specifically brought up by the parties involved in the matter. This judicial practice is what is known as the *sua sponte* concept or the court acting *suo moto*.

55. The concept of *sua sponte/suo moto* refers to actions taken by a court on its own initiative without being prompted by either party involved in the legal proceedings.⁶ The concept allows a judge to explore and address important legal matters which were not initially presented by the litigants. This concept enables judges to uphold the integrity of the legal system by addressing critical issues that may have been overlooked or neglected by the parties involved.

56. The question which then follows is, *whether the Trial Judge committed a legal error by making findings on the issue of enforcement of an agreement which was against public policy – an issue which was neither raised by the plaintiffs (now Appellants) nor the Defendant (now Respondent).*

57. I note that in Paragraph 5 of the plaint, the Appellants averred that, the agreement was against public policy in that it contravened **Section 3 of the Immovable Property (Transfer Restrictions) Act.**

58. I reproduce the provisions of the Section as follows:

A non-Seychellois may not—

(a)purchase or acquire by any means whatsoever and whether for valuable consideration or not, except by way of succession or under an order of the court in connection with the settlement of matrimonial property in relation to divorce proceedings any immovable property situated in Seychelles or any right therein; or

(b)lease any such property or rights for any period; or

(c)enter into any agreement which includes an option to purchase or lease any such property or rights,without having first obtained the sanction of the Minister.

59. Furthermore, the Appellants' prayer in the plaint was drafted in the following words:
“The Plaintiffs pray this Honourable Court declares that the agreement is against public policy and is a nullity and to order the Defendant to pay the Plaintiffs the sum of SR 6,657,000.00 and 9,500 euros as well as interest on the said sums ...”

⁶ Latin term meaning "of one's own accord" or "voluntarily."

60. In carrying his duty of evaluation of all the evidence presented before him, the Trial Judge first discussed the enforceability of the agreement before deciding whether or not to grant the prayer in the plaint - to declare the agreement illegal on grounds of public policy. The Judge's judicious approach demonstrated a thorough consideration of the facts and evidence adduced by the parties.

61. I therefore opine that the issue of enforcing an agreement between parties that contravened public policy, though not raised by the litigants, was intricately intertwined with the facts of the case and it was impossible for the Trial Court to dispose of the case without discussing the issue of enforceability. I find that the resolution of the issue not raised by the parties was integral to achieving a comprehensive conclusion of the entire matter.

62. Arising from the above analysis, I hold that ground 1 fails.

Grounds 2 and 3

Appellants' submissions

63. In support of Ground 2, the Appellants submitted that the Trial Judge failed to hold that the cause of action was one of unjust enrichment as opposed to enforcement of an agreement which was against public policy.

64. For ground 3, the Appellants' counsel submitted that, it is trite law that an action for unjust enrichment is a subsidiary action available to persons who suffer a detriment but have no other remedy available in contract, or quasi-contract, delict or quasi-delict. That in the present case, the Appellants suffered a detriment, without lawful cause and the Respondent was enriched by registering the property in his names hence making the circumstances appropriate for the claim of unjust enrichment.

65. To support the above submission, counsel relied on the persuasive case of **Ebrahim Dawood Ltd vs. Co-operative Centrale De Beau Bassin**⁷, wherein the Appellant company claimed from the Respondent society, payment of the sum of Mauritian Rupee

⁷ [1957] MR 363.

896.45 for goods sold and delivered although the Respondent society had not complied with Rule 57 of the Co-operative Credit Society Ordinance to permit it to carry on the business of operating credit services. That despite the invalidity of the contract of sale reached between the parties, the Supreme Court of Mauritius observed that:

"... As the plaint did not comprise a claim for "enrichment aux dépens d'autrui", even if the magistrate had found, contrary to what he did, that the transaction had benefited the Respondent, he could not have granted any amount to the appellant."

66. Furthermore, counsel relied on the persuasive case of **Co-operative Centrale De Beau Bassin vs. Mamet-Leferna Ltd**⁸, wherein the Court held that:

“Where a valid contract had not been entered into through an infringement of one of the provisions of the law, the Courts in France have ruled that no common law action could be taken yet a claim for indemnity was admissible.”

67. Appellant’s Counsel argued that in line with the above persuasive cases, a claim of unjust enrichment (action de in rem verso) is maintainable in cases where a contract is null and void on the grounds of public policy. Therefore, that the Trial Judge ought to have granted the relief sought by the Appellants.

Respondent’s reply

68. In reply, the Respondent submitted that, the Appellants failed to substantiate their contention that the cause of action was based on unjust enrichment. Counsel submitted that the Appellants’ pleadings were premised on nullity of the agreement as opposed to unjust enrichment.

69. Counsel further submitted that even though the cause of action was premised under Article 1381-1 of the Civil Code, which provides for a remedy for unjust enrichment, the said action would only be enforceable where there is a lawful cause. That in the instant matter however, there was no lawful cause since the agreement went against public policy. Thus, counsel submitted that unjust enrichment claims should be denied if they are predicated on actions or agreements that the law considers to be dishonourable,

⁸ [1959] MR 201

illegal, or contrary to public policy. To buttress the foregoing argument, counsel cited the following legal provisions:

i. Article 1108 of the Civil Code which stipulates the conditions which are essential for validity of an agreement. One of those conditions is that the agreement should not be against the law or public policy.

ii. Articles 6, 1131 and 1133 of the Civil Code, which state that: -

Article 6- It shall be forbidden to exclude the rules of public policy by private agreement.

Article 1131- An obligation which is against public policy shall have no legal effect.

Article 1133- The object of an agreement is unlawful when it is prohibited by law or when it infringes the principles of public policy.

70. In counsel's view, the principle of unjust enrichment applies where money is given for the benefit of someone under, or in anticipation of a contract and the basis for that transfer has failed. This could be as a result of frustration, total failure of consideration or want of contractual capacity by one of the parties to the contract.

71. Regarding the authorities of **Berard Monthy vs. Alex Buron (supra)** and **Project Properties Ltd vs. Fregate Island (supra)** which the Appellant attempted to distinguish from the present appeal, the Respondent's counsel submitted that the Appellant's analysis of the authorities was erroneous aimed at misleading the court and circumventing the law. That it is on record that the Appellants knowingly executed a contract which was against public policy and Justice Twomey held in the **Berard Monthy case (supra)** that, a *court cannot endorse an agreement which is against public policy*

72. Counsel also submitted that French jurisprudence⁹ follows the rule that the remedy of unjust enrichment cannot be invoked by those who have carried out work at their own risk and in their own interest.

73. In conclusion, the Respondent prayed that this Court dismisses the appeal with costs.

Court's consideration

⁹ Court of Cassation, Civil Chamber 3, of February 26, 1992, 90-18.042.

74. The **Black's law Dictionary** defines unjust enrichment as the retention of a benefit conferred by another, without offering compensation, in circumstances where compensation is reasonably expected.¹⁰

75. The principle is provided for in **Article 1381 (1)** of the **Civil Code**¹¹ as follows:

If a person suffers a detriment without there being a reason in law for that detriment, and another is correspondingly enriched, the former may recover from the latter the extent of the enrichment of the latter.

76. The Appellants argued that they contributed wholly to the purchase of the parcel and construction of the house without the Respondent making any financial contribution. That it would therefore amount to unjust enrichment of the Respondent by retaining property to which he did not make any contributions and yet the Appellants have not been compensated for the expenses incurred in obtaining Parcel PR2465. It is on that premise that the Appellants sought an order compelling the Respondent to refund the Appellants various sums expended on acquisition of the property.

77. In dealing with the argument advanced by the Appellants, the Trial Judge held as follows:

"The courts cannot order the Defendant [now Respondent] to make the payments prayed for by the Plaintiffs [now Appellants] as [they] knew that the transaction was illegal to start with.

I note that in CS80/2017 counsel for the Defendant Mr. Georges explained the Plaintiffs position clearly during the sitting of 28th March 2019 and to use his words "[the is dead in the water. His detriment is caused by his own fault in entering into a contract which is contrary to public policy. He is the architect of his own misfortune. But how can we allow a person to come to a court of law and say I broke the law well knowing it and totally guilty... but the consequence of breaking the law is that I have been impoverished and I am asking the court to say this impoverishment is unjust despite the fact that I have broken the law. This is not possible." (My emphasis)

78. In essence, the Trial Judge declined to grant the Appellants' prayer of compelling the Respondent to refund the sums of money because they were seeking to challenge the

¹⁰ Black's Law Dictionary, p. 1536, 7th edition (1999).

¹¹ Civil Code of Seychelles Act, 2020.

consequences of their illegal actions by claiming impoverishment and an unjust enrichment of the Respondent.

79. The conditions for success of an action for unjust enrichment as deduced from the decision of **Isaac vs. Quilindo**¹² are as follows:

- (i) That there was an enrichment;
- (ii) There was an impoverishment;
- (iii) Connection between the enrichment and impoverishment;
- (iv) The absence of a lawful cause or justification for the enrichment or impoverishment; and
- (v) The absence of another available remedy for the person who suffered the impoverishment.

80. A careful reading of the Record and decision of the Trial Judge shows the existence of all the above mentioned conditions which would result in success of the Appellants' action against the Respondent. However, **Article 1381 (3)** of the **Civil Code** provides that:

an action is not available where the person who has suffered the detriment caused the loss by his or her fault or negligence. Thus, if a person suffers a loss or negative consequence due to their own actions or omissions, they are not entitled to enforce the remedy of unjust enrichment.

81. It is clear from the Record and admission by the Appellants that they entered into an agreement which was against public policy that led to them losing both the parcel of land and the house constructed thereon. I find that the Mauritian cases cited by the Appellants are not relevant to the facts of this appeal. I hold just like the Trial Judge did, that it is not possible for courts to assist a plaintiff who has been guilty of illegal conduct.

82. Therefore, grounds 2 and 3 fail.

Conclusion.

83. The question left for determination is: *what happens to Parcel PR246?*

¹² (2011) SLR 112.

84. It is a generally accepted principle that findings of fact are matters within the province of a trial court. An appellate court will very rarely interfere with the findings of fact made by a trial court. An appellate court only interferes if the findings are perverse, unreasonable or not supported by the evidence adduced before the trial court.
85. It is also a generally accepted principle in court hearings that the demeanour of a witness is of value in shedding light on the credibility of a witness. The opportunity to observe the demeanor of a witness while testifying is often exclusive to the trial court, the court where evidence and testimony are first introduced, received, and considered.
86. In regard to whether or not it is the Appellant who exclusively paid for development of the property, it was the finding of the Trial judge that the first plaintiff was a more credible witness than was the defendant. The judge accepted the evidence of the first plaintiff that the Plaintiffs paid for the land and the house built on Parcel PR 2465. The judge went on to hold that all the parties knew that the Plaintiffs could not purchase the property in question and in order to get round the hurdle they agreed that the Plaintiffs would pay for the property which would be transferred to the Defendant for the benefit of the Plaintiffs.
87. We have no reason to depart from the findings of the trial judge that it was the first plaintiff who paid for the land and the house built on Parcel PR 2465. This finding leads to the conclusion that the Respondent has, as argued by the Appellant, been enriched without just cause.
88. The question therefore is - *in light of the fact that the Respondent in whose name the property is registered was enriched without just cause and that this was in circumstances which prove that he was complicit in an agreement intended to defeat the law and public policy, and that it is through the illicit conduct that he became registered owner of the property- what happens to the ownership of the impugned property?*
89. Section 5 of the Immovable Property (Transfer Restriction) Act comes into play. The Section provides as follows:

Section 5: Transaction unlawful and void for lack of sanction - Any transaction effected in contravention of the provisions of sections 3, 4, 7(1) or (2) or section 12 shall be unlawful and void, and in the case of a sale, **any immovable property or rights therein purporting to have been transferred under such sale shall be forfeited to the Republic. (my emphasis)**

It is therefore ordered that Parcel PR 2465 shall be forfeited to the Republic.

Signed, dated and delivered at Ile du Port on 3rd May 2024.

Dr. Lillian Tibatemwa-Ekirikubinza, JA.

I concur

Dr. M. Twomey-Woods, JA.

ANDRE JA

IN ADDITION TO THE JUDGMENT OF DR. PROF. LILLIAN TIBATEMWA-EKIRIKUBINZA

- [1] I have read the Judgment of my learned sister Dr. Prof. Lillian Tibatemwa-Ekirikubinza, JA and I concur with the Orders to dismiss the appeal, decline the request for restitution and that Parcel PR 2465 be forfeited to the Republic. In this regard I also endorse the discussion on the grounds of appeal, decision and orders as raised and considered at paragraphs [36] to [88] and [89] thereof.
- [2] It is worthy of mention however, that in some jurisdictions, the principle that illegality is the absolute bar for the action of restitution has been definitively removed. That being so, an analysis of the decided cases will make it absolutely clear that even if this case was to be determined in these jurisdictions, the same outcome would undoubtedly have resulted. Here are a couple of examples:
- [3] In the case of *DF Project Properties (Proprietary) Ltd v Fregate Island Private Limited (Supra)*, the Court of Appeal relied on a number of foreign cases. Most importantly it referred to the English case of *Mirza v Patel [2016] UKSC 42*, where Patel had paid Mirza the sum of £620,000 on the basis of the agreement that Mirza would use the sum to bet on the trading of shares using insider information. The agreement between the two men was a contract to commit a crime and was itself a criminal conspiracy (the offence of

insider dealing is contrary to § 52 of the Criminal Justice Act 1993). The agreement was not carried out because the information was not forthcoming.

[4] Nonetheless, Mirza did not return the money to Patel, who then brought a claim against Mirza, who contended that the claim should be dismissed because of the arrangement's illegal nature. In this case, the Supreme Court decided in favor of restitution despite the illegal contract on which the claim for enrichment was based.

[5] The court in *Mirza* referred to the Canadian case of *Hall v Hebert*¹³ which established that the doctrine rests on the principle that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system. On this basis, the Supreme Court in *Mirza* established a **three-stage test** to determine whether the public interest would be harmed in that way, by considering:

- (i) First, the underlying purpose of the prohibition which had been contravened and whether that purpose would be enhanced by the denial of the claim;
- (ii) Secondly, any other relevant public policy on which the denial of the claim may have an impact; and,
- (iii) Thirdly, whether denial of the claim would be a proportionate response to the illegality.

[6] The Court then explained the policy reasons behind the maxim *ex turpi causa* in its traditional application to defeat a civil claim:

- (i) First, that a person should not be allowed to profit from his own wrongdoing.
- (ii) Secondly, that the law should be coherent and not self-defeating, condoning illegality by giving with the left hand while it takes with the right hand.

[7] On the evidence in *Mirza*, the court found that the claimant's deposit of money used to place bets on a bank's share prices with the benefit of insider information should be returned to him.

¹³ [1993] 3 RCS 159.

- [8] Lord Sumption¹⁴ concluded that there is no inconsistency in the law in permitting a party to an illegal arrangement to recover any sum paid under it, so long as restitution is possible as the order for restitution simply returns the parties to the position in which they would and should have been, had no such illegal arrangement been made.
- [9] The *Mirza* case has been described as one of the most significant judgments in the area of English private law in recent years, as the UKSC decided in favor of a **restitution award for unjust enrichment despite the source being an illegal contract.** Consequently, the ancient rule that states **illegality is the absolute bar for the action of restitution has been definitively removed.**
- [10] These rules had some exceptions. The most important were:
- (i) When the parties were not in *pari delicto*; and,
 - (ii) When the claimant withdrew from the transaction during the *locus poenitentiae* (a space or time for repentance)
- [11] These foreign decisions explain the Court in *DF Projects*' deduction that Seychelles law is categorical in relation to breaches of public policy; that it does not provide for a balancing test to be carried out to examine the underlying purpose of the prohibition which had been contravened and whether that purpose would be enhanced by the denial of the claim or whether the denial of the claim would be a proportionate response to the illegality.¹⁵

ANDRE JA

Signed, dated, and delivered at Ile du Port on 3 May 2024

¹⁴ At para 250, 253.

¹⁵ *DF Projects*, Para 62.

