

**Durup v Adam & Or
(1998) SLR 193**

Kieran SHAH for the plaintiff
Philippe BOULLE for the defendants

Ruling on the objection to the admissibility of oral evidence on a matter, the value of which exceeds R5000, delivered on 6 February 1998, by:

AMERASINGHE J: In the examination-in-chief of the plaintiff, to a question by her counsel: "did you pay for the house", objection was taken by counsel for the defendant to the answer: "I paid for it. It was arranged that I buy from him at R35,000". The ground of the objection was that oral evidence is inadmissible in accordance with article 1341 of the Seychelles Civil Code as the matter in question exceeds the value of R5000. Counsel, Mr Boule, submitted that as the matter concerns the purchase of immovable property no exception will apply and the production of a written document is necessary to prove such a fact.

Counsel for the defendant relies upon the judgment of Alleear J as he was then, in the case of *Rene Françoise v Raymonde Herminie* (1992) SLR 111 delivered on 22 July 1992. The learned Judge in the said case held thus:

Besides, the sale or purchase of immovable property does not fall into the category of obligations where the insistence by one party for a written document could be interpreted as a *méfiance* or mistrust by the other. On the contrary, the insistence of writing is proof that the party or parties is/are indeed serious in his or their enterprise.

Counsel for the plaintiff on the other hand insisted that, although the plaintiff in evidence referred to the purchase of a house, his intention was only to adduce evidence to establish the payment of money. The question put to the plaintiff and the averments in the plaint appear to be consistent with the submissions of counsel. The question "did you pay for the house" need not necessarily be construed to mean payment of a purchase price or consideration, when the plaintiff has not pleaded any purchase of immovable property.

There is no dispute between the parties that the matter in question exceeds R5000 in value and the plaintiff is bound by article 1341 of the Civil Code that prohibits oral evidence and requires a document drawn up by notary or under private signature.

The plaintiff, however, claims that on the ground of moral impossibility for her to produce proof in writing of the payment of money that the prohibition in article 1341 is inapplicable in accordance with article 1348 of the Civil Code.

Article 1348 provides thus:

They shall also be inapplicable whenever it is not possible for the creditor to obtain written proof of an obligation undertaken towards him.

It is commonly accepted by courts that the specific provision of the said article 1348 is not exhaustive and the jurisprudence has developed to include moral impossibility to effectively remove the application of the provision of article 1341 even when the matter exceeds R5000 in value.

According to the testimony of the plaintiff, the first defendant is her sister and the second defendant is her nephew. In narrating the circumstances under which she made the payment, she adduced in evidence that when she and her husband returned to Seychelles in 1967 the first defendant, her sister, and the first defendant's husband, Boris, received them and provided them with the opportunity to stay with them in their own house. After some time, when the plaintiff and her husband has shifted to a house in Mont Fleuri and were living on their own, the first defendant's husband Boris and the defendants decided to move out of the house at Pointe Conan. It was then the plaintiff is alleged to have paid the sum of R35,000.

Counsel for the plaintiff submits that the very close ties that the existed between the parties and the fact that the first defendant's husband Boris and the first defendant had received them on arrival in Seychelles, provided them with their immediate requirements and ultimately gave them the house she now occupies, contributed to the circumstances that created a moral impossibility to demand for a document in proof of payment.

Counsel for the defendants in response argued against the contention of the plaintiff that there was a material impossibility for the plaintiff to obtain a document for payment. Although counsel for the defendants relied upon the judgment of *Rene Françoise v Raymonde Herminie* (supra) on the ground that different considerations apply when the payment was made for purchase of land, the learned Judge however gives no specific reasons for a distinction to be drawn. He only expressed the view, "that the sale or purchase of immovable property does not fall into the category of obligations where the insistence by one party for a written document could be interpreted as a méfiance or mistrust by the other". The said finding suggests that the real reason for the learned Judge to deny the existence of an impossibility to obtain a document in proof was that the circumstances did not permit a conclusion that the seller would consider that a demand for a document would be interpreted as a mistrust by the purchaser. It would appear that the basis for applying article 1348 according to the learned Judge was the existence or non-existence of an intimate relationship of the parties concerned.

As submitted by counsel for the plaintiff, and as is evident by the pleadings, although the plaintiff in answer admitted that the payment was for the purchase of a house, there can be no occasion in these proceedings to establish such a fact. In any event there can be no reason why oral evidence on the ground of moral impossibility to obtain a

document should not be admitted for the limited purpose of establishing on evidence that in fact the alleged payment was made.

To consider the circumstances that could constitute a moral impossibility and permit oral evidence, the following part of the judgment in the case of *Nunkoo and Ors v Nunkoo* 1973 MR 269 is of relevance:

Under article 1348 of the Civil Code, oral evidence is admissible, whatever the amount involved, when it has not been possible for the creditor to obtain written proof of the obligation contracted towards him. What constitutes impossibility is not defined by law and the court is allowed complete freedom in deciding each case, having regard to all the circumstances, including the relation between the parties, whether or not it was possible for a party alleging a certain transaction to obtain written proof thereof.

I fail to see why any distinction should be made between transactions for the purchase of immovable and transactions for the purchase of movable property. In the case of *Lewis Victor v The Estate of Andre Edmond* (1983) SLR 203 decided on 7 December 1983, Chief Justice Seaton found that a close and loving relationship between two half brothers would cause any demand for an agreement under notarial deed or private signature to be interpreted as lack of trust, hence he accepted the existence of a moral impossibility. Allear J, as he then was, in the case of *A Esparon v S Esparon and L Gabriel* (1991) SLR 59 decided on 27 September 1991 that the relationship between the plaintiff and his nephew's concubine, the second defendant, who had looked after the plaintiff and also his house for a while, created such circumstances of trust that made it impossible for the plaintiff to obtain a written document from the second defendant for the money owed to the plaintiff.

It is therefore concluded from the reasoning of the learned Judges as referred to in the aforesaid cases that what constitutes a moral impossibility in relation to article 1348 will be dependent on the facts of each case that affect the relationship of parties concerned.

On the evidence of the plaintiff, despite the fact that the property in question was owned by her brother-in-law Boris and the transaction was with him, the plaintiff no doubt had to consider that on her return to the Republic with her husband, they were welcomed by both her brother-in-law and her sister. The love between the plaintiff and her sister under normal circumstances would have necessarily given rise to a relationship of affection and trust that would have extended to her sister's husband as well, considering that they for a time lived with the plaintiff's sister, the first defendant, and her husband. It must be also taken into account that if not for the brother-in-law, who was the owner, she would not have been given the house. Another factor to be reckoned with is that for the money paid by the plaintiff to her brother-in-law, she in return got possession of a house, which would have caused a demand for a document extremely difficult and embarrassing in the face of the circumstances itself creating the acknowledgement of their deal.

I therefore conclude the oral evidence to establish the payment of R35,000 for the purchase of the house is admissible on the ground that the moral impossibility of obtaining a document in proof thereof causes article 1341 to be inapplicable to the said matters in issue.

Objection is overruled.

Record: Civil Side No 346 of 1997