

**International Investments Trading v Piazzolla & Ors
(2004) SLR 51**

France BONTE for the Plaintiff
Pesi PARDIWALLA for the First Defendant
Philippe BOULLE for the Intervener

The Appeal was dismissed on 25 November 2005 in CA 8 of 2004.

Ruling delivered on 16 January 2003 by

JUDDOO J: The intervenor has failed to put up an appearance before this Court to be examined on her personal answers. Learned Counsel, on behalf of the Plaintiff, has moved that the "facts, materials and things alleged" by the Plaintiff be held to have been admitted. Accordingly, it is moved that Judgment be entered in favour of the Plaintiff on the basis of the pleadings given the admission by the First Defendant of the Plaintiffs claim in its defence filed on record.

Under Section 162(1) of the Seychelles Code of Civil Procedure (Cap 213) - "Any party to a cause or matter may examine the adverse party on his personal answers as to anything relevant to the matter at issue between the parties." Two issues which arise in the instant determination are, firstly, whether Article 162(1) of the Code of Civil Procedure applies to an intervenor-party and, secondly, the consequences of non-appearance of the intervenor to be examined on her personal answers. In *Chez Deenu (Pty) Ltd v Philibert Loizeau* Civil Appeal No. 17 of 1987 (Jt 22/07/88), the Seychelles Court of Appeal observed:

The right of a party to examine his opponent on personal answers should not be taken away from the party except on strong grounds ... The purpose of calling a Defendant on his personal answers is to obtain admissions from him or evidence which would destroy his case or strengthen that of the party calling him."

In *Ex Parte Kassamally Esmael* (1941) MR 17, it is further observed:

The party examined is not required to testify on oath or affirmation; he is treated as an adverse witness for the purpose of obtaining from him admissions or statements derogatory to his own cause or to substantiate his opponent's cause; he is a party in the cause who has already submitted to the jurisdiction of the Court either as Plaintiff or Defendant, otherwise he could not be required to submit himself for examination on personal answers.

It has been rightly stated that Section 162(1) is silent as far as the consequences following the failure or refusal of a party to put up an appearance for being examined on personal answers. By contrast, under Section 161(2), applicable to a public

establishment, corporation or legal entity, it is expressly provided that failure by the appointed representative to appear and submit to examination on personal answers without "satisfactory reasons given, the facts, matters and things alleged by the adverse party may be held to be admitted". Hence in the latter category, a discretion is granted to the Court to assess the impact and consequence of non-attendance.

Although there is no express proviso pertaining to the impact and consequence of non-attendance of an individual on personal answers, I find that the issue is similarly regulated by the existing jurisprudence. In the examination of Section 162(1) of the Code of Civil Procedure, in the case of *Chez Deenu (Pty) Ltd v Philibert Loizeau*, supra, it was observed that "Section 161 of the Seychelles Code of Civil Procedure reproduces Article 324 of the French Code of Civil Procedure except that the French Code adds that the personal answers should not delay the "instruction" or the judgment." Resultingly, the following jurisprudence from Dalioz Repertoire Pratique, Verbo Interrogative sur faits et Articles is both relevant and appropriate:

1. L'interrogatoire sur faits et articles est une mesure d'instruction employee, a l'aide des reponses de son adversaire, a la decouverte de la verite des faits qu'elle a articles...

3. L'art. 324. C. proc. donne a "toute partie" le droit de demander l'interrogatoire sur faits et articles, sans avoir egard a la qualite en laquelle elle figure au proces. Ce droit appartient done au defendeur comme au demandeur, qu'il soit partie prindpale ou intervenante. ou meme simplement interesse, sans y etre directement partie ...

137. La partie dont l'interrogatoire a ete ordonne peut refuser de comparait, refuser de repondre. Il lui est d'ailleurs permis, lorsqu'elle comparait et refuse de repondre, de faire connaitre les motifs de son refus. Le juge doit, en pareil cas, dresser un proces-verbal sommaire des faits et dires de la partie, pour permettre au tribunal de tirer telles consequences que de droit lorsque l'affaire viendra a l'audience.

138. Si les motifs du refus de repondre ne paraissent pas fondes, le tribunal peut tenir les faits pour averes (C. proc. art. 330, Paris, 28 nov. 1822, R.115) - Il jouit. d'ailleurs. a cet egard, d'un pouvoir discretionnaire : la loi ne lui impose pas l'obligation de tenir les faits comme averes, elle lui laisse le soin d'apprécier les consequences du defaut de comparution et du refus de repondre ... Pouvant servir de preuve complete, le refus vnlntaire de comparaitre peut, a plus forte raison. servir de commencement de preuve par ecrit ... (the underlining is mine).

In the light of the jurisprudence, as quoted above, it can be safely stated that where an individual fails or default to put up an appearance for examination on his personal answers, the trial Court has to examine the failure or default taking into account all the facts and circumstances of the case and the evidence adduced. Where it is so satisfied,

the Court may treat the failure or default as complete proof of the claim held against the absentee or defaulter. However, this exercise can only be embarked upon once all the evidence, in the case, has been received and not at any intermediate stage.

In moving for judgment to be entered, learned Counsel relied on Section 126 of the Seychelles Code of Civil Procedure which provides that "if on the day fixed in the summons for the Defendant to appear, the Defendant appears and admits the Plaintiffs claim, judgment shall be given for the Plaintiff." Section 126 is applicable to instances where the Defendant first appears at the date fixed in the summons served upon him, elects not to file a defence and admits the Plaintiffs claim in totality. Where a defence has been filed, the matter is governed by Section 131 of the Code of Civil Procedure which provides for the parties:

at any stage of the suit before judgement, (the parties may) appear in Court and file a judgement by consent signed by both parties stating the terms and conditions agreed upon between them in settlement of the suit and the amount ...

Accordingly, Section 126, supra, is not applicable.

As examined earlier, the failure or refusal by the intervenor to be present for examination on her personal answers will be assessed and accounted for at the end stage of the proceedings. At the present stage, the matter is to proceed with the hearing whilst taking into account the fact of non-appearance of the intervenor on her personal answers.

Record: Civil Side No 178 of 1998