

**Dodin v Arrisol
(2003) SLR 197**

Antony DERJACQUES for the Plaintiff
Jacques HODOUL for the Defendant

Appeal by the Defendant was dismissed on 16 November 2004 6 of 2003.

Judgment delivered on 6 March 2003 by:

PERERA J: This is an action based on the principle of unjust Article 1381 - 1 of the Civil Code. Admittedly, the Plaintiff and together in concubinage for fourteen years. The Plaintiff has two children, and one child, Sylvette Arrisol, born on 3 November 1982.

ment contained in the Defendant had lived with the Plaintiff and their children by a previous marriage of the Defendant.

The Plaintiff avers that in 1984, a parcel of land bearing no. 59 at Mont Plaisir, Anse Royale, was purchased by her, but registered in the sole name of the Defendant for convenience. She avers that the house thereon was constructed with joint contributions.

59 at Mont Plaisir, Anse Royale, was purchased by the Defendant and renovated with joint contributions.

The Plaintiff further avers that on 28 April 1994, the Defendant demanded her to cease cohabiting with him and to move out of the premises with the children. She therefore avers that the Defendant has unjustly enriched himself at least 50% of the land. Parcel C.1059 and the house thereon, which she claims to be worth R100,000. She also claims a further R50,000 in respect of movables, listed in her amended plaint.

and demanded her to cease cohabiting with him and to move out of the premises with the children. She therefore avers that the Defendant has unjustly enriched himself at least 50% of the land. Parcel C.1059 and the house thereon, which she claims to be worth R100,000. She also claims a further R50,000 in respect of movables, listed in her amended plaint.

The Defendant, in his amended defence avers that Parcel C.1059 in his name, and the house thereon were financed solely by him, and that the Plaintiff made no contributions whatsoever. As regards movables, he avers that the Plaintiff moved out of the house on 28 April 1994 on her own accord, taking with her all her movable properties, except a cooker, a television set, a stove and a refrigerator, which are still in a store awaiting collection. As a matter of law, the Defendant pleads that the Plaintiff's prescription against all claims made against him and in respect of rights in title C.1059.

which is in his sole name, and the house thereon were financed solely by him, and that the Plaintiff made no contributions whatsoever. As regards movables, he avers that the Plaintiff moved out of the house on 28 April 1994 on her own accord, taking with her all her movable properties, except a cooker, a television set, a stove and a refrigerator, which are still in a store awaiting collection. As a matter of law, the Defendant pleads that the Plaintiff's prescription against all claims made against him and in respect of rights in title C.1059.

The Defendant, in a counterclaim, avers that he and the Plaintiff jointly purchased a parcel of land bearing no. S. 329 at Anse Aux Pins for R35,000, contributing equally towards the purchase price. He avers that that property was registered in the sole name of the Plaintiff for convenience. He further avers that he solely financed the construction of a partly completed house on that property to the extent of R94,870 without any contribution from the Plaintiff. This contribution, he avers, was stopped when the cohabitation ended in 1994. He values the land and the house on Parcel S.329 at R232,770, being R137,900 for the land and R94,870 for the partially built house. He avers that the respective interest of the parties in Parcel S.329 would be as follows:

- (i) The Plaintiff is entitled to one half share of the value of the land (R68,950)
- (ii) The Defendant is entitled to the balance half share of the land
- (iii) The Defendant is entitled to the full value of the partly constructed house by virtue of Article 553 of the Civil Code (R94,870).

The Defendant therefore counterclaims a sum of R163,820 from the Plaintiff.

In the answer to the counterclaim, the Plaintiff avers that Parcel S.329 was purchased solely by her upon a loan obtained from Barclays Bank, and that the construction of the house thereon was also done solely by her with a loan from the Seychelles Housing Development Corporation. She avers that she ceased construction upon initiating this action on 7th April 1994. She therefore claims the ownership of the entirety of the land and the partly built house thereon.

Preliminary Objections

The Plaintiff has based her claim on the principle of unjust enrichment as contained in Article 1381-1 of the Civil Code and not on a Societe de fait, a partnership, a contract or a quasi-contract. Article 1381-1 is as follows:

If a person suffers some detriment without lawful cause and another is correspondingly enriched without lawful cause, the former shall be able 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 detriment cannot avail himself of another action in contract, or quasi -contract, delict or quasi delict; provided also that the detriment has not been caused by the fault of the person suffering it.

In the case of *Michel Larame v Neva Payet* (1987) SCA 4 Eric Law JA commenting on the nature and scope of enrichment without cause, stated thus:

no enforceable legal rights are created or arise from the mere existence of a state of concubinage, but the cause of action "de in rem verso" can operate to assist a concubine who has suffered actual and ascertainable loss and the other party has correspondingly enriched himself by allowing the party who has suffered loss to recover from the other party who has benefited. Concubinage itself does not confer rights or obligations, but the action "de in rem verso" will operate to compensate a concubine who has suffered detriment without lawful cause to the advantage of the other party to the concubinage. Other examples of cases where a concubine can recover damages are when the parties to the concubinage have established a "societe de fait or have acquired enforceable rights based on implied or quasi -contract.

Mr Hodoul, Learned Counsel for the Defendant submitted that the Plaintiff had other avenues in law to obtain redress and that hence the action based on Article 1381-1 should be dismissed in limine. He submitted that as Parcel C.1059 is registered in the name of the Defendant, she could have brought a "real action" for a right of co-ownership or claimed a refund of her alleged contribution under quasi-contract pursuant to Article 1376 of the Civil Code. That Article is as follows:

A person who, *in error* or *knowingly, receives what is not* due to him, shall be bound to make restitution to the person from whom he has improperly received it.

The remedy contained in this Article has no application to the facts of the present case, as the Plaintiff has clearly pleaded that she purchased the land from her own funds but that the house thereon was constructed jointly, and that the land was registered in the name of the Defendant for convenience. She has further averred that the Defendant has now retained possession, and thereby unjustly enriched himself at her expense. The Plaintiff does not therefore allege that there was an error, or that the Defendant improperly received title to the land. What she claims in the plaint is a declaration that she has interests in the property and for an order on the Defendant to pay the value of the share, which she assesses at R100,000. This is the extent of the enrichment she avers the Defendant has benefitted from her contributions and the sum by which she had correspondingly become impoverished. Hence the action, as presently constituted has been correctly instituted.

For the same reasons, the Plaintiff could not have brought a "real action" for a right of co-ownership, as she had no legal right to the land which was registered in the sole name of the Defendant.

The submission of Learned Counsel for the Defendant that the Plaintiff had remedies under Articles 553, 554 and 555 of the Civil Code has no merit as the "third party" involved in the present matter is a concubine who claims to have contributed to the venture which would not create legal rights to property. In such circumstances, the proper remedy was a claim based on unjust enrichment.

As regards the movable property. Learned Counsel for the Defendant submitted that as the Plaintiff has alleged that the Defendant has refused to return them to her, the remedy would have been an action in delict or for unlawful possession. The Defendant has in his amended defence claimed that the Plaintiff had removed all her personal belongings when she moved out of the house, leaving only a TV set, a stove, and a fridge, which he averred could be removed by her anytime. The Defendant has further averred that all the movables were purchased from his own funds. Section 105 of the Code of Civil Procedure permits different causes of action to be joined in the same suit provided that they be between the same parties and that the parties sue and are sued respectively in the same capacities. There was therefore no necessity for the Plaintiff to institute a separate delictual, or a possessory action.

In any event, the Defendant joined issue with the Plaintiff who had based her claim on unjust enrichment and not raised any objections to the pleadings as presently constituted. Hence he could not have raised those matters for the first time in the submissions.

The only ground that is pleaded in limine is contained in paragraph 8 of the amended defence, wherein it is averred that all the claims made against the Defendant and in respect of rights in title C. 1059 are prescribed. It is clear that a cause of action for unjust enrichment arises only when a person suffers a detriment without lawful cause, and another is enriched thereby without lawful cause. The Plaintiff avers that the Defendant caused her to leave the house on 28 April 1994. The present case was instituted on 7 June 1994. She testified that the Defendant used to drink a lot, was aggressive and also threatened her with a knife. Hence she left the house and came back with Police Officers to remove some of her personal belongings. The Defendant on the other hand avers that the Plaintiff left of her own accord without lawful cause and came back on 27 May 1994 with Police Officers to collect her balance belongings. The Defendant in his testimony stated that there was an incident involving the Plaintiffs son, one Eddie regarding the feeding of a dog, and that he went out thereafter. On his return he found that the Plaintiff had left the house. On the basis of the evidence I accept the evidence of the Plaintiff that she left because of the intolerable behaviour of the Defendant and that therefore unjust enrichment by the Defendant at the expense of the Plaintiff commenced from that day. Further, it was held in the case of *Dingwall v Weldsmith* (1967) SLR 53 that the 5 year period of prescription cannot be pleaded as a defence to a claim in an action de in rem verso. Hence the ground of prescription fails.

The Law

In the case of *Reine Hallock v Philippe D'Offay* (1985) SCA 1) the parties had lived together in concubinage for 27 years. The Appellant sought a declaration that she was entitled to a share of the Respondent's house. Sauzier JA in a dissenting judgment stated in obiter that the powers of the Supreme Court to make property adjustment orders when cohabitation ends lay in Section 5 of the Courts Act which empowers the Court to exercise equitable jurisdiction. Goburdhun JA and Law JA disagreed. Goburdhun JA stated-

We are here not to judge moral or social matters. We are here to interpret and apply the law as it stands. In case the law needs some change to meet special situations, it is better left to the wisdom of the legislature.

The law, as it stands gives no recognition to rights of those living in concubinage. It is generally considered that a concubine goes to live with a man, expecting to be housed, fed, clothed and maintained in return for which she runs the household and looks after the children if any. However where she renders services additional to those normally rendered by a concubine, such as assisting in the man's business, or contributing her own funds to purchase property or to construct a house, the position would be different. Even in such situations, property adjustment orders of the nature granted to married parties on dissolution of marriage would not be made. What then would be the rights of

a concubine to recover contributions made by her during the period of the cohabitation?

Amos and Walton in the *Introduction to French Law* states thus:

The amount recoverable is limited on the one hand to the value of the enrichment. More than this the solvent cannot recover. It is assessed not, as in *gestion d'affaires* at the time of the institution but at the date of the action. If at the date of the action the value of the benefit has increased, the action will fail. The amount recoverable is limited on the other hand by the amount of the solvent's own expenditure: It is immaterial that at the time of the action the value of the benefit enjoyed is considerably high

the value of
the value is
tion but at the
appeared, the
r hand by the
the time of the

In the *Larame* case (*supra*), the rights of a concubine were considered on Appeal. In that case, the parties had lived in concubinage for 10 years. When they separated, the man had immovable property in the form of a house and land, and movable property in the form of a car and furniture, all valued at R300,000. The woman claimed that the property was purchased as a result of their "conjoint contributions". She claimed the value of a half share in the property, that is R139,000, and R50,000 as moral damages. The Supreme Court assessed the value of the assets at R165,000 and held that the land, house and car were acquired by the parties jointly. Stating that it was extremely hazardous to assume that they contributed, the trial Judge found that the woman had provided labour and thereby suffered impoverishment of her patrimony. Accordingly, she was awarded 30% of the assets, valued at R49,000. Her claim for loss of her property and moral damages was rejected.

ed by the Court of
s. At the time they
ise and land, and
3,000. The woman
on labour" and her
/ and other assets
Court assessed the
car were acquired,
less the proportion
money to the man
she was awarded
ture and for moral

The contributions made by the woman in that case consisted of R20,269. Mustafa P stated thus-

etary contributions
e total contribution

I have carefully considered the meaning of Article 1381 of the Civil Code. The operative word in the Article is "correspondingly". I think that the Respondent could only recover what she had given - that was the extent of her contribution. It is immaterial that also would "correspondingly" be the extent of the Appellant's enrichment. It is the Appellant's view that the concept of enrichment in the Article is that of enrichment by restitution.

I think that the
he Respondent
f her detriment;
s enrichment. I
s a connotation

Goburdhun JA agreeing with that view stated:

In such an action, the present value of the property is not relevant. The Respondent can only recover what she had contributed. It is immaterial that at the time of the action the value of the benefit enjoyed by "L'enrichi" is much more.

Law JA also concurred with those views, and the Court unanimously set aside the award of R49,000 made on the basis of a 30% share and ordered that the man pay a

sum of R20,269 on the basis that that was the extent of her detriment and the extent of his own enrichment.

In the present case, the Plaintiff in her testimony stated that at the time of purchase of the land. Parcel C.1059, she was employed as a nurse, and was earning R2,800 per month. She stated that she paid R24,000 for the land, and produced a certificate from Barclays Bank wherein it is stated that she had obtained a housing loan of R18,000 in February 1984 (exhibit P3). However, the purchase price as given in the deed of transfer is R12,000. The duty paid is R240. The Defendant had no regular job at that time, but was a garagiste. The Plaintiff also produced her bank statements and pass books which showed that he had substantial amounts in her accounts, (exhibit P4). On the other hand the pass book entries in the Defendant's Account (exhibit P5) for the period 1987/88 shows meagre balances below R1,500. The Plaintiff testified that the old house on the land (Parcel C.1059) was renovated by joint contributions, and produced two receipts, one for the purchase of a wheel barrow in February 1994 for R425 (exhibit P6) and a gas cooker in July 1990 for R2052 (exhibit P7) and bathroom fittings purchased through a neighbour in January 1992 for R2550 (exhibit P8). She stated that the other receipts were left behind when she moved out of the house in April 1994.

The Plaintiff also produced documents marked exhibits P8a, P9, P10, and stated that they were receipts for amounts spent on the Defendant by her, when he went to Mauritius. The total sum is R5003. She also produced a bank receipt for R1,610 paid for a telegraphic transfer £166 to the Defendant when he was in the U.K.

The Plaintiff further stated that the Defendant was in prison for two years, and during that time, he maintained herself and the three children. The Defendant however stated that he spent only 1 ½ years out of a sentence of 3 years, and that the Plaintiff and the family were supported by the Social Services Department.

As regards the movables, she claimed that everything listed in the schedule to the amended plaint belonged to her.

As regards Parcel no. S. 329 situated at Anse Aux Pins which the Defendant in his counterclaim has averred was purchased jointly, but registered in the Plaintiffs name, the Plaintiff in her evidence stated that the full purchase price of R33,000 was paid by her. She also stated that the house was constructed from a sum of R50,000 she received as gratuity from the Government, and that from a loan of R100,000 approved by the S.H.D.C, she obtained only R20,000 to complete the foundation of the house and instructed the SHDC to withhold the release of the balance sum of R80,000 until the present case was disposed of (exhibit PI 4). Exhibit P5, a letter dated 24 July 1996 is to the effect that a sum of R1,525 was being deducted monthly from her salary in respect of the SHDC loan. This was confirmed by witness Greta Simara an Officer of the SHDC. The Plaintiff also produced the application made by her to the Planning Authority on 14 January 1994 to construct a house on Parcel S. 329 at Anse Aux Pins. She also produced a valuation report dated 19 March 1996 from Hughes and

Polkinghome (exhibit P20) wherein it is stated that the house was partially built to up to window sill level over the foundation, and that such work did not exceed R22,074 in value.

On being cross-examined, the Plaintiff stated that when she met the Defendant in 1981, he was a motor mechanic. She also stated that she had already purchased a car by then but did not drive it as she could not obtain the licence. As regards the Anse Royale property. Parcel C.1059, the Plaintiff maintained that she obtained only two loans, one to purchase the property and the other to purchase Parcel S. 329 at Anse Aux Pins. She relied on the bank statements and other documents produced by her to substantiate her assertion. The defence produced a letter from the Ministry of Health (exhibit D2) whereby the Plaintiff was suspended from her duties as a nurse, with effect from 23 September 1985. However, the application for gratuity attached to the payment voucher (exhibit P18) shows that she was reinstated two days later on 25 September 1985. The Plaintiff also admitted that on 26 March 1982 (exhibit D3) she signed as guarantor to a loan of R10,900 obtained by one Alma Dodin from the Development Bank to purchase a boat and that he repaid the loan in installments (exhibit D4). She stated that the boat was purchased by her for the Defendant as he could not obtain a loan due his criminal record, and hence the application was made in the name of her brother Alwin Dodin. Learned Counsel for the Defendant suggested to the Plaintiff that she had several financial commitments of her own and that hence she could not have been able to contribute to the purchase of the Anse Royale property (C.1059) on 13 February 1984. The Plaintiff maintained that she paid R18000 she had obtained from the bank in February 1984 (exhibit P3). She denied that that sum of money was used for any other purpose. She also maintained that the Anse Aux Pins property (Parcel C.328) was purchased by her own funds and that the foundation of the housing was also constructed from money she received from her gratuity, and R20,000 she obtained from the SHDC. The charge on the property was however entered on 19 December 1994 (exhibit D6). A charge on Parcel S. 329 for a loan of R24,000 obtained earlier from Barclays bank was discharged on 27th December 1994. The Defendant on the other hand testified that at the time he met the Plaintiff in 1981, he was earning between R4000 to R6000 per month as a garagiste. He however stated that he spent R4000 to R5000 per year on purchasing food for the family. He stated that by agreement he asked the Plaintiff to keep her money in the bank and to withdraw only if he needed financial help. However after moving to the property at Anse Royale, he reverted back to his previous occupation as a herbalist. He claimed that he paid half of the costs of schooling and maintenance of the Plaintiff's child in Mauritius until they broke off in 1994. He also stated that he travelled to Mauritius and Rodrigues on several occasions with the Plaintiff and the children. On such occasions the Plaintiff also contributed towards the expenses, but when he went alone he bore all the expenses. He claimed that as a herbalist he still earned between R4000 to R5000 per month, but could sometimes earn about R5000 per week. He maintained that the Anse Royale property was purchased from his own funds.

Testifying regarding the counterclaim, he stated that Parcel no. S.329 at Anse Aux Pins was purchased for R33,000 out of which about R25,000 was paid by him. However he

did not produce any documentary proof of such payment. Questioned as to why that property was registered in the name of the Plaintiff, he stated "that property was placed on her name because I had mine at Anse Royale". He further stated that even the Planning application was made by her. He also stated that he contacted one Gerard Dorothee to construct the house. In his testimony, he first stated that Dorothee was a friend, and he would work every Saturday and whenever he needed money he asked him. Pressed by his Counsel as to any agreement on the contract price, he stated that it was R200,000, but he paid only about R20,000 as construction stopped when he went to England. He produced receipts marked D5 to D7 and D11 in proof of purchasing certain building materials during the period 1985 to 1997. The total amount on these receipts is R1300.53. According to the Plaintiff, the construction stopped after cohabitation ceased in April 1994. She produced a letter dated 24 July 1996 (exhibit P14) sent to the SHDC, wherein she stated that the 1st installment of R20,000 on the loan of R100,000 was received in April 1995, and repaid in June 1996, and requesting that the balance of R80,000 be withheld till the present case was concluded. But the Defendant claims that construction stopped when he left for England. This is contrary to his amended defence wherein he avers that construction stopped when cohabitation ended. According to exhibit P 11, the Defendant was in England in 1991. The land at Anse Aux Pins was purchased in 1984, and Planning permission to build the house was given in January 1994. The parties separated in April 1994. The Plaintiff received her gratuity of R30,000 on 16 February 1994 (exhibit P18) and the Barclays Bank loan of R18,000 also was in February 1984 (exhibit P3). The bank statements show that after depositing the sum of R30,000 in her account on 24th February 1994 she withdrew sums of R6000, 5000 etc totalling R34,520 up to 23 March 1994, a period of one month. The Defendant was unable to explain why the Plaintiff would have made those withdrawals, but ventured to state that she purchased a motor car and paid for driving lessons. But the Plaintiff's testimony was that she purchased a car before she met the Defendant in 1980, and that thereafter the Defendant became the driving instructor. When questioned regarding the expenses incurred by the Plaintiff, the Defendant became evasive and stated - "I am not answering any question concerning money of ladies. She spends on whatever she wants, how she wants to."

The Defendant stated that when they met in 1980, they had intended to remain together as a family for the rest of their lives. A child was born to them. The Anse Royale property was purchased in 1981. The Plaintiff who was a nurse drawing a salary of R2800 per month at the time of purchase of the land produced proof that she had obtained a housing loan of R18,000 from the Barclays Bank in February 1984. Apart from that, the bank statements produced by her show that she had a substantial amount of money in her account. She also produced several receipts for purchasing building materials at the relevant time.

As regards the Anse Aux Pins property, Gerard Dorothee, who the Defendant claimed was engaged as the contractor stated that due to the friendship with the Defendant he agreed to do all masonry work up to roof level for only R25,000. However the Defendant in his testimony stated that the agreed contract price was R200,000 but he paid only about R11,200 when construction stopped when he went to England.

Dorothee testified that he commenced construction between February and March 1994. But according to evidence, the Defendant went to England in 1991. Dorothee further testified that after the parties had separated, he renovated the house at Anse Royale, added a verandah, fixed tiles on the floor and rebuilt a cabinet.

Dorothee did not impress me as a credible witness. His evidence that he constructed the partly built house on the Anse Aux Pins properly cannot be accepted as the construction work had commenced prior to April 1994 financed by the loan of R20,000 obtained by the Plaintiff from the S.H.D.C. The receipts marked JD5 to D7 and D11 produced by the Defendant in proof of purchasing building materials during the period of 1985 to 1997 could well have been for the renovation of the house on Parcel C.1059 at Anse Royale.

I would therefore accept the evidence of the Plaintiff as regards actual and ascertainable loss suffered by her without cause as follows

In respect of Parcel C 1059 at Anse Royale

1. R12,240 paid for the purchase of the land and
R. 240 being the duty paid.
2. R 2,550 bathroom fittings.
3. R 425 wheel barrow.
4. R 2,052 gas cooker.
5. R 5,003 cost of foreign currency given to
the Defendant on his trips to Mauritius
6. R 1,610 telegraphic transfer of £166 to Defendant in the U.K.
R23,880

The Plaintiff did not produce any documentary evidence as proof of purchasing any of the movable items listed in the plaint. Anyway she testified that they were not of any great value. On the other hand, the Defendant has testified that the Plaintiff has already removed the items save for a cooker, a television set, a stove and a fridge, which he stated is still lying in a store for collection by the Plaintiff. In these circumstances, I make no order in respect of the movables.

In the final analysis, the Plaintiff shall receive from the Defendant a sum of R23,880 being the actual and ascertainable loss proved in the case. As no property adjustment is done in cases where the parties had lived in concubinage. Parcel C.1059 which is registered in the name of the Defendant, and the house thereon shall belong to the Defendant.

As regards Parcel S.329, the land is registered in the sole name of the Plaintiff. She has, on the basis of documentary evidence established that the land was purchased from the money she received as gratuity and that the incomplete house was constructed from the loan obtained from the SHDC. The dates of receiving those two sums of monies are proximate to the date of purchase of that Parcel of land, and hence on a

balance of probabilities, the Defendant cannot maintain his
hereby dismissed.

er claim, which is

Judgment is accordingly entered in favour of the Plaintiff in a su
the Defendant with interest from April 1994, the date the enric
costs of action.

₹23,880 payable to
t commenced, and

Record: Civil Side No 134 of 1994