

IN THE SUPREME COURT OF SEYCHELLES

SEYBERT (PTY) LTD
Hereinafter Rep by Sydna Philoe

PLAINTIFF

VERSUS

1. SEYCHELLES DEVELOPMENT CORPORATION 1ST DEFENDANT

Hereinafter Rep by its Managing Director Mr R. Kohler

2. MAUREEN VICTORINE

2ND DEFENDANT

Civil Side No 161 of 2004

Mr. W. Herminie for the Plaintiff
Mr. F. Chang Sam for the Defendants

JUDGMENT

Perera J

The plaintiff company and the 1st defendant company are engaged in construction business and also deal in property development. The 1st defendant company, (*hereinafter referred to as S.D.C*), entered into an agreement dated 23rd October 1997 to sell a plot of land, now known as Parcel C 4695, at Sale Fish Estate, Anse a La Mouche, to one Patricia Elizabeth Van Nierkerk, a South African national, who is a naturalized Seychellois, for a sum of Rs. 242,000 (P1). It was a condition in the agreement that the vendor would construct a concrete road and also install electricity and water connections. It was agreed that if the vendor failed to complete the work undertaken by 30th June 1999, the vendee would be entitled to cancel the agreement and obtain a refund of the money paid. As the S.D.C. failed to transfer the property in time, Mrs Van Nierkerk, on or about 30th November 2001 requested a refund of the purchase price. The plaintiff avers that at that time, as S.D.C had a "cash flow" difficulty, it was agreed between the plaintiff's director Mrs Sydna Philoe and S.D.C. director Mr Keehler, that the plaintiff company would, purchase the property from S.D.C. for Rs. 242,000. The 1st defendant (S.D.C) in its defence avers that the said Sydna Philoe was the Commercial Manager of S.D.C, as well as a Director and Executive Officer of the plaintiff company (*Seybert*) at that time, and that she surreptitiously and without lawful authority of S.D.C. unlawfully conferred the right to purchase Parcel C. 4695 to the plaintiff company.

Admittedly, on 4th October 2002 Mrs Van Nierkerk was paid the purchase price of Rs.242,000 by S.D.C, but the circumstances in which S.D.C. paid that amount to her is in dispute. The plaintiff company avers that the said land was purchased by them as previously agreed between Sydna Philoe and S.D.C. The S.D.C., in its defence categorically denies that the land was purchased by the plaintiff company as SDC "*never agreed to sell and never sold*

or authorised the sale of the land Parcel C. 4695 to the plaintiff". The S.D.C. avers that consequent to the rescission of the agreement to sell by Mrs Van Nierkerk, the property was sold to the 2nd defendant (*Maureen Victorine*) on 1st July 2004 (*exhibit D8*). The transfer deed was signed by Mr. Rainer Koehler, the Director of S.D.C, and it was registered at the Land Registry of 2nd July 2004.

The present case was filed by the plaintiff against S.D.C. on 4th June 2004, on the ground that the amount refundable to Mrs Van Nierkerk (*Rs.242,000*) was paid into the account of S.D.C. at Barclays Bank by Seybert Ltd, and that in breach of an agreement between Sydna Philoe as representative of the plaintiff company and S.D.C, the property had not been transferred to them. Together with the plaint, was filed a motion seeking that a caution registered against the S.D.C at the instance of Sydna Philoe be maintained, or in the alternative, an injunction be issued against S.D.C. prohibiting any dealings or disposal of Parcel C. 4695 until the disposal of the case. The plaint and motion were served on the secretary of Mr Koehler, Director of S.D.C on 21st June 2004. On 23rd June 2004, when the case was mentioned, Mr Changsam appeared for the S.D.C. and informed Court that Mr Herminie, Counsel for the plaintiff had gone to La Digue and that he had suggested that the case be adjourned for mention on 2nd July 2004 at 9.00 a.m.

When the case was mentioned on 2nd July, 2004, Mr ChangSam informed Court that the property had been disposed of. However, Karunakaran J proceeded to grant the injunction as prayed for, and the order was served by the Process Server on the land Registrar, the same day.

On 22nd July 2004, Counsel for the plaintiff filed an amended plaint and two motions. (1) seeking to add Maureen Victorine as a party defendant, and (2) for an injunction on the 2nd defendant (*Ms Victorine*) from dealing with or otherwise disposing of Parcel C. 4695, until the final determination of the case. Those motions were considered by Court on 18th August 2004, and the Learned Judge granted the injunction sought against the added 2nd defendant. That order was served on the Land Registrar on 19th August 2004. With the motion for injunction, Mr Herminie filed an affidavit on behalf of the plaintiff company, averring *inter alia* that-

- “6. That on the morning of the 2nd July 2004, the date set for hearing on the injunction, Attorney for the 1st defendant in open Court declared that Parcel C. 4695 had been disposed of and an injunction against the 1st defendant would be futile.
7. That subsequently it was verified that this was not the case and in fact the transfer of the said property in the name of the 2nd defendant was only registered at 2.30 p.m. on

that day, after the caution had been removed on 30th June 2004 without notice to the plaintiff and the transfer document had been signed on the 1st July 2004 in the office of the 1st defendant's Attorney.

8. That at the time the transfer in paragraph 7 above was made, Attorney for the 1st defendant had notice of the case against the 1st defendant and the motion for an injunction, as the date for hearing of the said motion was initially set down for 23rd June and thereafter the 2nd July.
9. *That the declaration by the 1st defendant's Attorney was made to defraud the plaintiff of its legitimate interest in Parcel C. 4695".*

Those allegations are repeated in the amended plaint filed by the plaintiff. It was averred that the transfer to the 2nd defendant was a "sham" to defraud the plaintiff of its legitimate interest in Parcel C. 4695. Therefore the plaintiff invokes the jurisdiction of this Court to set aside the transfer between the 1st defendant and 2nd defendant and to order specific performance of the contract in favour of the plaintiff.

The 1st defendant (S.D.C) avers that the failure to transfer the property to Mrs. Van Nierkerk was largely due to the fault of Sydna Philoe who was the Commercial Manager responsible for co-ordination of property sale of S.D.C. It is further averred that if the plaintiff was involved in the transaction with Mrs. Van Nierkerk it was due to the manipulations of Sydna Philoe who was at the same time a director and Executive Officer of that company. The 1st defendant denies any agreement with the plaintiff company regarding a sale of Parcel C. 4695.

As regards the allegation of the plaintiff that the sale between S.D.C and Ms Victorine was a "sham" transaction, the S.D.C. avers that after the recession of the agreement with Mrs Van Nierkerk, sometime in November 2002, the property was sold to the 2nd defendant who paid the full purchase price of Rs.300,000 in two instalments, Rs. 240,000 on 16th January 2003, and Rs.60,000 on 7th February 2003 (*exhibit D6*), but that the transfer was effected on 1st July 2004 after the Land Registrar on 30th June 2004, removed the caution entered by Sydna Philoe. The decision of the Land Registrar dated 30th June 2004 (D7) was that "*the applicant's (Seybert Ltd) representative (Sydna Philoe) had failed to prove that the applicant has a right whether contractual or otherwise to obtain an interest in the above-mentioned title and as such there is no need to maintain a caution against the above said Title in favour of the applicant.*" Hence the averment in the affidavit of Mr. Herminie that the caution was removed without notice to the

plaintiff company cannot be maintained as Sydna Philoe had appeared on behalf of that company at the inquiry.

The 2nd defendant in her statement of defence avers that she paid the full purchase price of Rs.300,000 in two instalments, as averred by the 1st defendant (SDC), and that the transfer was effected only on 1st July 2004 after the caution was removed on 30th April 2004. She further avers that she is a *bona fide* purchaser for value, and that she was not notified of the proceedings leading to the grant of an interim injunction on 18th August 2004 prohibiting her from selling or otherwise disposing of Parcel C. 4695 until the amended plaint making her a party defendant was served on her.

Considering the allegation that the transfer to the 2nd defendant was a “sham” transaction, I find that there was no legal impediment to that transfer as the Land Registrar removed the caution on 30th June 2004 on being satisfied that there was no agreement for sale between the S.D.C. and Seybert Ltd. The deed of transfer was signed on 1st July 2004 and sent for registration. The delay in registration was, as was submitted by Mr Chang Sam, a normal administrative delay. The fact that S.D.C was aware of the present case was immaterial from a legal point of view, as if the plaintiff succeeded in this case, any dealing with that property could have been declared null and void.

Sydna Philoe had a dual role in the transaction which is in dispute in the case. The plaintiff company “Seybert (Pty) Ltd” is “her” company, in which she is co-director. She was at the same time, the Commercial Manager of the S.D.C. Both companies were engaged in construction and property management business. The S.D.C entered into the agreement with Mrs Van Nierkerk to sell Parcel No. C. 4695 partly in Seychelles rupees and partly in foreign currency. Admittedly, the foreign currency amount of £ 15466.27 was received by the S.D.C. However as regards Sr. 121,000 payable, Sydna Philoe, in her capacity as Commercial Manager of S.D.C sent a letter dated 6th July 1999 (D1) using the letter head of S.D.C, to Dr. Van Nierkerk stating that the conditions precedent to the transfer were complete. She further stated thus –

“With regards to the final payment, we have to import some construction material for a company we are now undertaking construction amounting to ZAR 125,000 as per attached quotation and we would be grateful if you could assist us in making the payment on our behalf as has been the case the last time as foreign exchange problem still persist in our country.

We can come to an arrangement as to the rates. If you transfer money directly to the bank, the bank will credit our account at the bank buying rates plus commission. If however you agree to pay the invoice for us, we can convert the payment to the bank selling rate and you shall surely benefit from the difference in rate”.

That letter was replied by Mrs Van Nierkerk on 9th November 1999 (D2). In that letter, she consented to pay the invoice for ZAR 125,578 as requested by S.D.C. to Island Export Account in South Africa, as the final payment due for the purchase of Parcel C. 4695. In conclusion she stated "*it has been a pleasure to do business with your company through you, Sydna*". It is the position of the 1st defendant that Mrs Philoe entered into that arrangement with Mr Van Nierkerk without the authorisation of the S.D.C to benefit her own company Seybert Ltd, and that she misled Mrs Van Nierkerk to believe that she was in fact paying the balance amount for the sale to S.D.C.

Sydna Philoe testified that the materials ordered from South Africa were for the Apartments her company Seybert Ltd was building at that time, and that she negotiated with Mrs Van Nierkerk to pay supplier in South Africa with the agreement of the General Manager of S.D.C. She stated "*I requested his Assistance in the matter to be able to get this paid on my behalf, to refund the money later*". She testified that she has not refunded that money to S.D.C. so far, in an obvious attempt to dissociate that debt from the payment of Rs.242,000 to S.D.C, by Seybert Ltd.

In those circumstances, how did S.D.C pay Rs. 242,000 to Mrs Van Nierkerk? Sydna Philoe testified that initially, Mrs Van Nierkerk was given a cheque by Seybert Ltd for that amount, but Barclays bank wanted a cheque issued by S.D.C, as it was a refund by S.D.C. Thereupon she faxed the letter dated 4th October 2002 (P2) to Mr. Koehler, Director of S.D.C. who was abroad, and in the forwarding fax dated the same (P2a), she informed him "*I will deposit the money paid by the purchaser of the plot to S.D.C. Account tomorrow as well*". She admitted that at that time she was no longer working for S.D.C, and hence the need for approval to sign the S.D.C cheque. "*The purchaser of the plot*" referred to was undoubtedly Mrs Van Nierkerk, and the payment undertaken was the refund of the debt owed to S.D.C. By letter, (P2) addressed to Barclays bank, Mr Koehler authorised Mrs Philoe to sign a S.D.C. cheque as second signatory to make the refund to Mrs. Van Nierkerk. Mrs Philoe stated in evidence that Mr. Koehler agreed in a telephone conversation that the property Parcel C. 4695 would be sold to the plaintiff company. No written agreement was however produced. She claimed that it was an oral agreement.

At an inquiry held before the Land Registrar on 30th June 2004, to maintain the caution entered in January 2003, Mrs. Philoe failed to establish that there was any agreement by S.D.C. to sell or assign the rights of Mrs Van Nierkerk to her company. Accordingly the caution was removed. The S.D.C. produced a letter dated 27th April 2004 (D9) which Mr. J Blum, another Director, sent to the Land Registrar, stating *inter alia* that there was never any agreement to sell the property. It was further explained that Mrs Philoe had used her position with S.D.C. to induce Mrs Van Nierkerk to assign to Seybert the right to purchase the property, and with that view "*arranged to have certain payment due by Seybert to Mrs Van Nierkerk to be paid to (her) through S.D.C. The cheque for Rs. 242,000 made out to S.D.C. was one of those payments. It was not a payment made to SDC itself but to S.D.C. for Mrs Van Nierkerk*". It was also stated that S.D.C. had no record of any assignment by Mrs Van Nierkerk of her right to purchase Parcel C. 4695, and S.D.C was never advised that there has been such an assignment.

Ms Linda Hoareau, held the post of representative of the S.D.C. in all transactions involving land sales since 1st July 2002. She had worked with Mrs Philoe for 17 years as Accounts Officer and was aware of the transaction between S.D.C. and Mrs Van Nierkerk for the sale of the land. After Mrs Philoe left, she had access to the files. She noticed that there were debts owed to the company by several persons including Mrs Philoe. There was no written authority in any of the files giving Mrs Philoe the right to buy property Parcel C. 4695 for her company Seybert. As regards the cheque for Rs. 242,000 issued by S.D.C. to Mrs Van Nierkerk, Ms Hoareau stated that Mr. Koehler had left signed cheques with her as he was abroad, and hence he authorised Mrs Philoe to sign as second signatory although she had left S.D.C. by then. Mrs Philoe gave a cheque for the like amount issued by Seybert in favour of S.D.C. the same day. She accepted that cheque as a debt owed by Mrs Philoe to S.D.C. She had several other debts which are presently being recovered in a Court action. Those debts were monies which she had not accounted to the company in respect of sales of land. She accepted the cheque from Mrs Philoe as she was aware that monies due to SDC for the sale had been used by her to purchase materials from South Africa for construction work of Seybert, and also as she owed other monies to SDC.

Ms. Linda Hoareau also testified that according to S.D.C. records Mrs Van Nierkerk had paid £ 15,466.27 in terms of Clause 2.1.1. of the agreement that sum constituted the deposit of Rs. 121,000 under Clause 2.1. The final balance Rs. 121,000 was paid by Mrs Van Nierkerk in the form of ZAR 125,578 paid in respect of materials from Seybert. The Court is satisfied from the correspondence produced in the case that Mrs Van Nierkerk believed that she was indeed paying S.D.C. S.D.C. refunded the whole amount of Rs. 242,000 to Mrs Van Nierkerk at the instance of Mrs Philoe who, by the fax message to Mr. Koehler (P2a) undertook to reimburse S.D.C. the same day.

As, according to Ms. Hoareau, Mrs Van Nierkerk had paid only £ 15,466.27 (*which is equal to Rs.121,000 at the exchange rate of Rs.7.82*), Seybert Ltd was merely refunding (*ZAR 125,578 which Mrs. Van Nierkerk paid for the purchase of materials from South Africa. Z.A.R. 125,578 is equal to Rs.121,000 at the exchange rate of Rs.1.03*). Hence, in any event, Seybert Ltd by paying S.D.C. Rs.242,000, was not paying the purchase price of Parcel C 4695. It was partly the repayment of a debt owed to S.D.C. Moreover, there is no evidence whatsoever of an agreement to sell between S.D.C. and Seybert Ltd. Hence on the basis of both the oral and documentary evidence in the case, the Court is satisfied on a balance of probabilities that Mrs Philoe abused her position as Commercial Manager of S.D.C. and sought to establish an agreement to sell Parcel C. 4695 to her company Seybert Ltd, and for that purpose she issued a cheque from Seybert Ltd to S.D.C. for the exact amount of the purchase price agreed with Mrs Van Nierkerk, to create an impression of a genuine transaction, when in fact it was part repayment of the debt incurred in the present transaction, and part repayment of other debts owed by her to S.D.C. In these circumstances the plaintiff has failed to establish an agreement to sell Parcel C. 4695 by S.D.C., and consequently, the transfer of that property to the 2nd defendant was valid as a genuine sale. Consequently the Court hereby makes order revoking the injunction issued on

18th August 2004 restraining the 2nd defendant from dealing with Parcel C. 4695.

The plaintiff's action is accordingly dismissed with costs.

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A.R. PERERA

JUDGE

Dated this 30th day of June 2006