

# **IN THE SUPREME COURT OF SEYCHELLES**

IRENE JEANNY

**PLAINTIFF**

**VERSUS**

JASON ARRISOL

**DEFENDANT**

Civil Side No 470 of 2006

Mr. S. Freminot for the Plaintiff

Miss L. Pool for the Defendant

## **JUDGMENT**

**B. Renaud ACJ**

The defendant is moving this Court to set aside the judgment given on the 1<sup>st</sup> December, 2006 for reasons set out in an affidavit attached.

The matter was a small claim entered in the Magistrates' Court for the sum of SR24,000.00. The matter originally started off in the Magistrates' Court 'B' presided by Learned Magistrate Gaswaga (*as he then was*). After partly hearing the case the Learned Magistrate was elevated to the Bench of the Supreme Court. The matter was transferred to be heard by Judge Gaswaga sitting in the Supreme Court.

According to the lawyer of the defendant, at that stage only one witness was yet to testify, namely, Mr. Jose Guerreiro and that he was not informed of that change of venue. He

claimed that the defendant has been deprived of a right to be heard as enshrined in the Constitution which is a breach of natural justice. He alleged that judgment was given in the case on the 1<sup>st</sup> of December 2006 but he was not notified of it. He claimed that the defendant's counterclaim was to be heard by a separate plaint in another Magistrates' Court on 8<sup>th</sup> March, 2007

The defendant by Counsel is now moving this Court under Section 69 of the Seychelles Code of Civil Procedure to set aside the judgment given by Judge Gaswaga on the 1<sup>st</sup> December, 2006 and go for continuation or re-trial in the Magistrate Court.

Learned Counsel for the plaintiff, Ms. Domingue, corrected that the sum claimed was SR24,000.00 she stated that the case started off firstly before B Court Magistrate at the time – Mr. Mgetta. The latter left the country after partly hearing the matter. The case was transferred to Magistrate Ramdonee. It was later passed on Magistrate Gaswaga (*as he then was*) and he heard the matter afresh until he was elevated to the Bench of the Supreme Court. Even then Judge Gaswaga continued to hear the matter as it was an old case and the plaintiff was elderly and in frail health. Learned Counsel added that when she made the motion for the transfer of the case from Magistrate Court, before Magistrate Pertab, the defendant by Counsel was present and he indicated that he had no objections to her motion. They were both given another date to come back before the Court so that they may be informed whether the matter had been transferred to Judge Gaswaga. She admitted that although from the record there is no evidence of notification to defendant's Counsel or herself, yet they were both present when the motion was mad, and as such, both parties were aware that the matter will be heard by Judge Gaswaga but they were not given the date of the hearing. She was, however, diligent in following up the matter. She states that if the defendant has been deprived of his right to be heard that should not

be blamed on either the plaintiff or the Court. The defendant and his Counsel should have been diligent in finding out what was happening to the case, when a few months had elapsed and nothing was heard about the case. In any event the record will also show that the defendant applied various delaying tactics in order to delay this case. There were many times when the defendant and his Counsel were both absent and many times when she obtained ex parte orders from the Court. She consented many times to these orders being vacated in order to accommodate the defendant. She added that similarly, the record will show that she never acted in bad faith in that she moved the Court on at least 5 occasions when the case was before Judge Gaswaga, for the defendant's Counsel to be notified in order that he may come to Court so that they could have fixed a continuation date for the case. She emphasized that the right of the defendant should be balanced against the right of the plaintiff whose case has been dragged before the Court for 5 years, and some stages because of the defendant's absence.

I called for and perused the Magistrate's case file Cs05/01. I note that at the sitting of 7<sup>th</sup> September, 2005 Counsel for the defendant stated – *"The case part-heard before Mr. Gaswaga. We believe it's only just that the case be put before Mr. Gaswaga who saw the witness for final disposal."* The matter was adjourned by Senior Magistrate Gaswaga (as he then was) to 10<sup>th</sup> October, 2005 in the presence of both Counsels, when it was set for continuation on 12<sup>th</sup> January, 2006 at 1.45 p.m. and 25<sup>th</sup> January, 2006 at 9.00 a.m. On 12<sup>th</sup> January, 2006 the defendant's Counsel was absent and it was adjourned to 1<sup>st</sup> March, 2006. On that date Magistrate Musoke adjourned it to 26<sup>th</sup> March, 2006 when both Counsels were present and was adjourned. There is no record as to what transpired after that date until 4<sup>th</sup> April, 2006 when Judge Gaswaga heard the case who adjourned the matter to 7<sup>th</sup> April, 2006 with notice to defendant's Counsel. It was further adjourned to

23<sup>rd</sup> June, 2006 again with notice to defendant's Counsel. On that date defendant's Counsel was absent. Upon application of Counsel for the plaintiff the Court granted leave for the matter to proceed ex parte on 28<sup>th</sup> June, 2006 with notice to defendant's Counsel. The matter continued on 10<sup>th</sup> July, 2006 and adjourned to 4<sup>th</sup> October, 2006 for judgment. The judgment was not ready and it was adjourned to 1<sup>st</sup> December, 2006 when judgment was delivered.

I am satisfied that no injustice has been caused to the defendant by the Court. If any injustice is suffered by the defendant it could only be through his own fault for having shown an element of lethargy in handling the matter at least and lack of diligence at the most. The plaintiff cannot now be made to suffer the consequence of such lapses and inaction on the part of the defendant. The judgment was delivered after the matter was heard ex parte in consequence of the absence of the defendant. Justice demands that he should reap the benefit of the judgment without further delay. The defendant has not satisfied this Court that he was prevented by any sufficient cause from appearing when the suit was called for hearing. I therefore declined to set aside the ex-parte judgment and accordingly dismissed the application of the defendant.

I made no order as to cost.

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**B.RENAUD**  
**ACTING CHIEF JUSTICE**

Dated this 29<sup>th</sup> day of May 2009