

THE REPUBLIC OF SEYCHELLES
IN THE SUPREME COURT OF SEYCHELLES

Civil Side No. 285 of 2009

Bernard Georges
MYGS Limited

Plaintiffs

Versus

Guinness Overseas Limited

Defendant

Karen Domingoue for the plaintiffs

Francis Chang-Sam for the defendant

JUDGMENT

Egonda-Ntende, CJ

[1] The plaintiff no.1, and or in the alternative the plaintiff no.2, seek to exercise the option to redeem the sale of parcel V4801 to the defendant by paying the price therefor and other incidental cost. In the alternative the plaintiff seek an order that the defendant must offer this land to them before selling to a third party. In the further alternative the plaintiffs seek an order that the defendant sell to them at market value the said land, if the plaintiffs wish to purchase the same.

[2] The plaintiff no.1 asserts that at all material times he was the beneficial owner of land parcel V4801 situated at La Louise, Mahe. Plaintiff No. 2 is stated to have been the legal owner immediately prior to October 2003. Plaintiff No.1 was a director of Seychelles Breweries Ltd in which the defendant is a substantial shareholder.

[3] The plaintiff no.1 borrowed some money from Seychelles Breweries Ltd sometime prior to 2000. He secured the said sum of money with a charge over V4801. In 2000 the plaintiff no. 2 agreed to transfer to the defendant beneficial ownership of the land in question by a declaration of trust and a caution in favour of the defendant. In 2002 the plaintiff no. 2 executed an undated transfer in favour of the defendant. The parties sought to sub divide and transfer a portion to the defendant but the Government refused sanction for the defendant to purchase only a portion of the land.

[4] The plaint further contends that the parties subsequently agreed that the whole parcel of land will be transferred to the defendant upon the plaintiff no.1 being advanced more money on the following conditions: (a) The plaintiffs would have an option to redeem the whole parcel by refunding all sums paid by the defendant. (b) In the alternative to (a) the plaintiffs would have right to purchase back the said land at their convenience. (c) That in any case should the defendant wish to sell the land first option to purchase would be offered to the plaintiffs who would pay for in foreign exchange for the lower portion and in Seychelles rupees for the upper portion. (d) And lastly that the plaintiff no.1 would continue to look after the property.

[5] The plaintiff no.1 claims that in accordance with that agreement he provided a watchman to reside on the property. He has paid the watchman for cleaning the place, paid electricity bills up to 2006 and water up to date. The plaintiff no.1 has been advised that the defendant is selling this property to a third party in breach of the agreement between him and the defendant, hence this action.

[6] The defendant opposes this action. Firstly it sets up a point of law that the right to redeem or right of first purchase, if such rights existed, (which is denied), those rights are time barred and prescribed by law.

[7] The defendant admits that the plaintiff no.2 was the legal owner of the land but denies that the plaintiff no.1 was the beneficial owner thereof. The defendant avers that it purchased the land from plaintiff no.2 whose shares were held by Bourbon Nominees Ltd. Plaintiff no.2 owned the freehold of the land and Auberge Louis XVII (Pty) Ltd owned the leasehold interest in the land. All the shares of Auberge Louis XVII (Pty) Ltd were held by Bourbon Nominees Ltd. Bourbon Nominees Ltd, on 1 April 2000, declared in 2 separate documents that it was holding all the shares of plaintiff no.2 and Auberge Louis XVII (Pty) Ltd as a nominee for Guinness Ltd. The documents were signed by plaintiff no.1 and Annette Georges as directors of the Bourbon Nominees Ltd. It is clear from the correspondence that Bourbon Nominees Ltd were holding the said shares as nominees for the defendant.

[8] Originally the defendant was interested only in purchasing the lower part where the Auberge Louis XVII restaurant was. However as the plaintiff no.1 failed to pay his loans and became more indebted it was agreed that the defendant will purchase the whole parcel of land. On 16 October 2003 plaintiff no 2 unreservedly transferred and defendant unreservedly purchased the whole of the property. The defendant did not agree or commit itself to sell back the property to the plaintiff.

[9] The defendant denied that it ever agreed that the plaintiff no.1 looks after the property and only became aware later on of an occupant of one of the houses on the property during an inspection of the property. The

arrangement with the occupier of the house was without the authority, consent or knowledge of the defendant. The plaintiff did not have the authority and or consent of the defendant to connect water and electricity to the houses on the property. There was no agreement that the plaintiff no.1 would meet those costs.

[10] The defendant states that it was always its intention to sell the property to any willing buyer and that it sold this property to Sans Souci Properties (Pty) Ltd and in so doing the defendant denies that it breached any of the plaintiffs' rights as it had an unfettered right to dispose of the said property.

[11] In February 2009 the plaintiff lodged an application with the Land Register to enter a caution prohibiting the defendant from dealing with this land on the ground that he had a right of first offer to purchase the property. The defendant objected to this application. But prior to doing so and in spite of the fact that the plaintiff enjoyed no such right, the defendant offered the plaintiff no.1 time to buy the said land but the plaintiff failed to do so within the deadline set by the defendant. Following the plaintiff's failure to purchase the said land the defendant sold it to Sans Souci Property (Pty) Ltd for the same price as it had offered it to the plaintiff no.1.

[12] With regard to the plaintiff no.2 the defendant denies that it had any right to redeem or buy back the said property and put it to strict proof of its claims. The defendant prays that this court dismisses the plaintiffs' suit with costs.

[13] At the trial the plaintiff no.1 testified in person and called one additional witness. The defendant called three witnesses who testified in support of its case. After a review of the all the evidence called in this case including documentary evidence submitted by both sides it is clear to me that the factual position is not substantially in dispute but the what is in dispute is the interpretation of the facts in light of the claims of the parties hereto.

[14] It is common cause that the plaintiff no 1 enjoyed excellent relationship with the defendant for a considerable period of time in which he served on the board of Seychelles Breweries Ltd, a company substantially owned by the defendant and at the defendant's request. In the course of that relationship the plaintiff no.1 became indebted to the Seychelles Breweries Ltd for considerable sums of money which he intended to pay back. Initially these sums of money were secured by the parcel of land now in contention.

[15] In the course of time the plaintiff no.1's position seems not to have allowed him to pay the back the sums of money advanced to him. Initially the parcel of land was to be sub divided and the lower part transferred to the defendant. However government sanction for the transfer of the portion was denied. In the end, it was then agreed that the plaintiff no.1 would be paid more money by the defendant and would transfer the parcel to the defendant. The agreement is contained in the exhibit P9, a letter from the Seychelles Breweries Ltd to the plaintiff no.1. The letter states in part,

'Further to our letter of 09th November 2001 and subsequent to our meeting, this letter is to confirm your agreement to the sale of the remainder of Plot V4801 (8204 sq.m.) situated at La Louise Mahe, absolute free from all encumbrances whatsoever

for the sum of R 2, 256,100/- subject to Guinness Overseas Ltd obtaining the sanction of the Government for such purchase.

Payment towards the purchase will be made as follows:

(a) 50% (SR.1,128,000/-) of the purchase price on

(i) receipt of sanction to purchase,

(ii) proof to the satisfaction of Guinness Overseas Ltd that the seller is absolute owner in possession of the property, the property is absolutely free of all encumbrances and the person who is to sign the Deed of Transfer has been duly authorised to do so by the seller company, and

(iii) the execution of the Deed of Transfer by the so authorised representative of the seller company.

(b) Balance to be released on receipt by the representative of Guinness Overseas Ltd in Seychelles of the Deed of Transfer in the name of Guinness Overseas Ltd, duly stamped and registered by the office of the Registrar General.

Guinness Overseas Ltd will grant to both yourself and Mr. Alain St. Ange a motorable right of way for private use through the property. The use of the right of way will be in common with other users and subject to payment of a contribution towards its maintenance.

On execution of the Deed of Transfer you will be provided with a letter committing Guinness Overseas Ltd to sell you back the Plot with in a period of 12 months from the date at (b) above as follows:

(i) The sum already paid for the lower portion in Foreign Exchange.

(ii) the sum of R.2,256,000/- for the upper portion in rupees.

Both payments to be made together, the rupee amount to accommodate 10% inflation per annum. All legal charges and stamp duty on the purchase to be borne by yourself.

This letter is addressed to you in your capacity of Director of MYGS (Pty) Ltd acting for and on behalf of that company.'

[16] In a letter dated 12 March 2002, exhibit P11, to Mr. Chang-Sam, the attorney at law for the defendant, Government informed him that the sanction was not granted by Government. Notwithstanding that refusal money continued to change hands and the parties continue to explore different courses of action. In the end Government signified its sanction on conditions that appeared rather unacceptable to the defendant. The defendant contemplated appealing to government to review the conditions upon which the sanction was granted.

[17] On 17 January 2003 the plaintiff no.1 wrote to the Administration Manager of Seychelles Breweries Ltd on the subject, exhibit D4, and stated,

I write further to our recent conversation. **This letter serves to repeat my verbal intention to “repurchase” the above property by paying all sums advanced against the transfer prior to the registration of the signed deed of transfer.** You will remember that the sale of the upper portion of the parcel was never intended and agreement was reached for SBL to apply for sanction to purchase the whole parcel because of the length of time it would take to carry out a sub division survey of the parcel so that the lower portion, containing all buildings, could be sold to SBL. We have, at this stage received all the purchase price of the lower portion and an advance of Rs.600, 000.00 on the upper portion. A sum of Rs.1,500,000.00 approximately remains outstanding on the upper portion. Meanwhile, SBL is mindful of appealing against the application by government of a 30% sanction fee on the transfer, and the registration of the deed of transfer must await the outcome of the appeal.

Finally, agreement has been reached that if I exercise my option to repurchase the property, the refund of the price advanced will be made in foreign exchange in respect of the lower portion and in Seychelles Rupees for the upper portion.

At this point I can reiterate my willingness and preparedness to repay SBL all the sums advanced as agreed. Our arrangements overseas for the foreign exchange element are in their final stages of completion and I expect that I will have the necessary funds to repay by the end of the current month, or very early next month at the latest. **It will, in my view, be pointless for the appeal against sanction duty of 30% to be pursued at this stage in view and I would suggest that this be delayed a little. It is clear that SBL cannot wait indefinitely and I would suggest that, if I have made no payment to SBL, or arrangements to pay satisfactory to SBL, by 7 February 2003, SBL can proceed with its appeal against the sanction duty and proceed with the registration of the deed of transfer without further notice to me.**

In order to facilitate my cash-flow in the meantime, I would appreciate the further assistance of SBL with a letter to Banque Francaise Commerciale, as was done last year, to guarantee payment of a further Rs.700,000.00 against the sum still outstanding by, say end of April or May 2003. Obviously, if matters are finalised one way or another prior to that day, the guarantee will be taken into consideration when making payment one way or another.

I trust that this will be acceptable to SBL.'

[18] This letter, exhibit D4, from the plaintiff no.1 modifies the agreement of the parties, in relation to the buyback option or option to redeem, as initially set out in exhibit P9. The right to redeem was now to be exercised prior to the registration of transfer deed, and not one year from the date of date of registration of the transfer deed as set out in exhibit P9.

[19] On 28th April 2003 Seychelles Breweries Ltd wrote to the plaintiff no.1 asking him to cause to be done either of 2 things.

'(a) You refund in full the equivalent in convertible foreign exchange (as agreed) the sum of R5, 717,400.00 and balance in local currency on or before 5th May 2003.

Or

(b) You cause MYGS Limited to effect the transfer of Title No. V4801 absolutely and free of all encumbrances as mentioned above, on or before 5th May 2003.'

[20] Plaintiff no.1 acknowledged receipt of this letter in his letter of 29th April 2003. He undertook, if Seychelles Breweries Ltd permitted, to pay off all outstanding amounts in 2 instalments on 15th and 30th May 2003. He requested for Seychelles Breweries Ltd's bank details to enable such transfer to be made. These details were provided in a letter the following day written by Seychelles Breweries Ltd to Plaintiff No.1, exhibit D7. And in exhibit D8, a letter from Seychelles Breweries Ltd to the plaintiff no.1 his offer contained in his letter of 29th April 2003, to pay off the money by 30th May 2003 was accepted by the defendant.

[21] 30th May 2003 came and passed. No payment was made by the plaintiff no.1. In a letter dated 8th October 2003, exhibit D10, the plaintiff no.1 granted authority to Seychelles Breweries Ltd to pay off the plaintiff no.1's loan outstanding with Development Bank of Seychelles. Nevertheless he was still optimistic of purchasing the property back in the next couple of days before a transfer could be made.

'I am hereby reiterating my expectation to purchase back the property in the course of the next few days and should be grateful if you would act accordingly.'

[22] The plaintiff no.1 never paid Seychelles Breweries Ltd as he had undertaken again. Thereafter, on 3 November 2003, parcel V4801 was registered free from all encumbrances.

[23] It is clear from the foregoing that the parties appear to have agreed that the plaintiffs may purchase back the property in question and in fact time to do so was provided, and on all such occasions the plaintiffs failed to do so. It is also clear in my view that the agreement between the parties that resulted in the final transfer of the property, that such transfer was free from all encumbrances whatsoever, if the plaintiffs failed to purchase back the property prior to the transfer. This is evident from the letters exchanged between Plaintiff no. 1 and Seychelles Breweries Ltd, quoted above which include exhibit D4, D5, D6, D7, D8, D9 and D10. The land was finally transferred to the defendant only after the plaintiff had failed to buy back the property. The plaintiff no.2, either directly or through its directors, including the plaintiff no.1, never reserved a right to buy back the said property. It had actually failed to buy back the property prior to the registration of the transfer.

[24] In light of the documentary evidence I have examined which is more reliable than verbal claims of the plaintiff no.1 that he had always understood that he would have a right to buy back the property, such verbal claims are not simply credible. The agreement of the parties, as it evolved, reflected in their correspondence was for the plaintiff no. 2, (with the plaintiff no.1 acting as a director and representative of the plaintiff no.2), to buy back the property by 7th February 2003, and then 30

May 2003. All these dates were set by the plaintiff no.1 in writing. The plaintiffs failed to meet their own set deadlines. The plaintiffs again failed to meet their own last unilateral deadline expressed in exhibit D10, where the plaintiff no.1 stated that he expected to **'purchase back the property in the course of the next few days...'**.

[25] The plaintiff no.1 had in fact in his letter, exhibit D4, in undertaking to buy back the property by 7th February 2003 had expressly stated that if he failed to meet this date, **'SBL can proceed with the registration of the transfer of the property without further notice to me.'** This clearly demonstrates that the agreement of the parties was finally to part ways one way or the other. Either the plaintiffs would buy back by an agreed date, or failing that, the property would be transferred to the defendant free from all encumbrances whatsoever.

[26] From the evidence I have examined in this case I am unable to find any evidence that there was a reservation of an option to redeem by the seller that survived the registration of the transfer deed of the land. The option to redeem cannot just reside in the seller's mind without being communicated to the other party and in fact accepted as a condition of the sale. Of course if it not accepted, there is no agreement, and there would be no need for the prospective buyer to continue to finalise the agreement. There is no evidence showing that the plaintiff no.2, the seller in this case, reserved an option to redeem, to run after the registration of the transfer deed. Neither is there evidence that the plaintiff no.1, regardless of whatever interest he may have had in Parcel V4801, reserved an option to redeem this property to run after the registration of the transfer deed. In any case as the plaintiff no.1 was not the registered

proprietor of the property in question, he had no capacity to reserve an option to redeem personally.

[27] I find no evidence that establishes the other claims by the plaintiffs that it was agreed between the parties that the plaintiffs would have a right of first purchase in event of sale to a third party or the right to buy back the property at the plaintiffs' convenience. Intentions may reside in the mind of one party or even an agent of a party but such intention do not transform into a term of agreement unless agreed to by the other party. Agreements by their nature cannot be unilateral.

[28] In the result I am satisfied that the plaintiffs have failed to prove their case. This suit is dismissed with costs.

Dated, signed and delivered at Victoria this 31st day of January 2011

FMS Egonda-Ntende
Chief Justice