

IN THE SUPREME COURT OF SEYCHELLES

Miscellaneous Application No. 54/2013

[Arising from C S No. 251/2005]

[2013] SCSC

CHARLES LUCAS

Plaintiff / Respondent

versus

ZENA ENTERTAINMENTS (PTY) LTD

First Defendant / Petitioner

and

ZENA DUDLEY

Second Defendant

Heard: 15 May 2013

Counsel: Frank Ally for defendants/petitioner
Charles Lucas in person

Delivered: 8 July 2013

RULING

Egonda-Ntende CJ

[1] This dispute, which relates to an alleged sale of land in 1992, has spawned multiple court proceedings and dragged on for over 20 years. The case before me is an application for a writ habere facias possessionem. The first defendant company has applied for a stay of the application pending an appeal in a related case.

[2] The first defendant, Zena Entertainments (Pty) Ltd, was struck off the companies register in 1998. The status of the company at the time of filing this proceeding is unclear. No evidence of reinstatement has been provided. However, both sides appear to assume that the company has had legal capacity throughout this proceeding. With some reluctance, I will do the same for present purposes.

- [3] The second defendant, Zena Dudley, is the person who signed the original land transfer agreement as purchaser on the company's behalf. She (or her agents) has been in continuous occupation of the land ever since. However, neither Mrs Dudley nor her company has ever been the registered proprietor of the land. The current registered proprietor is the plaintiff, Charles Lucas, an attorney. Charles Lucas purchased the land from Philip Lucas, the former registered proprietor, in 2005. Prior to that purchase, he was acting for Philip Lucas in relation to this dispute.
- [4] The history of the dispute is convoluted but it is important to set it out clearly, in the interests of finality for all concerned.
- [5] For reasons still unknown, the original transfer agreement, signed in 1992, was not registered. The company registered a caution against the title in 1994. The company was struck off and removed from the Register in 1998. However, the caution appears to have remained. Philip Lucas (through Charles Lucas) applied to remove it in 2004. The affidavit filed in support of that application stated that "to date the Cautioner has failed to take steps by legal action before the Courts of Seychelles to enforce sale/transfer by specific performance or by order of the Court to register the alleged [sic] sale". As will be seen below, this statement was incorrect. Shortly after making the application, Charles Lucas wrote to the company to give notice that Philip Lucas had "withdrawn your right to occupy his premises". The application to remove the caution must have been successful, because a transfer from Philip to Charles Lucas was registered in 2005. Charles Lucas then filed this proceeding in his own right, seeking an order for vacant possession.
- [6] Three months later, the company filed its own proceeding against Philip Lucas, Charles Lucas, and another attorney who acted in relation to the original transfer agreement. That claim (CS 370/2005) alleged, in summary, that the defendants wrongly failed to register the 1992 sale, that the purported transaction between Philip and Charles Lucas in 2005 was unlawful and fraudulent, and that the register should be rectified to reflect the company's ownership of the land. I note that Mrs Dudley is not a party to that case in her personal capacity.

[7] Several weeks after this, the application in this case (CS 251/2005) was actually granted ex parte after the defendants (Mrs Dudley and the company) failed to appear. The defendants promptly filed a motion to set aside the ex parte order. There is no record of that motion ever being heard, although Mr Ally, learned counsel for the defendants, suggested to me orally that it was allowed by consent at some point. At any rate, Mr Lucas made no attempt to enforce the ex parte order in his favour. For the next seven years, the parties attempted to resolve the “principal case” in CS 370/2005, and this proceeding simply sat on the books.

[8] Judgment in CS 370/2005 was delivered by Gaswaga J in March 2013. The company lost. The company has since filed an appeal to the Court of Appeal. It is that appeal which is said to justify the current application for stay in this proceeding. The concern is, presumably, that the judgment in CS 370/2005 will be relied on by this Court to justify the issue of the writ.

[9] The basis of the judgment in CS 370/2005 does change the whole complexion of this proceeding. That judgment is based on an earlier judgment in a third case involving the same parties, which was delivered in 1995. There is no mention of that case (CS 251/1995) in the pleadings in this case. Indeed, Mr Lucas expressly denies its existence. Paragraph 11(d) of his affidavit in support of the application for writ includes the following:

I verily believe that for reasons best known to [the company and Mrs Dudley] [they] failed or neglected to file court action for specific performance under the laws of contract evidenced by the transfer deed of June 1992 to enforce registration of land transfer by court judgement.

[10] In fact, the judgment of Amerasinghe J in CS 251/1995, which was cited by Gaswaga J in CS 370/2005, shows that the company did file a contract claim against Philip Lucas in 1995, seeking (inter alia) an order “to direct the Registrar to have [the land] registered in favour of the plaintiff”. Amerasinghe J’s judgment records that Philip Lucas was duly served but failed to take any part in the proceeding. So the allegations in the plaint were taken as accepted. Be that as it may, the Judge found as fact that the parties had entered

into a valid transfer agreement and that the full purchase price had been paid. The Registrar of Lands was therefore ordered to transfer the title to the company.

[11] This order was, obviously, never given effect. Like Gaswaga J, “this court too wonders why!” It is almost as if both parties forgot that the first case had ever happened.

[12] So the position the parties find themselves in now is indeed a strange one. The company gained judgment in its favour in 1995. But that judgment was not implemented. And once the registered title had been transferred to Charles Lucas in early 2005, it could not be implemented. So the company (which may or may not have been struck off at the time) filed a fresh proceeding seeking effectively the same relief. As Gaswaga J put it:

The [company] sat on the judgment and therefore its rights and thereby failed, ignored or refused to give effect to it for almost ten years then returned to ask the court for what had already been sought and given.

[13] Charles Lucas, on the other hand, effected the transfer of a property from a client to himself in circumstances where he must have been aware that his client’s title was disputed. He gained an ex parte order in his favour in 2005, without disclosing the existence of the 1995 judgment against his former client. But he then appears to have consented to the revocation of that order. And in the most recent hearing before me, Mr Lucas conceded that he has no objection to dismissing this proceeding and allowing the dispute to turn on the final outcome of CS 370/2005. He does however seek costs dating back to 2005.

[14] All in all, this is a paradigm example of undesirable multiplicity of litigation. Both parties must take responsibility for this state of affairs. Serious allegations of fraud were made before Gaswaga J. As a result of the operation of res judicata, those allegations may never be resolved. The truth of the events in 1992 should have been explored before Amerasinghe J in 1995. It may now never emerge.

[15] What is apparent is that this was not an appropriate case for the use of the special writ procedure. A writ of habere facias possessionem is available only where there is no bona fide or arguable defence to a claim of title. A judgment of the Supreme Court in the defendant’s favour certainly qualifies as an arguable defence. If Mr Lucas was somehow

unaware of the existence of Amerasinghe J's judgment in 2005, he should have withdrawn this proceeding as soon as it was drawn to his attention.

[16] As for the stay application, both parties have accepted that CS 370/2005, which has always been described as the "principal" or "main" case, is sufficient to settle the issues in dispute between them. In those circumstances there is no basis for further prolonging this multiplicity of proceedings.

[17] Mr Lucas' failure to disclose the existence of the 1995 judgment is a sufficient basis for declining to take the unusual step of awarding costs to an unsuccessful party. However, in any event, Mr Lucas appeared in this proceeding as a private citizen, not as counsel. He could therefore have only properly sought to recover disbursements.

[18] The orders of the Court are as follows. The underlying application for a writ (CS 251/2005) is dismissed. The application for stay (MA 54/2013) is likewise dismissed. I make no order as to costs.

Signed, dated and delivered at Ile du Port on 8th day of July 2013

F M S Egonda-Ntende
Chief Justice