SUPREME COURT OF SEYCHELLES

Reportable
[2021] SCSC ……..…
CS 79 of 2018

In the matter between:

THONY CLEMENT ADELINE acting through **Plaintiff**
His curator Sydna Lavigne
(rep. by Kieran Shah)

and

ALWYN TALMA **Defendant**
(rep. by Frank Elizabeth)

Neutral Citation: *Adeline v Talma* (CS 79/2018) [2021] SCSC …….. (…… June 2021).
Before: Pillay J
Summary:
Heard: 10th February 2020, 11th February 2020
Delivered: …….. June 2021

ORDER

[1] I confirm the sale of PR957 to the Defendant.

[2] The Defendant having paid the sum of SCR 355, 000/- shall settle the outstanding balance of SCR 645, 000/- within 3 months of today's date with interest at the legal rate from the date of filing of the case.

[3] In the event that the balance is not settled within that time the Plaintiff shall refund the Defendant the sum of SCR 355, 000/- and the Registrar of Lands shall remove the Defendant as proprietor of PR957 and instead register the Plaintiff as the proprietor of PR957, on proof of payment of the sum of SCR 355, 000/-.

[4] Costs are awarded to the Plaintiff.

[5] Judgment is entered accordingly.

JUDGMENT

PILLAY J

[6] The Plaintiff seeks a judgment declaring that the purported transfer of Parcel PR957 dated 20th June 2013 registered and transcribed in Volume 86 No 205 of the Register of Transcription is null and void or alternatively to rescind the sale document for failure to pay the sale price.

[7] The Plaintiff's case is that the Plaintiff is a feeble-minded person and the Supreme Court of Seychelles appointed Sydna Lavigne as one of his curators by provisional order dated 5th August 2015 and made final on 11th November 2015. By a document dated 20th June 2013, registered and transcribed on 22nd August 2014 in Volume 86 No 205 of the Register of Transcriptions, purportedly sold land parcel PR957 to the Defendant. The purchase price as stated of SCR 1, 000, 000.00 was not paid. The Plaintiff has no command of the English language and would not have understood what the said document was about and therefore could not have validly consented to this purported sale. The purported transfer document is defective and despite the Plaintiff's curator's objections the Defendant has irregularly transferred monthly sums of SCR 5, 000.00. It is the Plaintiff's claim that the purported sale document is null and void or alternatively should be rescinded.

[8] The Defendant denied that the Plaintiff is feeble-minded and claims that the Plaintiff s lucid and in full control of his mental faculties. The Defendant admitted that the transfer was effected between the Plaintiff and himself but denies that it was a "purported" transfer. He claims that he had arrangement with the Plaintiff to effect payment by instalments but for the purpose of the prescribed form under the Land Registration Act

the notary had to state on the transfer that the purchase price had been paid. He denied that the transfer was defective claiming that it was done by a notary with many years standing. He further denied that the curator objected to the monthly transfers of SCR 5, 000.00 and claims that he had by the time of filing the Plaint credited the Plaintiff's account with the sum of SCR 390, 000.00.

[9] Juliette William an Assistant Compliance Officer at the Registration Office produced the deed of transfer transcribed in volume 86 No 205 in respect of PR957 between the Clement Adeline and Alwyn Talma, under the Mortgage and Registration Act as Exhibit PE1.

[10] Nicole Gabriel an Attorney at Law and Notary testified that he knows Alwyn Talma who has been his client for about 8 years. He identified PE1 as being a document prepared by his office on the instruction of Mr. Talma. He accepted that the consideration was for SCR 1 million however he did not witness the payment. He went to Praslin to meet with Mr Adeline. Since he could not sign the documents he put his prints and two office assistants from his office attested the stamping. He brought the two witnesses with him because he had been told that Mr Adeline was unable to sign. The document was signed on 28th June 2013.

[11] Mrs. Sumita Andre an assistant Registrar with the Supreme Court produced the court file in Ex Parte matter 102/2015 wherein Jenna Marie Payet and Sydna Lavigne were appointed the curators of the Thony Clement Adeline on 5th August 2015 confirmed on 11th November 2015.

[12] The Plaintiff's curator Sydna Lavigne testified that she has known the Plaintiff from birth. He is her neighbour. He does not know how to read and write. He went to school up to the primary level. Since he fell ill after a fall he does not speak. He fell down in 2014. In 2015 she was appointed as one of his curators. Since 2005 he started drinking a lot and was using alcohol every day. Before that he didn't used to go to work regularly but now he is working every day. When she checked the bank statement she saw that he was removing money every day to drink. He used to be able to sign his name but now he

is unable to sign his name. She also noticed a deterioration of his signature from 1986 to 2013.

[13] The Defendant denied the claims of the Plaintiff. He testified that he knows the Plaintiff very well from the time the Plaintiff came to live at Cherimont in 2001. The Plaintiff was working for LWMA and cleaning the beach from Cherimont to his property. They struck up a friendship. At some point the Plaintiff started asking him for little loans and eventually told him about a land he had that he wanted to sell to a foreigner. He advised the Plaintiff that was difficult because of sanctions and the land use plan by government. It was his testimony that the Plaintiff is literate and spoke many languages as he was a tourist guide.

[14] The Plaintiff's counsel filed submissions submitting that there were defects in the deed of transfer, there was no valid consent to the sale of PR957 as the Plaintiff is of feeble mind and that the Defendant has not paid the consideration for the sale of PR957.

[15] With regard to the defects in the deed of transfer, the Plaintiff's counsel submitted that the deed of transfer is null and void as the proper procedures were not followed in accordance with law, more specifically schedule (section 16) 1.1 of the Notaries Act, in that the two persons who purportedly witnessed the Plaintiff's print were employees of the notary and therefore not legally competent witnesses.

[16] It was further his submission that notaries are under an obligation to record "the fact and reason of the inability of the party to sign" whereas the deed of transfer does not stipulate why the Plaintiff's fingerprint was used instead of his actual signature.

[17] He submitted that the notary failed to ascertain from the Plaintiff whether the consideration of SCR 1 million was paid to him at the time of affixing his fingerprint on the deed of transfer in direct breach of the Notaries Act.

[18] With regard to the Plaintiff being of feeble mind, counsel submitted that the Plaintiff could not and did not give valid consent to the sale of PR957 in reliance on Article 1108 of the Civil Code.

[19] Counsel relied on the case of **Hoareua v Hoareau (216 of 2008) [2011] SCSC 16** for the proposition that the deed of transfer is null and void because it failed to satisfy one of the essential conditions of contract.

[20] Lastly counsel submitted that the Defendant has not paid the consideration for the sale of PR957 in that the Defendant has unilaterally been transferring the sum of SCR 5, 000.00 to the Plaintiff's bank account to the tune of SCR 614, 953.60 inclusive of the alleged advances that the Plaintiff paid the Defendant in cash when the agreed price was SCR 1 million and no time was granted to the Defendant to pay the said SCR 1 million.

[21] Counsel for the Plaintiff identified the issues for consideration as follows:

(1) Was the transfer dated 20th June 2013 registered and transcribed on 22nd August 2014 in Vol 86 No 205 of the Register of Transcriptions valid in law?

(2) If so, does the Defendant's non-payment of the purchase price listed therein frustrate the sale agreement and render it liable to be rescinded?

Analysis

[22] To the first issue: "*Was the transfer dated 20th June 2013 registered and transcribed on 22nd August 2014 in Vol 86 No 205 of the Register of Transcriptions valid in law*?"

[23] The validity of the contract has to be decided on the basis of the evidence having regard to Article 1108 of the Civil Code of Seychelles which provides that:-

> *The four conditions for a contract to be valid are:*
>
> *a. the consent of the party to bind himself*
> *b. his capacity to enter into a contract*
> *c. a definite object which forms the subject-matter of the undertaking*
> *d. that it should not be against the law or against public policy*

[24] The Plaintiff's case is that there was no valid consent as the Plaintiff has no command of English and would not have understood what the transfer document was about.

[25] In accordance with Article 1109 "the consent shall not be valid if it is given by mistake, or extracted by duress or induced by fraud."

[26] Learned counsel for the Plaintiff relied on the case of **Houareau v Houareau (216 of 2008) [2011] SCSC 16 (18 March 2011)**. The Plaintiff in the said case sought a judgment to rescind a transfer of land for the reason that he was not in good mental health at the time of the alleged transfer and he was misled and mistakenly signed the transfer document believing that he was being granted a loan and the property would revert back to him on repayment. The Court accepted the evidence of the Plaintiff and concluded that the transfer "is vitiated by lack of valid consent by the plaintiff due to adverse state of mind the plaintiff had on account of ill-health at the material time coupled with the mistaken belief trigged by misrepresentation of facts by the parents of the defendant and the notary."

[27] On the pleadings and Learned counsel's reliance on **Hoareau** the Plaintiff seeks to void the transfer agreement on the basis that consent was given by mistake.

[28] In terms of what constitutes a "mistake" Article 1110 provides that -

> *1. Mistake shall only be a ground of nullity of the contract if it relates to the very substance of the thing which is the object of the contract. It shall not be a ground of nullity if it relates to the person with whom it was intended to enter into a contract, unless the personal qualities of that person are a principal consideration in the agreement.*
>
> *2. There is a mistake as to the substance if the parties would not have concluded the contract had they known of the true circumstances…*

[29] The Plaintiff's position is that the Plaintiff is feeble-minded as a result of years of alcoholism and epilepsy. It is the position of the Plaintiff that the fact that the Plaintiff affixed his thumb is indication of his lack of consent since the Plaintiff knew how to sign his name. According to the Plaintiff's curator the Plaintiff used to be able to sign his name but now he is not able to. It was her testimony that she has a document from 1986 that bears the Plaintiff's signature.

[30] It is noted that the Defendant since 2012 has been writing out the invoice to LWMA on behalf of the Plaintiff. It would appear that from October 2012 the Defendant started

sending the invoice to LWMA with the Plaintiff's thumb print rather than his signature, as noted in the invoice dated 4th October 2012 produced in the bundle marked DE2.

[31] If indeed as the Defendant stated, the Plaintiff was literate and spoke English and French to clients as a former tourist guide, then why was the Defendant in 2012 informing the LWMA that henceforth the Plaintiff would be using his thumb print on the invoices and not his signature? If indeed the Defendant was close (in terms of friendship) to the Plaintiff, which would seem to be so, he could not have failed to realise that the Plaintiff's faculties were declining.

[32] In fact in cross examination when asked if the signature of the Plaintiff on the invoice to the LWMA did not reflect an unsteady man the Defendant stated "well that is how he sign" Then he went on to say "It might be that he had han[g]over or whatever but I do not think that this was a proper signature to send to LWMA and he I said look he presses is thumb better which was accepted." I fail to understand the logic behind the Defendant's argument. If indeed the Plaintiff was not unsteady as he says but that the scrawl was in fact the Plaintiff's normal signature and LWMA was used to the Plaintiff signing his papers that way, why would it not be proper for the Plaintiff to sign his invoices with the signature that the Defendant clearly believed was the Plaintiff's way of signing documents? For that matter if he had just been hungover on that particular date in 2012 why would the Plaintiff need to print his thumb each time subsequently? Unless of course he was hungover every day from then, which is on the evidence of both the Defendant and the curator is more likely than not to have been the case.

[33] The Defendant's logic is even more askew when he explained that he thought if the Plaintiff printed his thumb it would go faster, not because the LWMA were making queries which delayed payments (in fact he testified that the LWMA did not query the Plaintiff's signature) but it would be faster because the Plaintiff sometimes did not come on the day he was supposed to come so when he would stop by the Defendant would just tell him to press his thumb and he (the Defendant) would then give the Plaintiff the invoice to take to LWMA. I fail to understand how much longer it would take the Plaintiff to sign the invoice than to print his thumb.

[34] According to the Defendant the Plaintiff "was always taking money from me because on Rs2804/- you can hardly become a drunk[ard]… I mean he does not drink Baka Clement…" According to the Defendant the agreement was that he would pay the Plaintiff SCR 5000.00 per month like a pension, probably until he dies. By my calculation it would have taken in excess of 16 years for the sum to have been paid.

[35] According to DE2, receipt number 3501, payment for PR957 is dated from April 2013 even before the transfer was signed. From what I can glean from DE2, the payments of SCR 5000 from April 2013 match those on the Plaintiff's bank account up to 16th October 2015.

[36] I note a number of random payments starting Jan /Feb 2015 with SCR61922.22, March 2015 SCR 6462.91, April 2015 SCR1595, May 2015 SCR 1790, June 2015 SCR980, July 2015 SCR 1625, August 2015 SCR 3869, September 2015 SCR 1045, October 2015 SCR1070, November 2015 SCR 2218, December 2015 SCR 6710, January 2016 SCR 2030, February 2016 SCR 2840, all the way through to June 2017 well after the curator had been appointed. There is no supporting document for those receipts. If as the Defendant says, the Plaintiff was seeking advances from him on a regular basis why is it that the receipts only start in 2015? The Defendant produced a voluminous bundle of various receipts, why not the calendar that he says he used to note down the various advances he gave to the Plaintiff on a daily basis?

[37] On the above it is my firm belief that the Defendant was well aware of the Plaintiff partiality to drink, describing him as a "drunkard" and used that to his advantage. The intent of the Defendant is clear from his evidence, "I lent him money hoping that he will sell the land…"

[38] According to the Defendant the land is above 60 metres and part of it was above70 metres. It was his testimony that he told the Plaintiff that the land was worthless and that the Plaintiff had put him in a bind because he could not build on the land since it was above 50 metres as a result of which the Plaintiff told him that he inheritance and they could make a deal. That deal resulted in the Plaintiff transferring his interest in another plot of land on to the Defendant. In as much as this Court is not concerned with the other

transaction between the parties the process by which it was done is relevant as it shows the conduct of the Defendant.

[39] In his examination in chief when explaining how the transfer of PR957 from the Plaintiff to him came about, the Defendant stated that the Plaintiff told him that he has a piece of land to sell and asked the Defendant if he knew of any foreigner who might want to purchase the land. The Defendant told the Plaintiff that it was difficult for a foreigner to buy land because they "need sanctions and at this time in 1995 there was a land use plan by the government for Anse Lazio and Praslin general. Anse Lazio we were not allowed to build 80 metres from the high water mark and 50 metres above the geographical contour and where Madam Lavigne Gemma lives is over 70 metres and it was a house that existed for a long time before the land used plan. On Clement's Property there were no house and you would not be able to build even a shack normally…(sic)"

[40] Furthermore by his own admission he won his case before the Supreme Court where he sued the government for classifying his land in such a manner in the land use plan that prohibited him from developing his land. That case was filed in 2010. With that in mind it is hard for me to believe first of all that in 2013 the Defendant would believe that the Plaintiff's land was worthless because of the land use plan in operation at the time that prohibited construction above 50 metres when he himself was suing the government to get full use of his property at Anse Lazio. Secondly it is hard to believe that at the time he agreed to purchase the land, PR957, the Defendant did not realise that the land was above 50 metres when by his own testimony when the Plaintiff had approached him to find a foreigner to purchase the land he had explained to the Plaintiff the difficulties as a result of necessity for sanctions and the land use plan. The Defendant knew all the details of the Plaintiff's affairs even about the agreement and terms of the attempted sale to the French man. It was disingenuous of the Defendant to make the Plaintiff believe the land was worthless and in my view it was a calculated attempt to get the Plaintiff to sell him the land.

[41] It is my finding that the Defendant took advantage of the Plaintiff in the full knowledge that the Plaintiff was a "drunkard" and was only looking to his next drink. In my view

the circumstances quite clearly show that the Defendant manipulated the Plaintiff into selling the land to him. I do not believe the Defendant that it was the Plaintiff's "wish" that he be paid SCR 5, 000/- per month. On the evidence it is more likely than not that it was the Defendant who came up with that suggestion and the Plaintiff went along with it.

[42] However the Court is bound by the pleadings on file and the evidence on record. The facts of this case does not align with that of **Hoareau** above. I would venture to say that the Plaintiff was misled on the value of the land in question, however I do not believe it would be correct to say, on the evidence that the Plaintiff was misled into signing the transfer. In line with Article 1110, the object of the contract was the transfer of land for a sum of money. In my view even if the Plaintiff knew that he was being manipulated, he would still have concluded the transfer since as per the evidence of the curator and the Defendant he (the Plaintiff) was withdrawing money or borrowing money every day to drink, therefore it is safe to conclude that he just wanted money to drink and transferred the land for that purpose.

[43] On the above therefore this Court cannot conclude that there was mistake vitiating consent. In the circumstances I find that the contract is valid in law.

[44] Now, in view of the above, "*does the Defendant's non-payment of the purchase price listed therein frustrate the sale agreement and render it liable to be rescinded*?"

[45] Before I consider the second issue let me deal with the manner in which the transfer was drawn up. Part III of the Notaries Act provides for the manner in which deeds are to be drawn up as well as its contents. Section 15 provides that:

> *"Subject to this Act –*
>
> *(a) a deed may be drawn up before a single notary;*
>
> *(b) the Schedule shall have effect with regard to the manner of drawing up deeds and the content of deeds drawn up by a notary.'*

[46] Section 1 (1) and (5) of the Schedule provides that

(e) Where a deed is in respect of a transfer of immovable property, thing or right whatsoever for a consideration-

(i) a clause to the effect that the parties declare to the best of their knowledge and belief that the purchase price or consideration represents the actual price and real value of the property, thing or right transferred or that the actual price and real value of the property, thing or right for the purposes of the Stamp Duty Act is estimated at the sum specified in the clause;

(ii) a clause stating that the notary has warned the parties to the deed of the consequences to which they expose themselves if the full purchase price, consideration or conditions giving rise to stamp duty under the Stamp Duty act, is not truly expressed.

(5) A person shall not be a witness to a deed drawn up by a notary-

(a)….
(b) he is –
(i) ….
(ii) a clerk or servant of the notary or a party to the deed;
(iii) …

[47] Section 2 provides as follows:

(4)Before a party or a witness subscribes to a deed drawn up by a notary the notary shall-

…

(c) ascertain whether each party and witness, if any, understand sufficiently the language in which the deed is drawn up to understand the contents of the deed and, if a party or witness does not so understand, explain the content of the deed to that person in a language which that person understands.

(6) Subject to any other written law, where a party to a deed drawn up by a notary cannot sign by reason of illiteracy or any physical incapacity –

(a) the party shall affix his thumbprint or, where he does not have a thumb, he shall affix the print of any other finger or put his mark, to the deed in the presence of two additional witnesses qualified under this Act;

(b) the notary who drew up the deed shall record –

(i) the fact and reason of the inability of the party to sign;
(ii) …
(iii) the fact that the party affixed his print or put his mark to the deed in accordance with subparagraph (a) in his presence after the notary has complied with paragraph (4) in the presence of every witness to the deed.

[48] By Mr. Gabriel's own admission the two persons who witnessed the deed were two people who worked in his office in clear violation of the above.

[49] The transfer of PR957, PE1, clearly states that "In consideration of the sum of One Million Rupees (1, 000, 000SR) (which sum the Vendor hereby acknowledges having received) the Vendor hereby sells…" According to the evidence of Mr. Gabriel he did not ask the Plaintiff if he had received the money.

[50] Indeed I have to agree with the submission of counsel for the Plaintiff that no reasonable person would accept the sum of SCR 1 million rupees to be paid in instalments of SCR 5, 000.00 per month. In fact when asked by the Court if he had explained to the Plaintiff that the transfer included a reference to him having received the sum of SCR 1 million Mr. Gabriel stated that he had but he left it to the two parties in regards to the nature of how to pay. When asked by Mr. Shah if he had asked the Plaintiff if he had received the money Mr. Gabriel said he hadn't. He went on to add that he had read it to him, presumably the part of the transfer in relation to the consideration, and he believed that had he not been paid the Plaintiff would have said something but he (the Plaintiff) did not mention and to his understanding the Plaintiff was satisfied that he was being paid. For someone he did not know, Mr. Gabriel made a lot of assumptions about the Plaintiff. It strikes me that Mr. Gabriel came to the understanding that arrangements had been made from his client, the Defendant, since other than explaining to the Plaintiff what a transfer

is, there doesn't seem to have been any other conversations between the Plaintiff and Mr. Gabriel. Certainly there is no indication that the Plaintiff acknowledged payment of the SCR 1 million as clearly stated in the transfer that Mr. Gabriel says he read over to the Plaintiff before having him put his thumb print on it. This is quite concerning.

[51] What is further concerning is the name as well as the identity number of the Plaintiff as printed on the transfer. Indeed this Court is not a handwriting expert but giving the voluminous file of receipts handed in by the Defendant with each one bearing the printed name of the Plaintiff as well as his ID number in the same script I cannot help but conclude that the details of the Plaintiff on the transfer was printed by the Defendant. It leads me to believe that all arrangements were made by the Defendant and Mr. Gabriel merely went on what the Defendant told him.

[52] It would appear that Mr. Gabriel overlooked his obligation to ensure that both parties understood the language and content of the deed. Mr. Gabriel's clear failures to comply with the Notaries Act however does not translate into the deed being null and void as section 21 of the Notaries Act provides specific circumstances in which a deed is void and the present circumstances do not fall into the stated categories.

[53] I can do no better at this point than to repeat what the PCA, then Justice of Appeal, Fernando said in the case of **The Estate of Charlemagne Grandcourt and others vs Christopher Gill (SCA NO CS 7 of 2011) [2012] SCCA 21 (07 December 2012)**

> *We are of the view that Notaries should in the future refrain from stating in notarial documents executed before them incorrect and false statements such as the one found in P 1 namely, that moneys have been paid when it is not so. The risks involved in making such a statement is shown in the following dialogue between the Respondent and Counsel for the Appellants:*
>
> *"Q. Did you Mr. Gill and a 80 year old man sign a transfer charge and you did not pay him a cent on that day? Is that the way you do business?*
>
> *A. Yes*
>
> *Q. He could have walked out of that door and within half an hour he could have dropped dead at that age.*

A. That is very sad, it could have been unfortunate if it happened."

We do not agree with the argument of Counsel for the Respondent that the Notary had prepared the transfer document according to the ***Form LR 1 as set out in the Land Registration Act****. An examination of Form LR 1 set out in the Land Registration Act shows that provision has been made to make the necessary amendments to it, namely "I/We……. In consideration of Rupees……(which sum [or of which sum Rupees……] has been paid) hereby transfer to……".* ***Rule 3 of The Land Registration Rules*** *states: "Subject to section 58 of the Act, every instrument shall with such variations as may be necessary to meet the circumstances of any particular case, be in one of the forms in the Second Schedule to these rules, whichever is appropriate."*

.The breach of these statutory provisions in the preparation of the transfer documents does not in our view necessarily vitiate the agreement between Grandcourt and the Respondent. We have highlighted these deficiencies so that there will be no repetition of it by notaries in the future. The Bar Association is requested to bring this judgment to the notice of all of its members especially those who practice as notaries.

[54] Now back to whether *the Defendant's non-payment of the purchase price frustrates the sale agreement and renders it liable to be rescinded*?"

[55] Learned counsel for the Plaintiff seeks rescission of the transfer on the basis of Articles 1184, 1612 and 1654 of the Civil Code which reads thus:

Article 1184

1. A condition subsequent shall always be implied in bilateral contracts in case either of the parties does not perform his undertaking.

It may also be implied in some unilateral contracts, such as a loan or a pledge.

In that case, the contract shall not be rescinded by operation of law. The party towards whom the undertaking is not fulfilled may elect either to demand execution of the contract, if that is possible, or to apply for rescission and damages. If a contract is only partially performed, the Court may decide whether the contract shall be rescinded or whether it may be confirmed, subject to the

payment of damages to the extent of the partial failure of performance. The Court shall be entitled to take into account any fraud or negligence of a contracting party.

Rescission must be obtained through proceedings but the defendant may be granted time according to the circumstances.

Rescission shall only be effected by operating of law if the parties have inserted a term in the contract providing for rescission. It shall operate only in favour of the party willing to perform.
2. The Court may, in relation to an action for rescission, make such orders as it thinks fit, both in relation to the rights and duties of the contracting parties and in relation to the rights of their heirs.

3. If, before the performance is due, a party to a contract by an act or omission absolutely refused to perform such contract or renders the fulfilment thereof impossible, the other party shall be entitled to treat the contract as discharged.

Article 1612

The seller shall not be bound to deliver the thing if the buyer has not paid the price, provided that the seller has not granted him time for payment.

Article 1654

1. If the buyer does not pay the price, the seller may demand rescission of the sale.

2. However, after the extinction of any privilege that the seller may have upon the property, his right to claim rescission cannot be exercised to the detriment of third parties having over the property to which the privilege applied rights derived from the purchaser, and having conformed to the law for preserving their said rights.

[56] As discussed above, though the transfer reflected that the consideration had been paid, it had in fact not been paid. As per my finding at paragraph 36 above I do not believe that it was the Plaintiff's wish that the sale be done in the manner that it was done whereby account would be taken of the advances the Defendant had given to the Plaintiff and

thereafter the payment would be by way of SCR 5000/- per month “like a pension” but rather it was the Defendant’s ploy.

[57] By my calculation, cross referencing the receipts from the Defendant to the Plaintiff from 15th April 2013 to 15th March 2019, the banking slips as well as the bank statements of both the Defendant and Plaintiff, the Defendant has paid 21 instalments of SCR 5000/- coming to a total of SCR 355, 000/-.

[58] On my reading of Article 1184 (1) the Plaintiff has the option of asking the Court for either performance of the obligation or rescission and damages. In the event that there is part fulfillment, the Court then has the discretion to either rescind or confirm the contract. Effectively, the Plaintiff having elected to seek rescission and there being part payment, this Court now has the discretion to either rescind the transfer or confirm it. In exercising its discretion the Court may take into account any fraud or negligence of either party to the contract.

[59] In as much as I find the conduct of the Defendant, as well as his payment of SCR 5, 000/- per month in the manner of a pension to the Plaintiff, to have been reprehensible, there has been part payment, regularly, and on the evidence the Plaintiff transferred the land in exchange for money. In the circumstances I exercise my discretion to confirm the sale of PR957 to the Defendant.

[60] The Defendant having paid the sum of SCR 355, 000/- shall settle the outstanding balance of SCR 645, 000/- within 3 months of today’s date with interest at the legal rate from the date of filing of the case.

[61] In the event that the balance is not settled within that time the Plaintiff shall refund the Defendant the sum of SCR 355, 000/- and the Registrar of Lands shall remove the Defendant as proprietor of PR957 and instead register the Plaintiff as the proprietor of PR957, on proof of payment of the sum of SCR 355, 000/-.

[62] Costs are awarded to the Plaintiff.

[63] Judgment is entered accordingly.

Signed, dated and delivered at Ile du Port on …

_____

Pillay J