

SUPREME COURT OF SEYCHELLES

Reportable
[2021] SCSC *389*.....
CS 59/2017

In the matter between:

JEANNE D'ARC ISABELLE SAVY
(rep. by Serge Rouillon)

Plaintiff

and

MERIA NOURRICE
(rep. by Karen Domingue)

1st Defendant

LUCY POOL
(rep. by Kieran Shah)

2nd Defendant

Neutral Citation: *Savy v Nourrice and Anor (CS 59 of 2017) [2021] SCSC *389* (30th June 2021)*
Before: Pillay J
Summary: Promise of Sale – specific performance or order for damages
Heard: 5th July 2019, 2nd March 2020, 9th March 2020, 10th March 2020 and 4th September 2020
Delivered: 30th June 2021

ORDER

[1] Judgment in favour of the Plaintiff as follows:

- (1) *The first Defendant shall pay the Plaintiff the sum of SCR 1 million rupees in damages.*
- (2) *The first Defendant shall pay the sum of SCR 50, 000.00 as moral damages to the Plaintiff.*
- (3) *The whole with interest from the date of judgment with costs.*

JUDGMENT

PILLAY J

[1] The Plaintiff seeks an order of the Court, amongst others, for:

(1) *Specific performance ordering the first defendant to transfer the agreed portion of land Title V18949 with the house thereon to the Plaintiff for Rupees 1, 500, 00/- less the deposit already paid;*

In the alternative

(2) *The defendants jointly and severally to pay the Plaintiffs damages in the sum of R1, 531, 934/-, and*

(3) *The Defendants jointly and severally to pay the Plaintiffs moral damages in the sum of R 800, 000/-.*

[2] The Plaintiff claims that:

(1) *The Plaintiff and the 1st Defendant are respectively, first time buyer and seller of an immovable property at Foret Noire, Mahe, and the 2nd Defendant is a Notary Public.*

(2) *That following a site visit of an immovable property at Foret Noire, Mahe, the Plaintiff and the 1st Defendant agreed for the purchase by the Plaintiff of the property of the 1st Defendant comprised of a house and a then an unknown size piece of the Defendants land around the house.*

(3) *On the 8th April 2016 by a Notarial Deed executed at the Chambers of Notary the 2nd Defendant, the Plaintiff and the 1st Defendant signed a Promise of sale (the 1st Agreement) containing, inter alia, the following terms;*

a. *the 1st Defendant promised to sell to the Plaintiff the house standing on Parcel No: V5298 and the purchase price was stated a Rupees One Million Five Hundred Thousand (R1, 500, 00/-);*

- b. *the Plaintiff agreed to pay a deposit of Rupees Five Hundred and Fifty Thousand (Rs 550, 00) to the 1st Defendant with the balance of Rupees Nine Hundred and Fifty Thousand (R950, 000/-) was to be paid at the end of July 2016;*
 - c. *The Promise of sale was to lapse and be void and of no effect if after 4 months from the date of execution of the Promise of sale the Plaintiff failed to pay the balance of the purchase price and her deposit would be forfeited by the 1st Defendant;*
- (4) *The Plaintiff paid the deposit to the 1st Defendant on signing of the 1st Agreement and she accepted what she was told by the defendants about the property that she was being sold the house and surrounding land.*
- (5) *The 2nd Defendant prepared and attested the 1st Agreement as Notary in the presence of both parties; without;*
- a. *setting out in the document; the full identity and capacity particulars of the parties; the full terms of the agreed transaction of the parties which included the land around the house; and a loan to be taken by the Plaintiff for payment of the balance of the purchase price;*
 - b. *informing the Plaintiff of what immovable property she was in fact buying by only mentioning "a house" and failing to mention that there were two houses on the land: and*
- (6) *On that date the Plaintiff in the presence of the 2nd Defendant was told by the 1st Defendant that there was a loan registered against land title V5298 and she would use the deposit to pay off the loan with the Housing Corporation ("HFC").*
- (7) *Shortly after the Plaintiff was told that the property was to be sub divided and the 2nd Defendant confirmed that it was a normal procedure and the sale could not be executed until the subdivision was complete which would take about six months. The Plaintiff accepted this and waited to hear from them so that she could sort out her loan application and process to pay the balance.*
- (8) *Before the end of July 2016 the Plaintiff contacted the Defendants for information about the subdivision and when she would make the balance payment; they informed her that the subdivision was not yet completed and it will take a few more months.*
- (9) *The Plaintiff had advised the Defendants that she required a bank loan and would have to charge the property she was buying to pay the balance. The 1st Defendant said the sub division would be complete by the time she secures the loan.*

- (10) *The Plaintiff obtained approval for her loan with Seychelles Credit Union (“SCU”) for the balance payment; the bank asked for a valuation of the property to be charged. The 1st Defendant was unable to provide this as the subdivision was not complete.*
- (11) *In December 2016 the 1st Defendant gave the Plaintiff an Official Search Certificate dated 1st December 2016; a Valuation Report dated 20th July 2015 and a letter to say that she was selling plot V18949 (subdivision of V5298) to the Plaintiff for her to give to her bank to complete the loan process. The said letter from the 1st Defendant stated that she was the Title V18949 for Rupees One Million Five Hundred Thousand (Rs. 1, 500, 000/-) to the Plaintiff.*
- (12) *In February 2017 the balance of Rupees Nine Hundred and Fifty Thousand was available from SCA to pay the 1st Defendant and the Land Transfer document for land Title V18949 was prepared and waiting for the parties to sign (“the 2nd Agreement”).*
- (13) *When the loan amount had been disbursed by the bank to the lawyers’ escrow account and the land transfer document for land Title V18949 was prepared a time and date were agreed for the signing of the 2nd Agreement but the 1st Defendant told the Plaintiff that she was waiting for a road to be registered on the parcel of land before she signs the 2nd Agreement.*
- (14) *Another date was fixed for signing the 2nd Agreement and the 1st Defendant appeared and produced a handwritten document with additional clauses to be inserted in the draft sale document including a restriction in her favour on the land to the effect that;*
- a. the Plaintiff should subdivide the property after she has bought the land and repaid her loan;*
 - b. the Plaintiff should extract 700 square metres from the land she buys and sells the same to the 1st Defendant; and*
 - c. the Plaintiff consents to a Restriction being placed on the property subject to the above conditions.*
- (15) *The 1st Defendant was informed by the Plaintiffs lawyer that such conditions would not be acceptable as the loan to be repaid by the Plaintiff would be for 19 years and the condition would not easily be enforceable if one of the Parties passed away and, the bank practice for giving bank loans is to have an automatic exclusivity restriction for first line charges. The Charge would not be registered – the bank would not agree to such terms and conditions.*

- (16) Shortly after the 1st Defendant advised the Plaintiff that she has to raise her price for selling her Title V18949 and house for a new sum of Two Million One Hundred Thousand (Rs. 2, 100, 000/-). The Plaintiff said she could not accept this.
- (17) The 1st Defendant still has the Plaintiffs deposit but to date all her attempts at compromises and variations of the parties different agreements have proved unsatisfactory.
- (18) The Plaintiff avers that the 1st Agreement as evidenced in the promise of sale was defective and null and void for the purposes of the law in that;
- a. when it was signed the 1st Defendant was the executrix of the land in heirs names and she had no legal right to enter into any private agreement concerning the property with the Plaintiff for a share of the land or rights therein without it being clearly stated on the document prepared by the 2nd Defendant; and
 - b. the agreement between the two parties stipulated that the 1st Defendant was to sell "the house" on land Title V5298 when there are two houses on that plot;
 - c. there is no mention of any subdivision or extractions as agreed by the parties contrary to their first agreement when the 1st Defendant showed the Plaintiff the property as evidence by the actions of the 1st Defendant since the signing of that document;
 - d. the 2nd Defendant prepared and attested an incomplete and incompetent legal document which failed to define and include the parties full identity; their capacities to sign the document and their legal rights under the law.
- (19) As a result of the breach of agreement by the 1st Defendant and failure of the 2nd Defendant to properly carry out her notarial duties in correctly and accurately in preparing the 1st Agreement; failing to give correct advice according to law, the Plaintiff has suffered substantial loss and damage for which the Defendants are liable jointly and severally.

PARTICULARS OF LOSS AND DAMAGE

- a. Deposit Payment by the Plaintiff Rs. 550, 000/- to the 1st Defendant since 8th PRIL 2016;
- b. Payment of Rs. 142, 000/- as security savings for loan with Seychelles Credit Union;
- c. Rs. 57, 434/- as additional costs and fees for insurance and legal fees and other fees to be to purchase this property; and
- d. Financial loss and moral damages against the Defendants jointly and severally for substantial disappointment, loss, inconvenience R800, 000/-

Total: R1, 549, 434/-

(20) *Despite many approaches and several requests by the Plaintiff the Defendants have failed to carry out any of the two Agreements despite the fact that the agreed subdivision has been completed and the 2nd Agreement is possible in fact.*

(21) *Furthermore the 2nd Agreement can still be carried out and the Plaintiff in addition to the above seeks an order of specific performance of the 2nd Agreement.*

(22) *The Plaintiff avers that in the circumstances it is urgent just and necessary that an Inhibition be entered preventing any dealings with land Title V18949 and the Plaintiffs interest therein until the completion of this suit.*

- [3] Both Defendants denied the claims made by the Plaintiff.
- [4] The first Defendant's defence is that the Plaintiff knew and agreed that she would "purchase a house and part of the property which would eventually belong to the 1st Defendant." The first Defendant claims that "the Plaintiff and the 1st Defendant visited the property at Foret Noire and the Plaintiff agreed on the purchase of part of the property the whole of the property was still co-owned and was in the process of being sub-divided and the Plaintiff knew and was informed of this fact."
- [5] The first Defendant further claims that the Plaintiff only "paid her the sum of SR 400, 000 upon the signature of the Promise of Sale and SR 30, 000 in March 2017. The balance of SR 120, 000 was paid by the Plaintiff to the 1st Defendant in various instalments. The Plaintiff breached the Promise of Sale as in fact she did not respect the dates that the instalments were to be paid to the 1st Defendants as laid down in the signed Promise of Sale.
- [6] The first Defendant further claims that "the Plaintiff knew pertinently well what she was purchasing having visited the said property on more than one occasion and having specified exactly what she wanted to the 1st Defendant."
- [7] The first Defendant claims that the "Plaintiff never spoke to the 1st Defendant about a loan as she stated that she would have the means to pay the totality of the purchase price from

her own funds and that of her partner and that she would pay the totality of the purchase price by the end of April 2016.”

- [8] The second Defendant initially filed a plea in limine on the basis that the Plaintiff discloses no cause of action against her therefore should be struck off and that the pleadings against her are malicious, frivolous and vexatious and an abuse of the Court process.
- [9] The plea was dismissed by way of a ruling on 28th February 2018 whereupon the second Defendant proceeded to file her defence on the merits dated 20th June 2018 which was subsequently amended on 24th October 2018.
- [10] The second Defendant admits that she is a Notary Public. She claims that she was not a party to the site visit conducted by the Plaintiff and first Defendant, that she was neither a party to the negotiations that took place between the Plaintiff and the first Defendant leading to the purchase of the 1st Defendant’s house and surrounding land in addition to be unaware of what took place between the parties with regard to the sale of the property.
- [11] The second Defendant admits the clauses 1 and 2 of the Agreement including that part of the deposit was in paid in her Chambers. The second Defendant claims that the terms and conditions of the promise of sale was prepared on the instruction of the parties. The identity and particulars of the parties were given to the second Defendant as described in the Promise of Sale Agreement.
- [12] The second Defendant claims that the Plaintiff and the first Defendant had discussed and already knew that there was a charge registered against Title V5298 and what they had to do to remove the charge.
- [13] She went on to claim that the promise of sale Agreement clearly states that at the time, the first Defendant was executrix of V5298 and the owner of a house on the said Title; that the application for appointment of the first Defendant as executrix was not made or handled by the second Defendant; that the first Defendant was selling her house on parcel V5298; that the instruction of the first Defendant was that she was selling her house (the house that she had built and was occupying); that the second Defendant had no instruction that there

were two houses on Title V5298; that the second Defendant was not involved in any subdivisions that were carried out by the first Defendant.

[14] Other than the claims and admissions above the second Defendant denied all the claims of the Plaintiff.

[15] The Court along with the parties proceeded to a locus in quo on 9th March 2020 at 11am. The Plaintiff indicated that when she visited the site the structure at the back was connected to the main house. The first Defendant for her part pointed out the area where she said she showed the Plaintiff the subdivision would be done.

[16] The evidence of the Plaintiff is that she was looking for a piece of land or a plot with a house. One of her friends informed her that there is a lady selling her house at Foret Noire. She called and arranged to visit her property. She came to know the second Defendant through the first Defendant. She visited the property four times. The plot that she agreed to buy had only one house on it. The first Defendant informed her that she had a lawyer that could do the promise of sale. They went to the second Defendant who drew up the agreement. She signed the promise of sale and gave a deposit of SCR 500, 000 in the second Defendant's office and then later gave the first Defendant SCR 50, 000. The first Defendant promised to sell her the house on land title V5298 for SCR 1.5 million. Nothing was conveyed to her about a subdivision until after she had paid the deposit. Thereafter when she went to apply for the loan the bank requested documents from her which the first Defendant willingly brought to the bank and gave her. She trusted the second Defendant because she was a lawyer and believed everything would be okay.

[17] The Promise of Sale Agreement drafted by the second Defendant and signed by the Plaintiff and first Defendant reads as follows:

PROMISE OF SALE

I, Meria Lebon of Foret Noire, Mahe, Seychelles (hereinafter referred to as the Promisor) HEREBY PROMISES TO SELL AND TRANSFER to Jeanne D'arc Savy of La Louise, Mahe, Seychelles (hereinafter referred to as the Promisee) the house standing on Parcel No. V5298, on the following terms and conditions:

1. *The purchase price of the house is Rupees One Million Five Hundred Thousand (R1, 500, 000).*
2. *The Promisee shall pay a deposit of Rupees Five Hundred and Fifty Thousand (R 550, 000) to the Promisor.*
3. *The balance of Rupees Nine Hundred and Fifty Thousand (R 950, 000) shall be paid at the end of July 2016.*
4. *The Promisee shall pay notarial fees stamp duty and any other costs incidental to the preparation, execution and registration of the transfer document.*
5. *The Promise of sale shall lapse and be void and of no effect if after 4 months from the date of execution of the Promise of sae the Promisee fails to pay the balance of the purchase price whereupon the deposit shall be forfeited by the Promisor.*

Made in duplicate at Victoria, Mahe, Seychelles this 8th day of April 2016

- [18] Per PE2 the first Defendant was on 20th March 2003 appointed the executor of the estate of the late Norbert Josphe Lebon who left immoveable property parcel V5298.
- [19] Per PE4 V5298 was partitioned and allocated by notice filed on 27th September 2016, by the second Defendant, registered on 10th November 2016 with V18949 being allocated to the first Defendant.
- [20] By 1st December 2016 an official search reflected that V18949 had the first Defendant registered as the proprietor.
- [21] On 7th December 2016 the first Defendant send a letter to the Manager at the Seychelles Credit Union stating that she was selling her land at Foret Noire Parcel No. V18949 to the Plaintiff for the value of SCR 1.5 million. It is noted that the letter states the first Defendant's name as Meria Louise Nourrice nee Lebon.
- [22] PE7 reads as follows:

Subject to the following conditions:

(1) The Buyer shall subdivide the property after she repays the full amount of the loan.

(2) The Buyer shall extract 700 square metres and transfer the same on the Seller.

The Buyer consent to the Registrar entering a restriction in terms of the above conditions.

- [23] PE 10 the property valuation reflects that the value of V18949 in July 2015 was SCR 2, 015, 458.75. In compiling the report the valuer took into account the land, the house and other developmental work. The latter he described as “storage and laundry area ... built of concrete base, blockwork walling and corrugated iron sheet roofing ...” which he valued at SCR 46, 800.
- [24] Per P17 a GIS photo of V18949 shows one house. There is no second house on the property.
- [25] The evidence of the first Defendant is that she lives at Foret Noire on the property in question. She came to know the Plaintiff through somebody when she called her saying she was looking for a house. She told the Plaintiff she was selling the whole plot of SCR 2.8 million but the Plaintiff refused as she only wanted “the house”. Then the Plaintiff agreed to pay half. They went to the second Defendant whom the first Defendant recommended as the second Defendant was her lawyer on her divorce proceeding. The Plaintiff paid her the deposit before the expiry of the four months stated in the promise of sale.
- [26] In cross examination she described the structure behind the main house as the family house. She stated that since the year before people had stopped living in that house (structure). It was her evidence that the second Defendant knew of the existence of V18949 at the time that the Promise of Sale was drawn up. She stated that things changed because of the loan. What was meant to be a cash transfer fell ran in problems when the Plaintiff applied for a loan. She agreed that she entered into a agreement to sell the Plaintiff her property for the sum of SCR 1.5 million. She agreed that she made another agreement with the Plaintiff agreeing to sell the Plaintiff V18949 for the same price and that she never cancelled the second agreement or rescind the first one.

- [27] The evidence of the second Defendant is that she is an attorney and notary public. She accepted having drafted the promise of sale and that it was signed by both parties in her presence. It was her evidence that the Plaintiff and the first Defendant came to her office and requested that she draw up a promise of sale for them for the purchase of a house belonging to the first Defendant on parcel V5298. They gave her the conditions they wanted on the promise of sale and she laid them down and they signed the promise of sale.
- [28] In cross examination she denied being involved in later events. She denied having written PE7 since neither her name nor her signature was on the document. It was her evidence that she hadn't made any investigation to check if the first Defendant was executrix of the property but that she saw an appointment of executrix though she could not remember if she was given a copy. She stated that she could not remember what documents she was given to prepare the promise of sale.
- [29] Counsel for the Plaintiff submitted that an individual co-owner is obliged to carry out any dealings through an executor or fiduciary. He relied on the case of **Chetty & Ors v Chetty (2003) SLR 133.**
- [30] Counsel also relied on the case of **The Estate of Charlemagne Grandcourt and or v Christopher Gill SCA 7 of 2011 SCCA 31** Twomey JA in support of his argument as to the binding effect of the Agreement between the parties.
- [31] Late in the day counsel for the second Defendant filed submissions.
- [32] Learned counsel for the second Defendant submitted that there is no causal relationship between the alleged shortcomings and the purported damage the Plaintiff suffered from the first Defendant's refusal to transfer. It was his submission that there was no dispute that she was purchasing the house belonging to the first Defendant on heirs land. He submitted that the second Defendant drafted what the Plaintiff and the first Defendant instructed her.
- [33] Counsel further submitted that the second Defendant was not instructed that the Plaintiff had applied for a loan to pay the balance.

[34] It was his submission that the Promise of Sale drawn up by the second Defendant was in compliance with the Notaries Act Section 15 (b) (the schedule) in that it contained, as stated under the Act, the Parties' name and addresses, the subject matter which was the promise to purchase a house standing on Title V5298, the purchase price and the schedule of payment. Therefore he submitted that the second Defendant was not in breach of the Notaries Act.

[35] He further submitted that the second Defendant did not handle any payment in respect of the parties transaction and accordingly Section 14 of the Notaries Act which prohibits the Notary from doing certain acts in respect of any money received on behalf of the client does not apply to the second Defendant.

[36] Counsel finally submitted the Plaintiff when she was cross examined by the second Defendant's counsel as to what claims she had against the second Defendant she could not answer. With that he submitted that the second Defendant should not have been made a party to the proceedings.

[37] The issues for the Court to decide are:

(1) Was there a valid agreement between the parties and what was the agreement?

(2) If there was an agreement, is the first Defendant in breach of the said agreement between herself and the Plaintiff?

(3) If there was a breach of the agreement should specific performance be ordered and/or damages be awarded?

(4) Did the second Defendant fail to properly carry out her notarial duties in correctly and accurately in preparing the 1st Agreement; failing to give correct advice according to law?

To the first issue; was there a valid agreement between the parties and what was the agreement?

[38] The first Defendant wholly admitted paragraph 3 of the Pleintiff that there was an agreement executed on the 8th April 2016 between the Plaintiff and the first Defendant at the Chambers of Notary Public, the second Defendant.

[39] Article 1134 of the Civil Code of Seychelles provides generally for the effects of obligations as follows:

“Agreements lawfully concluded shall have the force of law for those who have entered into them.

They shall not be revoked except by mutual consent or for causes which the law authorises.

They shall be performed in good faith.”

[40] Article 1583 reads thus:

“A sale is complete between the parties and the ownership passes as of right from the seller to the buyer as soon as the price has been agreed upon, even if the thing has not been delivered or the price paid”

[41] Article 1589 provides that:

A promise to sell is equivalent to a sale if the two parties have mutually agreed upon the thing and the price.

However, the acceptance of a promise to sell or the exercise of an option to purchase property subject to registration shall only have effect as between the parties or in respect of third parties as from the date of registration.

[42] Article 1590 provides that;

If the promise to sell is accompanied by a deposit, each of the contracting parties shall be free to withdraw; the person who has paid the deposit shall lose it, the person who has received it shall return double the amount.

[43] Article 1602 reads thus:

The seller shall be bound to explain clearly what he undertakes.

An obscure or ambiguous terms shall be interpreted against the seller.

In regard to the obligations of the seller the provisions of Article 1625 shall have particular operation.

- [44] The promise of sale sets out the undertaking of the first Defendant to sell "the house" on V5298 to the Plaintiff for the price of SCR 1, 500, 000.00 with a deposit of SCR550, 000.00 to be paid.
- [45] Indeed it is in evidence that the deposit was also paid the same day that the promise of sale was signed as per P12 three cheques were made on 8th April 2016; Cheque No 00000025 to Meria Nourice for the sum of SCR 100, 000, Cheque 00000026 to Meria Louise Nourice for SCR 400, 000.00 and Cheque N0 00000027 to Lucie Pool 750.00. The Plaintiff testified that she gave the first Defendant the remainder of the deposit in cash. The first Defendant also admits that the sum was paid though disputed the dates.
- [46] The main contention of the first Defendant is that the agreement was for the sale of one of the two houses on Title V5298. From the very outset though the first Defendant confuses herself as to the number of houses standing on V5298. In paragraph 15 of her defence reference is made to the Plaintiff refusing to purchase the whole property and "only want[ing] the house on the property" whereas in paragraph 17 she "agrees that the agreement made specific reference to the fact that the 1st Defendant was to sell "the house" on land Title V5298 when there are two houses on that plot, ..." If from the very outset both sides were in agreement that there were two houses on the property that would have been reflected in paragraph 15 too.
- [47] In cross examination the first Defendant stated that when she went to the second Defendant with the Plaintiff she explained to the second Defendant that the land is big and they were supposed to subdivide. Indeed the second Defendant stated in her own evidence that there was a subdivision to be done. I accept the evidence of the first Defendant that there was a subdivision to be made. However the subdivision was to be of parcel V5298 and not of parcel V18949. In fact parcel V5298 was subdivided into 4 plots; V18947, V18948, V18949 and V19323; with parcel V18949 being allocated to the first Defendant. In as much as the GIS photo remained an item, it cannot be ignored that it reflects the four above stated plots of land which originally made up V5298 along with the fact that it shows only one house standing on what was previously V5298. That house now stands on the subdivided plot registered as V18949 which was allocated to the first Defendant. This clarifies the

promise of sale which makes provision for the sale of “*the house standing on Parcel No. V5298*”.

- [48] It is noted that the first Defendant in evidence stated that the land was to be subdivided again. In her personal answers she stated that the agreement with the first Defendant was for SCR 1.5 million for half of the land. She could only mean parcel V18949 as she had no capacity to sell half of parcel V5298. She further stated that “we were talking about to remove the other part where there was the other house on the land, to take this piece and remove the other piece with the house on it and she agreed.” Taking a look at P17 which is an overhead photo of V18949, there is only the one house on the property. At the locus the first Defendant stated that her son had recently extended the house at the back towards the structure at the back which she calls the second house. Comparing P17 to the photos in the valuer’s report, P10, which was produced in 2015, I am satisfied that P17 is an overhead depiction of the photos in P10 and shows the back structure connected to the main house. In terms of the pitch of the roof, I do not see any changes that could correspond to the first Defendant’s evidence that the house was only extended recently. With that in mind I do not believe that there was any agreement for any subsequent subdivision of V18949. It is my firm belief that the agreement was for the sale of the one and only house on V5298 and upon subdivision the house stood on V18949.
- [49] This belief is reinforced by the valuer’s report. It was the testimony of the first Defendant that Mr. Valentin, the valuer, called her but since she could not get out of work she asked the Plaintiff to pick up the report. The very same report requested by the Plaintiff for the purposes of her loan application that showed that there was only one house on the property.
- [50] Furthermore, it has to be said that I have difficulty believing the first Defendant when she says that there were people living in the structure, which she says is the second house, as late as 2019. Mr. Valentin in his report described the structure as a store and laundry area in need of major refurbishment.
- [51] At this point I have to say that I fail to understand the first Defendant’s claim that things changed when the Plaintiff applied for a loan. From the evidence the first Defendant was nowhere close to being ready for the sale to go through in August 2016 since the application

for partition notarized by the second Defendant was submitted on 27th September 2016 and only registered on 10th November 2016.

[52] In spite of the Promise of Sale lapsing in August 2016 the first Defendant proceeded as if it still subsisted; informing the Plaintiff of the progress of the subdivision, eventually giving her a letter to take to Seychelles Credit Union, dated 7th December 2016, indicating her intent to sell the Plaintiff V18949. This letter in my view expressed the first Defendant's desire to keep to the terms of the promise of sale signed on 8th April 2016. It clarified their true intent which was the sale of parcel V18949, in the same way her counsel by letter dated 20th April 2017 extended her willingness to perform the promise of sale. By their conduct both sides treated the promise of sale as subsisting and continuing beyond the stated time frame with the clarification by the letter dated 7th December 2016.

[53] In any event in line with Article 1602 above, the Plaintiff gets the benefit of any ambiguity in the agreement.

[54] On the above I find that there was a valid promise of sale between the parties.

If there was an agreement, is the first Defendant in breach of the said agreement between herself and the Plaintiff?

[55] The first Defendant insists that she would have signed the transfer document had the Plaintiff agreed to V18949 being further subdivided as per their prior conversations. If indeed there had been conversations from the very start about subdividing the land further into two separate plots with a house on each, which she says that she informed the Plaintiff that her surveyor Mr. Fostel was working on, why wasn't the conditions contained in P7 which addressed that subsequent subdivision, not included in the promise of sale?

[56] On this issue I believe the Plaintiff that there was no conversation about any subsequent subdivision of V18949.

[57] Having failed to effect the transfer as agreed in the promise of sale the first Defendant is in breach of her undertaking to sell.

If there was a breach, should the court order specific performance and/or award damages?

[58] Article 1142 provides that

“Every obligation to do or to refrain from doing something shall give rise to damages if the debtor fails to perform it”.

[59] The Court of Appeal in the case of **Gummery v Ernestine (SCA 05/2014) [2016] SCCA 7 (22 April 2016)** found that:

...an action by the Beneficiary for breach of a unilateral promise of sale can only result in an order for damages as provided by article 1142 of the Civil Code (supra) and cannot give rise to an action for specific performance. (See Cass. 3ème Civ, 26 juin 1996 pourvoi N°94-16.326, 3ème Civ 28 octobre 2003, pourvoi N°02-14.459 confirmed by 3ème Civ, 11 mai 2011 pourvoi n° 10-12.875).

[60] In the case of **Barra & Anor v The Government of Seychelles (CS 36/2017) [2020] SCSC 29 (20 January 2020)** the Court of Appeal explained that:

Article 1142 is couched in language that expresses the rule that performance of the contract in kind is the rule and the only exception would be when the execution of the obligation is impossible in which case an award of damages would be the remedy. In Grandcourt and Ors vs Gill (SCA 7 of 2011) [2012] SCCA 31 (07 December 2012) which concerned a contract to sell land, the Court of Appeal (Twomey JA) stated:

“[19] We view this case as arising purely out of a right of action under Article 1142 of the Civil Code, i.e. the obligation to perform. French jurisprudence has maintained that despite the provisions of Article 1142 there is an inherent right to specific performance corresponding with that contained in Article 1183:

“La partie envers laquelle un engagement contractuel n'a point été exécuté a la faculté de forcer l'autre à l'exécution de la convention lorsque celle-ci est possible” (Cass. civ. 1 16 janvier 2007).

[61] The distinction between the two cases is that in **Gummery** the promise of sale was a unilateral agreement whereas in **Barra** the promise of sale in issue was a bilateral agreement. Therefore the question for this Court is whether the promise of sale in issue was a unilateral or a bilateral agreement.

[62] In Gummery the nature of a unilateral agreement was described thus:

In a unilateral promise of sale of property, the Promisor ... undertakes to sell property to a Beneficiary ... under certain determined conditions during a certain period. The Beneficiary of the promise acknowledges the commitment of the Promisor, but he does not promise to conclude the final contract. He has an option to give his consent or not.

The unilateral promise differs both from a simple offer to contract (pollicitation) and from the final contract contemplated. It lies somewhere in between. It is more than a simple offer, but less than a final contract (See Alex Weill, Droit Civil – Les Obligations (Paris, Dalloz 1970)111).

[19] *A subsequent retraction by the Promisor prevents a meeting of minds between the Promisor and the Beneficiary and hence the birth of a contract. There is no contract and only a breach of a promise to do something (obligation de faire) by the Promisor. In such cases, the right of the Beneficiary is a credit-right, a right in personam.*

[63] Whereas a bilateral was explained as;

a synallagmatic promise of sale (which is formalised in Seychelles by the transfer document and registration and in France by a compromis de vente and the acte authentique and registration) the parties make mutual promises to conclude a certain contract at a later date (see Alex Weill, Droit Civil – Les Obligations (Paris, Dalloz 1970) 114-116) [whereby t]he Promisor undertakes to sell his property and the Promisee undertakes to buy the property.

[64] On examination of the promise of sale in issue with the above distinctions in mind, the promise of sale was a unilateral agreement whereby the first Defendant undertook to sell subject to the price being paid. As such the breach by the first Defendant is not subject to an order for specific performance but rather to an order for damages.

[65] The damages to be awarded are provided for in Article 1149 of the Civil Code which provides that:

1. The damages which are due to the creditor cover in general the loss that he has sustained and the profit of which he has been deprived, except as provided hereafter.

2. Damages shall also be recoverable for any injury to or loss of rights of personality. These include rights which cannot be measure in money such as pain and suffering, and aesthetic loss and the loss of any amenities of life.

- [66] The first Defendant admitted to having received the sum of SCR 550, 000.00 as deposit.
- [67] The Plaintiff paid SCR 750 to the second Defendant for the promise of sale. Seychelles Credit Union blocked the sum of SCR 142, 500.00 on her account as contribution for the loan. She paid SCR 14, 884.00 as insurance premium. She had to undergo medical tests twice in order for the loan to be processed. In total her expenses for processing the loan was SCR 57, 434.00 which the first Defendant in her evidence accepted.
- [68] Though she accepted that she had been paid the deposit it was the first Defendant's evidence that the Plaintiff took over six months to pay her. It was her evidence that the Plaintiff paid about SCR 400, 000.00 initially and then the rest by instalments. However P12 shows that on the same day that the SCR 400, 000.00 was paid by cheque the sum of SCR 100, 000.00 was also paid by cheque to the first Defendant.
- [69] According to the first Defendant she knew nothing of the loan until Mrs. Rouillon spoke to her about it. Her evidence was that she only became aware when she received a sum of SCR 30, 000.00. From D2 the sum of SCR 30, 000.00 was deposited in the first Defendant's account on 13th March 2017. How could she have only known about the loan then when she had signed P1 in December 2016 and sent the Plaintiff to collect the valuation from Mr. Valentin, the two documents needed in order to assist the Plaintiff to obtain the loan, which was approved in December 2016?
- [70] It is noted that the Plaintiff on 4th January 2017 sent the first Defendant the sum of SCR 5, 000.00. The evidence of the Plaintiff is that she gave the first Defendant money on several occasions in excess of the deposit; money which the first Defendant told her would be deducted from the balance due. I accept the evidence of the Plaintiff that she did give the first Defendant money over and above the deposit. I found her credible and her distress over this whole situation to be genuine. The first Defendant on the other hand contradicted herself on numerous occasions and was not credible. Her dishonesty is evident by her

continuing to request and take money from the Plaintiff as late as March 2017 when it was obvious that she had no intention of honouring her undertaking in the promise of sale.

[71] In consideration of the above I award a global sum of SCR 1, 000, 000.00 as damages for the breach.

[72] With regard to the claim for moral damages, the Plaintiff deponed that she suffered a lot. She had to take money from her business and not travel for her business in order to pay the deposit. According to her “when you go through these situations, it scares you.” She explained that the episode had not been easy for her and there were times she could not sleep.

[73] In the case of Zatte v Joubert (1993) SLR 132 the sum of SCR 10, 000 in damages was awarded for inconvenience caused by a delay in obtaining a house and for loss of peace of mind.

[74] Noting the Plaintiff’s evidence and the conduct of the first Defendant I accept the Plaintiff’s claim for moral damages though the claim for SCR 800, 000.00 I find is excessive. Taking into account the above I find that a sum of SCR 50, 000.00 for moral damage is just and fair.

Did the second Defendant fail to properly carry out her notarial duties in correctly and accurately in preparing the 1st Agreement; failing to give correct advice according to law?

[75] In terms of paragraph 19 of the Plaint the Plaintiff claims loss against the second Defendant in delict.

[76] Interestingly when the second Defendant was asked about P7 she did not deny making the document but rather stated thus “[t]his document, my lady, does not have my name written on it, I have never signed a document, there is no signature, and there is no name so it is neither here nor there; so it is a document with no signature and no name. How can it be said that it came from me when my name is not on it neither my signature.”

[77] I am further surprised that the second Defendant could not remember what documents were given to her in order to prepare the promise of sale. One would assume that she would keep records of each transaction that she handles along with the archives she is required to keep in law.

[78] I am even more aghast that the second Defendant denied that the first Defendant was her client when she accepted that she had represented the first Defendant a few times including representing her in her divorce proceedings.

[79] I find that the second Defendant's conduct is beyond the pale and certainly not to be encouraged. However, shocking it may be, on the evidence it is not conduct that gives rise to a claim in delict, there being no causal link proved between the laxities she displayed and losses suffered by the Plaintiff. If anything the second Defendant's conduct is a matter to be dealt with under the Notaries Act in separate proceedings, if at any. I accordingly dismiss the claim against the second Defendant.


[80] In conclusion I enter judgment in favour of the Plaintiff as follows:

(1) The first Defendant shall pay the sum of SCR 1 million rupees in damages the Plaintiff.

(2) The first Defendant shall further pay the sum of SCR 50, 000.00 as moral damages to the Plaintiff.

(3) The whole with interest from the date of judgment with costs.

Signed, dated and delivered at Ile du Port *30th June 2021*



Pillay J