

THE SUPREME COURT OF SEYCHELLES

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**Reportable**

[2021] SCSC 585

MC 61/2021

In the matter between:

**WINSEL POTHIN**

(rep. by Mr. Charles Lucas)

**Applicant**

and

**JONATHAN SEARLES**

(rep. by Ms. Alexandra Benoiton)

**Respondent**

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**Neutral Citation:** *Pothin v Searles* (MC 61/2021) [2021] SCSC 585 (02 September 2021)

**Summary:** *Writ Habere Facias Possessionem* – transfer of usufructuary interest – whether for the lifetime of the transferor or the transferee – whether Respondent has any right or interest in the property.

**Before:** Dodin J

**Heard:** 18 August 2021

**Delivered:** 10 September 2021

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**ORDER**

The Application for the Writ Habere Facias Possessionem is granted. The Respondent shall vacate land parcel T477 situated at Bougainville, Mahe within one month the date of this Ruling. The Registrar of Lands shall delete and remove the name of the Respondent as the owner of the usufructuary interest in parcel T477 forthwith.

A copy of this Judgment shall be served on the Registrar of Lands.

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**RULING**

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**DODIN J**

- [1] The Applicant Winsel Pothin, moved the Court by Motion supported by affidavit to issue a Writ Habere Facias Possessionem against the Respondent, Jonathan Searles in respect of parcel title T477 situated at Bougainville, Mahe.
- [2] According to the application and official records produced by the Applicant, the Applicant purchased the bare ownership in parcel T477 from one Audrey Kirth Monthy by transfer document dated 25<sup>th</sup> April 1997 which transfer was registered on the 2<sup>nd</sup> May 1997. On the same day the said Drixelle Monthy who owned the usufructuary interest in the land, transferred her usufructuary interest to the Respondent. The said transfer was also registered on the 2nd May 1997. Drixelle Monthy passed away on the 12th June 2021. On the 8<sup>th</sup> July 2021, the Applicant's attorney wrote to the Respondent asking him to surrender the land and structures thereon as the Applicant did not wish that the Respondent continued with to be in occupation of the land after the death of Drixelle Monthy. The Respondent has not moved out to date, hence this Application by the Applicant for a Writ Habere Facias Possessionem for an order for the Respondent to vacate the land and house in question.
- [3] The Respondent in his reply to the Application also supported by affidavit raised four grounds which if substantiated could defeat the issuance of the prayed for writ by the Court:
- i. That the land was purchased by him whilst he was in a relationship with the Applicant;
  - ii. That it was not his intention to have the usufructuary interest transferred to Drixelle Monthy for the remainder of her life but the usufructuary interest was to be in his favour for the rest of his life and bare ownership on the Applicant;

- iii. That it was a mistake for the usufructuary interest to have been transferred and tied to the lifetime of the late Drixelle Monthy, hence his usufructuary interest did not extinguish with the passing of Drixelle Monthy; and
- iv. That he has occupied the land in good faith until now and he has built and paid for the construction of the house from his own funds.

[4] Learned counsel for the Applicant submitted as follows:

*“Audrey Monthy, owner of Title T477 transferred the usufructuary interest therein to his mother, Drixelle Monthy for her lifetime on the 5<sup>th</sup> August 1993. On the 25<sup>th</sup> April 1997, he transferred his bare ownership to the Applicant, while Drixelle Monthy transferred her usufructuary interest to Jonathan Searles. The usufructuary interest was for her lifetime only.*

*The parties to this case were companions in life as at 1997, but they severed the relationship in 2010. Civil Appeal SCA07/2014 settled all issues relating to their respective interests in T477. The Applicant moved out of the house on T477, while the Respondent remained in occupation pursuant to his interest therein as usufruct for the lifetime of Drixelle Monthy.*

*On the 12<sup>th</sup> June Drixelle Monthy passed away. Simultaneously the usufructuary interest for her life that she had transferred to the Respondent automatically extinguished on that very day. Thus the interest of the deceased merged with the Applicant’s bare ownership, rendering her the full owner of Title T477. The right of occupation as usufruct by the Respondent was ipso facto terminated upon the passing away of Drixelle Monthy.*

*The Applicant had no other cause of action, save for seeking the possession of T477 because the Respondent illegally and without any colour of right refused to vacate, while erroneously claiming that the usufructuary interest he purchased from Drixelle Monthy was for his lifetime. The latin maxim, “Nemo dat qui non habet” (No one gives who possesses not) applies squarely to this case. Drixelle Monthy’s interest in T477 was a usufructuary interest for her lifetime and not for the lifetime of the Respondent. She conveyed exactly what she had in T477 and could not transfer what she did not possess.” [Sic].*

[5] Learned counsel for the Respondent made the following submission:

A.

*PRELIMINARY POINT*

1.

*The Respondent respectfully maintains that this Honourable Court should have examined the point raised during the first mention in that the application was filed on 26<sup>th</sup> July 2021 whilst the attorney for the Applicant's licence was expired. Additionally as attached to the Applicant's affidavit, the notice sent by the Petitioner's attorney dated 8<sup>th</sup> July 2021 to the Respondent was signed 'attorney at law' whilst he was unlicensed.*

2.

*The Licence expired on or around the 12<sup>th</sup> June 2021 and judicial notice can be taken that as per registrar's email to all officers that Mr Lucas was unlicensed and no extension of licences were being issued.*

3.

*By continued practicing without a licence, not only invalidates the proceedings before this Honourable court, but the Attorney has acted in flagrant disregard of the Legal Practitioner's Act.*

B.

*ON THE MERITS*

4.

*The powers of the Supreme Court of Seychelles to deal with summary matters such as writs derive from articles 806-811 of the French Code of Civil Procedure.*

5.

*A writ of habere facias possessionem is a special remedy available to anyone who is dispossessed otherwise than by a process of law and it is available to a party whose need is of an urgent nature and who has no other equivalent legal remedy at his disposal.*

6.

*The principles of a grant of a writ are well by Sauzier J in Delphinus Turistica Maritima SA v Villebrod in 1978, Emerald Cove vs. Intour 2000, and Amade vs. Mousmie. Summarised, for an order for a writ habere facias possessionem to be made, the following conditions need to be met:-*

a.

*No serious or bona fide defence can be made to the application;*

b.

*There are no serious issues to be tried;*

c.  
*There is no alternative legal remedy; and*

d.  
*There is urgent need for the writ and delay would cause irreparable loss and hardship.*

*The Respondent shall canvas these conditions below.*

*No serious or bona fide defence can be made to the application*

7.  
*One of the most important considerations in respect of the writ is whether or not the Respondent has a serious and bona fide defence. Should this Honourable Court, be satisfied that there is, it cannot issue a writ.*

8.  
*In Government of Seychelles vs Albert (Civil Side No: 1 of 2012) [2013] it was held that the court must first be satisfied that the respondent has raised substantial grounds in respect of their bona fide defence and that in doing so shall refuse the application.*

9.  
*In the Respondent's reply it is averred that the Respondent purchased the property and instructed Mr Gerard Maurel to transfer the bare ownership to the Applicant and that the Respondent would reserve the usufructuary interest.*

10.  
*It is further averred that the Respondent did not intend to have his investment tied to the lifespan of a third party but to reserve his right for his lifetime. The basis on which he subsequently designed and paid for his home to be built on T477 from his own funds.*

11.  
*The Respondent, being a lay man, also avers that the real intention of the document was to grant himself a usufructuary interest for his own lifetime and that the document must have been mistakenly drafted and prepared by the conveyancing Attorney-At-Law and Notary.*

12.  
*That even after the separation of the parties, the Respondent occupied, and possessed at all material times the property and the house thereon in good faith and based on the usufructuary interest.*

13.

*The respondent therefore humbly submits that it he has raised a good and bona fide defence to the writ.*

14.

*The Respondent has already stated in his affidavit that he intends to file a case before the court for declaration of his usufructuary interest in the property and rectification of the error.*

*No serious issues to be tried*

15.

*The Respondent humbly submits that on the basis of the above submissions the present issues before the court are complex and therefore should be determined only on the basis and merits of evidence adduced in a regular civil action. Lesperance Estate Co Ltd v Intour SKL (CS 184/2000) [2001].*

16.

*In Servina nee Desaubin v Hoareau (213 of 2009) [2010] the court ordered that where the facts indicate that there is an arguable defence that appears to exist, a writ is not the proper procedure to resolve the dispute between the parties.*

17.

*As stated above, the Respondent intends to file a case for declaration before the courts, although he has not done so yet, the court has historically not found that to be fatal to the Respondents claim. In Servina the Respondent had not yet filed any application or alluded to doing so but the court ruled that a writ habere facias possessionem could not be sustained.*

*No alternative remedy*

18.

*That one consideration for a writ is that there should not be any other legal remedy available to the Applicant. The respondent submits that the applicant was well aware of the true intention of the initial agreement and grant and that given the complex issues involved, the Applicant does have remedies available by resolving the matter by plaint.*

*There is urgent need for the writ and delay would cause irreparable loss and hardship*

19.

*Another consideration this Honourable Court must make is whether or not the application before it is urgent and if any delay in granting a writ immediately would cause irreparable loss and hardship. In the applicants affidavit in*

support there are no averments in respect of irreparable loss and hardship averred.

20.

*It is the respondent humble submission therefore that there is no urgency for this present application or proof that any irreparable loss and hardship will be suffered in the event that it is not granted. Having not resided or had possession of the property since 2010 when she left, it is clear that the Applicant has alternative accommodation.*

21.

*This remedy is available to an Applicant whose need is of an urgent nature and to whom any delay in the remedy will cause irreparable loss and hardship.*

22.

*This case, does not meet the urgency requirement as established in David v Mortier (MC08/2018) [2018].*

23.

*Similarly as in Intour Supra , the Respondent avers the Applicant's alleged claim and need for possession is not genuine and the case is not of urgent nature.*

24.

*Even where there is good title but no urgency sufficiently demonstrated the courts in Hodoul v Kannu's Shopping Centre (CS 293/2006) [2007] ruled a writ would be denied.*

C.

Conclusion

25.

*Therefore the Respondent humbly submits that on the face of the affidavit of the Applicant do not meet the principles required to meet the threshold for the granting of a writ. If anything the affidavits show that there are legal issues that should be tried, and therefore the writ should not be issued in the circumstances. Tamboos v Pillay and Ano. (MC 107/2016) [2016]*

26.

*The intention of the proceedings for the writ habere facias possessionem and the relevant law was developed to provide an owner who has been dispossessed by intruders with no colour of right whatsoever Hodoul Supra the Respondent does not meet this criterion.*

27.

*Therefore this Honourable court should find that this case poses complex legal issues that cannot be dealt with using the special writ procedure and on the basis of the above submissions, a writ of habere facias possessionem should not be granted to the Applicant.*

[6] Learned counsel for the Respondent moved the Court to find that the Respondent has a good and bona fide defence and to dismiss the Application with cost.

[7] On the preliminary issue of the probable expiry of the licence of the attorney for the Applicant, I make the following observations and finding. The legal practitioner's licence or renewal thereof is governed by section 6A of the Legal Practitioner's Act. The person or authority responsible for overseeing the same is the Registrar of the Supreme Court. The Judge has no power to determine whether a legal practitioner has met all requirements to appear or sign documents for clients. In fact since the documents signed by learned counsel for the Applicant have been accepted by the registry and filing fees have been paid, the requirements for the case to proceed have been met. This matter is therefore not something to be addressed by this forum.

[8] Indeed as submitted by learned counsel for the Respondent, the Supreme Court of Seychelles derives its powers to determine an application for the issue of a writ *habere facias possessionem*, under Articles 806-811 of the French Code of Civil Procedure which has been assimilated into the jurisdiction of the Supreme Court. The Court makes this determination on the basis of Application and Affidavit of the Applicant and the Respondent's Affidavit in Reply. All relevant material evidence must be disclosed in the affidavits with the relevant documents in support attached. The Court may allow the parties to make oral or written submission, which was the case in this Application. The Respondent however did not make further final submission.

[9] As stated by Renaud J. in the case of *Fikion v Cecile and Others (Civil Side No 22 of 2011) [2011] SCSC 47 (28 July 2011)*:

*“The issue of a writ habere facias possessionem is a special remedy available to anyone who is dispossessed otherwise than by a process of law, and, is*



*available to a party whose need is of an urgent nature and who has no other equivalent legal remedy at his disposal. The Court may issue such a writ upon the application by the owner or the lessor of the property. If the Court is satisfied that the Respondent has raised substantial grounds indicating that he/she has a bona fide, genuine, serious and/or a valid defence, the application is refused and the Applicant may pursue a regular action to obtain an alternative remedy.”*

[10] Further, the case of Mary Dubignon v Antonio Mann- Civil Side No: 9 of 1999, established the following principles to be considered by the Court in determining the issuing of such writs:

1. *“The Court in granting the writ Habere Facias Possessionem acts as a Court of equity rather than a Court of law, in exercise of its equitable powers conferred by Section 6 of the Courts Act- Cap52.*
2. *The one who comes for equity should come obviously, with clean hands. There should not be any other legal remedy available in law to the applicant who invokes an equitable remedy.*
3. *An equitable remedy is available to the applicant whose need is of an urgent nature and any delay in obtaining the remedy would cause irreparable loss, hardship, or injustice to him.*
4. *Before granting the Writ Habere Facias Possessionem, the Court should be satisfied that the respondent on the other hand has no serious defence to make; and*
5. *If the remedy sought by the applicant is to eject a respondent occupying the property merely on the benevolence of the applicant then that respondent should not have any lawful interest, right or title over the property in question.*

[11] Having analysed the Application, affidavit and supporting documents filed by the Applicant and also having carefully considered and analysed the affidavit in response of the Respondent, I am led to the following findings of facts.

[12] On the transfers of the parcel T477, Drixelle Monthy transferred the said parcel to Aubrey Kirth Monthy on the 5<sup>th</sup> of August 1993. On the same day, Aubrey Kirth Monthy transferred the usufructuary interest to Drixelle Monthy, reserving the bare

ownership for himself. The transfers by Aubrey Kirth Monthy to Winsel Pothin and Drixelle Monthy to Jonathan Searles were made on the 25<sup>th</sup> of April 1997, almost 4 years later. The contention by the Respondent that he had negotiated for Aubrey Kirth Monthy to transfer the usufructuary interest to him for his lifetime in 1997 is not only highly improbable but nigh impossible. Upon the transfer of the usufructuary interest to the Respondent, the late Drixelle Monthy had held the usufructuary interest for almost 4 years. The Respondent's contention that it was not his intention for Aubrey Kirth Monthy to transfer the usufructuary interest to Drixelle Monthy for her lifetime in 1993 is pure conjecture, not supported by any shred of evidence or logic.

- [13] On the issue that the Respondent negotiated, paid for the land and built the house thereon from his own funds, I find that these issues were dealt with by the Supreme Court in case Searles vs Pothin (CS 315.2010) [2014] SCSC 33 (31 January 2014) and the judgment of the Court was confirmed and upheld by the Court of Appeal in Jonathan Searles v Winsel Pothin Civil Appeal SCA07/2014. The Court rightly concluded on the issue of who owned the property that it was the Applicant who had the bare ownership and the Respondent had the usufructuary interest. The Court of Appeal emphatically maintained after analysing the facts that:

*“it is clear from the evidence on record that when the Appellant gave the money and properties to the Respondent “there was no expectation of a return benefit, compensation, or consideration.” He cannot, therefore, claim that they be returned to him. Contrary to what learned Counsel for the Appellant urged us to hold, this was not a fit and proper case for the Supreme Court to invoke its equitable powers under sections 4 and 5 of the Courts Act.”*

With the matter of ownership and contribution having already been determined by the Supreme Court and the Court of Appeal, the Respondent cannot revive the same grounds denoting a bona fide claim to the property.

- [14] Furthermore, if the Respondent made any further contribution towards the development of the property after the judgment of the Court of Appeal in SCA07/2014, [above], he did not particularise any such undertaking in his affidavit in

reply and provided no supporting document in support these assertions. This Court being bereft of any fact in support of the Respondent's assertions does not find any ground upon which the Respondent could claim gives him even a prima facie right or interest in the property which could give him the slimmest chance of success in a hearing by plaint.

[15] Furthermore, the Respondent' Affidavit in Response contradicts and defeats all the arguments he advanced as reasons to dismiss this Application. The Respondent contends that he was the one who negotiated the transfers and instructed the notary to draft the transfers which they signed in April 1997. The Respondent personally signed transfer of the usufructuary interest from Drixelle Monthy to himself. Now over 24 years later, he claims it was all a mistake. From the facts as elaborated in the Respondent's own affidavit, it is obvious that if any mistake was made in 1997, it could only have been made by the Respondent. How the Respondent intends to rectify this "mistake" without this Court even considering the prescription period of 20 years set down by article 2262 of the Civil Code of Seychelles Act beggars' belief.

[16] Article 617 of the Civil Code further states among others that:

*The usufruct shall be terminated -*

*By death of the usufructuary;*

In this case, Aubrey Kirth Monthy transferred to Drixelle Monthy the usufructuary for her lifetime in 1993. In 1997, Drixelle Monthy transferred to the Respondent her usufructuary interest. As rightly submitted by learned counsel for the Applicant, since Mrs Drixelle Monthy only had a lifetime usufructuary interest in T477, which was all she could transfer. Upon the death of Drixelle Monthy, the usufructuary interest transferred to her and sold to the Respondent ceased to exist and the Applicant assumed full and absolute ownership of T477.

[17] Considering the above analysis and findings, I find that all the reasons advanced by the Respondent for dismissing this Application have no merit as none could meet the minimum threshold that could give the Respondent the slightest chance of

maintaining a claim for any right to T477 after the death of Mrs Drixelle Monthy. On the other hand I am satisfied to the highest level of probability that the Applicant became entitled to a clear, full and absolute title to T477 upon the death of Mrs Drixelle Monthy.

[18] Consequently, the Respondent has no claim or right to T477 and has no right to be on the property from the death of Drixelle Monthy. I therefore grant the Applicant's prayer for a Writ Habere Facias Possessionem with the following additional orders and conditions:

- i. The Respondent shall vacate land parcel T477 situated at Bougainville, Mahe within one month the date of this Ruling.
- ii. The Registrar of Lands shall delete and remove the name of the Respondent as the owner of the usufructuary interest in parcel T477 forthwith so that the Applicant has full and absolute ownership of the property.

[19] I make no order for costs.

[20] A copy of this Judgment shall be served on the Registrar of Lands.

Signed, dated and delivered at Ile du Porton 10 September 2021

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Dodin J

Judge of the Supreme Court