SUPREME COURT OF SEYCHELLES

Reportable/Not Reportable/Redact
[2023] SCSC 186
CS114/2021

In the matter between:

BERNEY MARIE — **1st Plaintiff**

LUDMILA MARIE — **2nd Plaintiff**
(rep. by Wilby Lucas)

and

THE DEVELOPMENT BANK OF SEYCHELLES (represented by its Chief Executive Officer — **Defendant**
(rep. by K. B. Shah)

Neutral Citation: Marie v Development Bank of Seychelles (CS114/2021) [2023] SCSC 186 (10 March 2023).
Before: Carolus J
Summary: Striking out of plaint where remedy prayed for cannot be granted.
Delivered: 10 March 2023

ORDER

The plaint is struck out and the suit dismissed.

RULING

E. CAROLUS, J

Background & Pleadings

[1] This ruling arises from a plea in *limine litis* raised by the defendant in his statement of defence relating to a Compromise entered into by the parties.

The Plaint

[2] The plaintiffs Dr Berney Marie and Dr. Ludmila Marie are licensed medical practitioners operating a private medical clinic whereas the defendant the Development Bank of Seychelles ("the Bank") is a bank owned by the Government of Seychelles. The plaintiffs took a loan of SCR9,000,000.00 from the bank for the purpose of purchasing a CT-Scan and parcel V8825 with a house thereon, which was intended to house the CT-Scan. Repayment of the loan was to be made in 143 monthly instalments of SCR116,790.00 with interest at the rate of 10% per annum. The loan was secured by charging parcels V8825 and C1248 in favour of the defendant.

[3] The money obtained from the loan was partly used to purchase parcel V8825. However the plaintiffs aver that the process for changing the use of the house on parcel V8825 to convert it into a medical clinic took some time and it was only at the end of two years that they were issued with a certificate of occupancy. Further before the CT-Scan was purchased, the house was determined by technicians who examined it, not to be suitable for the CT-Scan to be installed therein. At that stage the grace period for the plaintiffs to commence repayment of the loan had expired, and they used the remainder of the money obtained from the loan, which was intended for the purchase of the CT-Scan, to start making the monthly repayments. As a result the CT-Scan could not be purchased and the whole project failed to materialise. With no means to continue making the monthly loan repayments the plaintiffs defaulted on the same, thus falling into arrears with the repayments.

[4] The Bank commenced proceedings for the seizure and judicial sale of parcels V8825 and C1248 pursuant to the provisions of the Immovable Property (Judicial Sales) Act, to recover the sum owed by the plaintiffs to the Bank. Proceedings were commenced by service of a Commandment on the plaintiffs, in which it was stated that the sum owed by the plaintiff to the Bank stood at SCR10,442,891.00, which was followed by seizure of the properties and court proceedings. The plaintiffs aver that as a result of the seizure of the properties the defendant as execution debtor had the obligation thereafter to keep the properties in its possession as judicial sequestrator. They aver that following a disagreement between the parties on the mise a prix for the two properties as set out in the memorandum of charges, the Court intervened and increased the mise a prix for parcel

C1248 from SCR 5.2 million to SCR 6.8 million but maintained the mise a prix of SCR 4.6 million for parcel V8825. On 7th February 2014, the day fixed for the sale, the attorney for the Bank was not present but was represented by another counsel who moved for withdrawal of the matter, which was objected to by counsel for the plaintiffs. The Court refused the motion to withdraw and adjourned the matter sine die.

[5] On 6th May 2014, the Bank invited the Plaintiffs for a meeting with a view to settling the case out of court. At the meeting there was a discussion about a compromise to be entered into by the parties for the transfer of the two properties to the Bank to set off the loan balance in return for which the Bank would waive all accrued interest and penalties. They aver that even if their attorney was present at the meeting they were not given the opportunity to participate fully and ask questions but rather was presented with a *fait accompli* which was imposed upon them by the Bank's attorney. At a subsequent meeting the Bank's attorney presented them with the compromise for their signature without any explanation of the same. Given that their attorney had already endorsed the agreement albeit in their absence, this prompted the plaintiffs to do the same. They also signed several other documents presented to them by the Bank's attorney in the absence of their own attorney. After that on two different occasions, the Bank's attorney came to the plaintiffs' clinic to ask them to re-endorse documents which had not been correctly done initially. It is only after the signing of the compromise and the transfer deeds transferring parcels V8825 and C1248 to the Bank, that the Bank brought to their attention that there was still an outstanding balance of SCR1,298.524.28, which they had to pay by monthly instalments of SCR17,160.09 until 1st April 2024, which they have been complying with since then.

[6] The plaintiffs aver that the defendant through its attorney has acted unethically, dishonestly and in bad faith to obtain their consent to their detriment in that (a) the motion for the withdrawal of the case was motivated mainly by the fact that the mise a prix for parcel C1248 had been revised from SCR5.2 million to SCR6.8 million; (b) the defendant breached its duties as judicial sequestrator when it initiated an out of court settlement for the transfer of the two properties which were still under seizure without a court order as required by section 11 of the Act, and while the matter was still under the supervision of the Court; (c) the mise a prix for parcel V8825 is incorrectly stated in the Compromise as

SCR5.2 million which is lower than the mise a prix fixed by the Court; (d) the Compromise incorrectly states at page 2 para 4 that it was the defendant who requested for the matter to be adjourned sine die whereas the defendant had requested for the case to be withdrawn.

[7] The plaintiffs aver that if the sale had taken place on the date and at the mise a prix fixed by the Court, a minimum of SCR 11.4 million could have been raised which would have been sufficient to pay off the loan together with all interests. They further aver that even if they have signed several documents with a view to court proceedings being discontinued, they did so without any proper explanation of the same, and on the understanding that the out of court settlement would discharge them of all their obligations and liabilities towards the Bank without any outstanding balance left for them to pay.

[8] The plaintiffs aver that on the basis of the aforementioned facts and the bad faith of the defendant, a cause of action in rem arises which is prescribed after 20 years, and they have suffered the following damages for which the defendant is liable: Loss of parcel V8825 – SCR6,800,000.00; Loss of parcel C1248 – SCR4,600,000.00; Loss of overpayment in excess of the sum of SCR11,400,000.00 subject to computation; and moral damages – SCR200,000.00.

[9] They therefore pray for the following remedies from this Court:

(i) To declare the transfer of title Nos. C1248 and V8825 as null and void;

(ii) Alternatively to declare the mise a prix set by the Court for title Nos. C1248 and V8825 at SCR 11,400,000.00 to be the current market value of the titles, and to set off the loan plus interest and penalties with that sum, as at 7th February 2014.

(iii) To order a computation of the payments made by the plaintiffs since 7th February 2014, in excess of the mise a prix, which should be refunded to the plaintiffs.

(iv) To order the defendants to pay to the plaintiffs the sum of SCR200,000.00 for humiliation, distress and phobia.

(v) For any other order deemed reasonable and appropriate in the circumstances.

The Defence

[10] The defendant opposes the claim and has filed a statement of defence in which he raises the following pleas in limine litis:

1. *Both Plaintiffs together with the Defendant having executed a Compromise dated 6th May 2014 duly registered on 13th May 2014 in Register No. A58 No 3247, and thereafter performing their respective obligations therein cannot challenge its validity.*

2. *A compromise has the authority of a judgment and estops the parties from further appeal.*

3. *Its validity cannot be disputed whether on the ground of error of law or lesion.*

4. *The Compromise was executed to put an end to a dispute between the parties already begun namely the case of Development Bank of Seychelles v Dr. Berney Marie and Dr. Ludmila Marie C.S. 5/2013.*

5. *The Compromise is a personal contract and if at all possible to be challenged would be prescribed after 5 years.*

[11] On the merits the defendant denies that it breached its obligations as judicial sequestrator to keep the seized properties in its possession. It denies that it sought to withdraw the proceedings for judicial sale before the Court because the Court had revised the mise a prix fixed for parcel C1248 from SCR5.2 million to SCR6.8 million, or that if the sale had taken place on the date and at the revised price fixed by the Court, enough money would have been raised to pay off both the loan and interests. The defendant also denies the manner in which the plaintiffs claim they entered into the Compromise and their allegations that they were deceived as to the terms thereof or that it or its lawyer had acted unethically, dishonestly or in bad faith. It avers that both plaintiffs are well educated persons who were fully aware of the contents of the Compromise and furthermore, immediately after executing the Compromise complied with their obligations including making monthly payments of SCR 17,161 towards the remaining debt of SCR 1,298,524.28 with interest thereon at 10% per annum with effect from 1st May 2014 in terms of clause 6 of the

Compromise. It therefore denies that the plaintiffs suffered the loss and damages alleged or that it is liable for such damages to the plaintiffs.

[12] In the alternative, the defendant pleads that the plaintiff's purported action is prescribed on the basis that the Compromise is a personal contract and if at all possible to be challenged would be prescribed after 5 years.

[13] The defendant prays for dismissal of the plaint with costs.

[14] Both parties have filed written submissions on the pleas in limine litis raised by the defendant, which I have carefully considered and will refer to as appropriate in the analysis below.

The Law

[15] The provisions relating to compromise are contained Title XV of Book III of the Civil Code of Seychelles Act 1975 – the applicable law at the time this suit was filed. The relevant provisions for the purpose of determining the issues raised by points 1- 4 in *limine litis* are reproduced below.

Article 2044
1. The compromise is a contract whereby the parties put an end to a dispute already begun or prevent a dispute from arising.
2. A person may compromise any rights of which he can freely dispose.
3. This contract must be in writing.

[...]

Article 2052
1. A compromise shall have, with regard to the parties to it, the authority of a judgment against which there is no further appeal. Its validity may not be disputed on the ground of error of law or lesion.

[...]

Article 2053
A compromise may be rescinded when there is an error as to the persons or as to the subject-matter of the dispute.

It may be also annulled for fraud or duress.

Analysis

[16] Counsel for the defendant submits that all the conditions which have to be met in order for a Compromise to be legal have been met. These as correctly stated by counsel and as set out in Dalloz Encyclopedie Juridique 2e Edition Répertoire de Droit Civil Tome VII Vo Transaction Note 6 are *"1o une situation litigieuse; 2o l'intention des parties d'y metre fin; 3o des concessions réciproques consenties dans ce dessein ..."* It would indeed appear that all these conditions have been met.

[17] Counsel for the defendant also referred to the Mauritian case of *Treebhoohun M v Mon Ile Luxury Com Ltee & Anor* [2018] SCJ 134], which I note was not provided to this Court and which this Court has therefore has not had the benefit of reading. Counsel stated that the Court in that case considered Article 2044 of the Mauritian Civil Code which I note is the same as in our law, and which he stated is "supported by note 429 of Encyclopedie Dalloz V XV on Transaction" which reads as follows: *"C'est par son effet extinctif que la transaction s'apparente le plus à une decision judiciaire. Dans un cas comme dans l'autre, il est mis fin au litige par l'épuisement du droit d'action des parties. Ainsi, si un procés venait à renaître malgré la transaction, le défendeur disposerait d'une exception péremptoire, l'exceptio litis finitae per transactionem, semblable à l'exceptio litis per rem judicatam"*. Counsel stated that in that case the Court held that the plaintiff agreed to sign the said 'transaction' without being pressured by the defendant, and that further the wording of the 'transaction' clearly demonstrated the fact that although it was not a judgment of a court of law, it had the same effect and character of a judgment. It upheld the objection and dismissed the plaintiff's case.

[18] Counsel also laid great emphasis on Article 2052 of the Civil Code which is reproduced at paragraph [15] above. He submits that the conditions having been met when the Compromise was signed by the respective parties, it has the authority of a judgment and estops the parties from further appeal. Further its validity cannot be disputed *"whether on the ground of error or lesion"*.

[19] In fact Article 2052 only prevents the validity of a Compromise from being disputed on the ground of error of law or lesion. Error of law is known in French law as *"erreur de droit"* and is to be distinguished from *"erreur de fait"*. Specific examples of *"erreur de fait"* are given in Article 2053 namely *"error as to the persons or as to the subject-matter of the dispute"* which are grounds for rescission. Counsel for the defendant also omitted to mention that under Article 2053 a Compromise may also be annulled for fraud or duress. In addition a Compromise being a contract, must also fulfil the essential conditions for the validity of contracts generally as set out in Article 1108 of the Civil Code. In that regard *Dalloz Encyclopedie Juridique, 2 e Edition, Répertoire de Droit Civil, Tome VII, Vo Transaction Note 76* states:

> *"La transaction est, en principe, soumise au droit commun des contrats. Elle doit à ce titre, être conclude par des parties capables, ayant le pouvoir de transiger et dont le consentement se trouve exempt de tous vices (Art. 1er); elle doit d'autre part, avoir un objet (Art 2) et une cause licite (Art 3)."*

[20] Note 232 on *"Nullite du Contrat de Transaction"* further explains the consequences of those essential conditions not being fulfilled :

> *Comme tout contrat la transaction peut être annulée pour incapacité d'une des parties ... ou si sa cause ou son objet présente un caractère immoral ou illicite ...; dans le premier cas, la nullité est relative; elle est dans le second absolue. Ces solutions ne sont que l'application du droit commun et n'appellent pas d'autre commentaire. Il en va autrement, au contraire s'agissant des vices du consentement ou du vice de lesion.*

[21] Note 233 goes on to explain the specific rules applicable to the Compromise in regards to "vices du consentement" and "lesion". In regards to the former it states –

> *§ 1er. – Vices du consentement.*
>
> *233. Parce que procédant de la volonté des parties, la transaction n'est valablement formée qu'autant que chaque partie a eu un consentement sain at libre; dès lors et conformément au droit commun, ce contrat est annullable pour cause d'erreur, de dol ou de violence.*

[22] In regards to "erreur" Note 234 makes the distinction between *"erreur de fait"* and *"erreur de droit"* explaining that the validity of a Compromise may only be disputed for the former, as follows –

"Il résulte des Article 2052, alinéa 2, et 2053 alinéa 1er, du code civil, que la transaction peut être attaquée pour cause d'erreur de fait mais non d'erreur de droit ..."

[23] As stated, Article 2053 contains two types of *"erreur de fait"* namely *"error as to the persons or as to the subject-matter of the dispute"* which are grounds for rescission. On the facts of this case, it is clear that there is no error as to the persons who entered into the compromise. In Note 237, it is observed that *"[b]eaucoups plus nombreuses sont ... les decisions annulant la transaction pour cause d'erreur sur l'objet. Celle-ci concerne normalement la prestations des parties ..."* The plaintiffs are alleging among other things, that as a result of bad faith and misrepresentation on the part of the defendant and its attorney they were not aware of the exact terms of the Compromise at the time of its conclusion. They claim that they only became aware that there was an outstanding balance of SCR 1,298,524.28 that they would still have to continue paying after they had signed the Compromise, whereas they had been under the impression that the terms of the Compromise would discharge them of all their obligations and liabilities to the defendant. If the plaintiffs are able to prove these allegations, they may well be able to prove there was *"erreur sur l'objet"* i.e. *"error as to the subject-matter of the dispute.*

[24] The plaintiffs also claim that the value of the properties as reflected in the mise a prix set out in the Compromise is incorrect and if the correct figure had been entered, the total value of the properties would have been sufficient to cover the loan amount and interests and penalties without leaving any outstanding balance for them to continue paying. Counsel for the defendant further submits that the plaintiffs were further pressured into signing the Compromise because the interest and penalties on the loan balance owed to the defendant were continuously increasing. These may well amount to fraud ("dol") and duress ("violence"), if proved.

[25] If the plaintiffs were challenging the validity of the Compromise, no issue would arise as they would be doing so on grounds permitted by the law i.e. error as to the subject-matter

of the dispute, fraud and duress. This, they are entitled to do notwithstanding that Article 2052 provides that *"[a] compromise shall have, with regard to the parties to it, the authority of a judgment against which there is no further appeal"*. Whether they would be able to prove the matters alleged is another question which would be determined after hearing the matter on the merits. Points 1- 4 of the pleas in *limine litis* would therefore fail.

[26] I note however that the remedy sought by the plaintiffs at paragraph (i) of the prayer for relief in the plaint is "to declare the transfer of title Nos. C1248 and V8825 as null and void". It seems therefore that they are challenging the validity of such transfers rather that of the Compromise, and this despite the material facts averred in the plaint showing that it is the Compromise which is viciated by error, fraud and duress. In my view the plaintiffs ought to have prayed for rescission of or a declaration of nullity in regards to the Compromise, whichever is appropriate, as opposed to the nullity of the transfer of title Nos. C1248 and V8825. Given that the transfer of title Nos. C1248 and V8825 were made pursuant to the Compromise, it follows that if the plaintiffs are successful in challenging the validity of the Compromise the transfer of title Nos. C1248 and V8825 would consequently fall, and the Court could have granted the prayer of the plaintiff. In order for the Court to grant the prayer of the plaintiffs, it would first have to rescind or make a finding of nullity of, whichever is appropriate, the Compromise, which is not prayed for by the plaintiffs. If the Court were to do that, it would be acting *ultra petita*. It is trite that a court may not grant a relief not sought for in the pleadings. It is clear therefore that the plaint is defective and that the Court will therefore not, on pain of acting *ultra petita*, be able to grant the relief prayed for at paragraph (i).

[27] I note that the plaintiffs have at paragraph (v) also prayed "for any order deemed reasonable and appropriate in the circumstances". It may be argued that the Court could have made an order or a declaration that the Compromise is invalid in terms of this prayer. In my view this type of prayer is a catch-all one intended to cover orders consequential to or necessary for the implementation of the main orders prayed for. I do not think such prayer is sufficient for the Court to make an order or declaration as to the validity of the Compromise which should have been specifically prayed for.

[28] At paragraph (ii), the plaintiff makes an alternative prayer "to declare the mise a prix set by the Court for title Nos. C1248 and V8825 at SCR 11,400,000.00 to be the current market value of the titles, and to set off the loan plus interest and penalties with that sum, as at 7th February 2014". This Court has difficulty in seeing how to accede to this prayer. First and most importantly, because as long as the Compromise entered into between the parties subsists and is not declared invalid, it has the force of law for them (Article 1134(1)) and the Court cannot interfere with their obligations thereunder. Secondly the mise a prix for title Nos. C1248 and V8825 was fixed at SCR 5.2 million and SCR 4.6 million respectively in the memorandum of charges in judicial sale proceedings in CM05/2013 and subsequently increased by the presiding judge in respect of C1248 to SCR 6.8 million. These are separate proceedings from the current one. This Court cannot rely on the mise a prix in CM05/2013 to make a declaration as to the current market value of the aforementioned titles in the absence of reliable evidence as to how the mise a prix for the said titles were reached. For the same reason this Court cannot grant the plaintiff's prayer at paragraph (iii) "to order a computation of the payments made by the plaintiffs since 7th February 2014, in excess of the mise a prix, which should be refunded to the plaintiffs" or any of the other prayers.

[29] Given the above findings, and further that point 5 of the plea in *limine litis* relates to prescription of an action challenging the Compromise, whereas the relief sought in terms of the plaint is for nullity of the transfer of title Nos. C1248 and V8825, this Court finds no necessity to address the issue of prescription.

Decision

[30] For the reasons given above the plaint is struck out and the suit dismissed.

Carolus.

Signed, dated and delivered at Ile du Port on 10th March 2023.