

SUPREME COURT OF SEYCHELLES

Reportable
[2023] SCSC 678
CS 18/2022

In the matter between:

NATASHA PATTERSON BORN BRASSEL
(rep. by Bernard Georges)

1st Plaintiff

NIKITA SONIA BRASSEL
(rep. by Bernard Georges)

2nd Plaintiff

and

THE ESTATE OF THE LATE

PHILIP BRASSEL REPRESENTED

BY ITS EXECUTRIX

ASHNI BRASSEL
(rep. by Kieran Shah)

Defendant

Neutral Citation: *Brassel and Anor v The Estate of the late Philip Brassel* (CS 18/2022) [2023] SCSC 678 (10th August 2023).

Before: Pillay J
Summary: Challenge of Will
Heard: By way of submissions
Delivered: 10th August 2023

ORDER

The Plea in Limine fails

RULING

PILLAY J:

[1] This ruling is a result of a plea in limine raised by the Defendant that the Court has no jurisdiction to hear this matter and alternatively should decline jurisdiction.

[2] The grounds for the plea in limine is as follows:

(1) *The notarial will is a South African Notarial will executed in South Africa by the Deceased who was living and was domiciled in South Africa at all material times.*

(2) *The will was proven before the High Court of South Africa (KwaZulu-Natal Division) and the said Court issued letters of Executorship to the Defendant pursuant to section 13 and 14 of the Administration of Estates Act No. 66 of 1965 (of South Africa). The said will has been accepted by the said court as a valid testamentary disposition.*

(3) *The will and succession is governed by South African law.*

(4) *Any challenge to the will and the succession must be adjudicated by the South African Court and under South African Law.*

[3] By agreement of the parties the plea was listed to be decided first and that to be done by way of submissions.

[4] The Plaintiff submitted that the issues for the Court to consider in the matter is as follows:

(i) *when and where did the succession of the Deceased open?*

(ii) *what law will determine the validity of the Deceased Will and the disposition made thereunder, as well as the jurisdiction for any challenge relating to the Will and succession of the Deceased?*

[5] The Plaintiff submitted that the place and time of opening of succession is provided for under Article 718 of the Civil Code.

[6] However, Learned counsel for the Plaintiff referenced the case of *Rose v Mondon (1964) SLR 134* as well as *Austin v Bailey (1962) M.R. 113* along with Article 12 of the Civil Code as support for the proposition that the applicable law in relation to the immovable

property, which is part of the succession, is the Seychelles Law, being the law where the immovable property in question (Parcel H7349) is situated.

- [7] It was the Plaintiff's submission that the proper venue for hearing the case is the Supreme Court of Seychelles and not the South African Court.
- [8] Learned counsel for the Defendant submitted that the law applicable when challenging a will is that which applies on the opening of succession. It was his submission that the Deceased domicile was in South Africa. The notarised will was made in South Africa and admitted by the South African court as a valid testamentary disposition, thus capacity and domicile under South African law would determine the validity of the will.
- [9] It was his submission that "it is the law of the deceased's domicile that governs his status and capacity to dispose of his assets by will. He further submitted that it is that law that decides who is qualified to inherit or who can be excluded from the will or challenge the validity of the will.
- [10] Learned counsel went on to refer to Article 3 (2) of the Civil Code of Seychelles which states that "Immovable property shall be governed by the law of Seychelles. This rule applies to immovable property under foreign ownership or control." He added that the *lex situs* must govern certain aspects of the land, like registration formalities, sale, donation, offering land in security for a debt like a mortgage. It was his contention that there is no provision under the law of succession which states that if there is immovable property comprised in the succession of the Deceased, then Seychelles law of succession applies even if it differs from the law of inheritance of the Testator's domicile.
- [11] He referenced the case of *Privatbanken Aktieselskab v Bantele 1978 SLR p226* where Judge Sauzier stated that "*as far as the jurisdiction of the Supreme Court of Seychelles in concerned, it is now almost entirely governed by English law or by laws based on English law. Since the rules of private international law must necessarily have their foundation in the internal law, the rules dealing with the jurisdiction of foreign courts in the international sense must be based substantially on the provisions of the law regarding jurisdiction of the*

Seychelles courts especially of the Seychelles Supreme Court, and guidance must accordingly be sought from the English rules of private international law.”

[12] On that basis he argued that the earlier decisions following French principles in private international law are no longer applicable.

[13] The Plaintiff’s case as I understand it is not to declare the will invalid in that the Deceased had no capacity to make the will, but that the will is contrary to the laws of Seychelles in that the Plaintiffs were deprived of their reserved inheritance, more particularly the disposition of the immovable property parcel H7349.

[14] The issue for the Court to consider then is:

What is the law that governs immovable property in Seychelles?

[15] Learned counsel for the Plaintiff relied on the authority of ***Rose & Ors v Mondon [1964] SLR 134*** wherein CJ Bonnetard was guided by the French Rules of private international law as were the judges of the Court of Appeal in the case of ***Augustin v Bailey (1962) M. R. 115. Augustin v Bailey*** where they explained the principle regarding successoral law applicable in such cases as ***Rose & Ors v Mondon*** and the present matter as follows:

There is no specific text in the Civil Code which lays down what is the applicable law regarding movable property, but it is settled case law that the maxim ‘mobilia sequuntur personam’ applies and that the law applicable is the law of the “lieu d’ouverture” of the testatrix (see Battifol, Traite Elementaire de Droit International Prive, 3rd edn., para. 651; Niboyet Traite de Droit International Prive Francais 2e. Edn., vol. 4, pages 413, 764; Clunet, Journal du Droit International Prive, 1940 -1945, pages 112, 805) The successoral law regarding immovable property is the law of the place where it is situated. This rule derives from the second paragraph of art. 3 of the Civil Code which provides that “Les immeubles, meme ceus possedes par des etrangers, sont regis par la loi francaise” (see Battifol, op. cit., para. 652; Niboyet op. cit. pages 198, 758; Clunet, op. cit., 1955, p.408).

[16] Article 3 of the Civil Code of Seychelles before the amendment had a similar provision which read thus:

1....

2. *Immovable property shall be governed by the law of Seychelles. This rule also applies to immovable property under foreign ownership or control.*

3. *Status and capacity shall be governed by such laws as are from time to time enacted. Subject to this provision, capacity shall further be determined by the domicile of a person. Domicil shall be inferred from the fact that a person retains or voluntarily establishes his sole or principal residence in a country with the intention of retaining or making that country the centre of his personal, social and economic interests.*

4....

Which has been amended by Article 12 of the Civil Code in 2021 and reads as follows:

*Immovable property is governed by the law of the place where it is situated.
(lex situs)*

- [17] The position of the Defendant is that the earlier decisions following French principles in private international law are no longer applicable. It was the submission of Learned counsel for the Defendant that guidance must be sought from the English rules of private international law.
- [18] The general rule in English private international law as regards movables, is that testamentary succession is governed by the law of domicile of the deceased at the time of his death, see *Abramova and Ors v ACT Offshore Ltd (MC 91 of 2020) [2021] SCSC 395 (05 July 2021)*
- [19] As regards immovables, the English rule as set out in G. C. Cheshire, Private International Law, Sixth Edition, Oxford University Press 1961 page 603 is that:

[while m]ost countries have adopted the principle of unity of succession by which questions relating to intestacy or to wills are governed by one single law, the personal law of the deceased, irrespective of the nature of the subject-matter. England, however, together with other Anglo-Saxon countries, has consistently adhered to what is called the principle of scission under which the destination of immovable on the death of the owner is governed by the lex situs, not by the law of his domicile as in the case of movables.

at page 604 that:

With regard to will of immovables the rule of the common law is that it is the lex situs, and the lex situs exclusively, which decides whether the testator has capacity, whether the appropriate formalities for the making or for the revocation of a will have been observed, whether the testator has an unlimited or only a restricted power of disposition, and whether the interest devised is essentially valid.

[20] This general rule of private international law, commonly referred to as the Mocambique rule” was established in *The British South Africa Company v The Companhia de Moçambique [1893] AC 602* and is generally regarded as having two limbs:

1. an English court will not exercise jurisdiction in respect of the title to, or possession, of land situated abroad; and

2. an English court will not entertain an action for trespass to foreign land even if the plaintiff's title is not in issue.

[21] Subsequent cases have drawn a distinction between an action in rem as compared to an action in personam; rights which are exercisable against the whole world and not just inter partes will be caught by the Mocambique rule, whereas actions in personam where the court exercises jurisdiction over the person within its jurisdiction is excepted as in the case of *Deschamps v Miller [1908] 1 Ch. 583* where it was held that:

...exceptions to the rule...depend on the existence between the parties to the suit of some personal obligation arising out of contract or implied contract, fiduciary relationship or fraud, or other conduct which, in the view of a court of equity in this country, would be unconscionable, and do not depend for their existence on the law of the locus of the immovable property. Thus, in cases of trusts, specific performance of contracts, foreclosure, or redemption of mortgages, or in the case of land obtained by the defendant by fraud, or other such unconscionable conduct ..., the court may very well assume jurisdiction. But where there is no contract, no fiduciary relationship, and no fraud or other unconscionable conduct giving rise to a personal obligation between the parties, and the whole question is whether or not according to the law of the locus the claim of title set up by one party, whether a legal or equitable claim in the sense of those words used in English law, would be preferred to the claim of another party, ...the court ought [not] to entertain jurisdiction to decide the matter.

[22] If I am to follow the reasoning of the Learned counsel for the Defendant, that guidance must be sought from the English rules of private international law, I would then have to agree that the law that governs the formal validity of the will as well as the movable property is that of South Africa, the country of domicile of the Deceased. However as regards the immovable property being parcel H7349 the applicable law is that of the country where the property is located which is Seychelles, as in English common-law the principle applied is that for immovable property the rule of *lex situs* applies.

[23] However, in the case of *Albert v Albert (MA 39 of 2019) [2020] SCSC 618 (01 September 2020)* the Supreme Court addressed the issue of the rules of international law to be followed in Seychelles as follows:

[Although] early Seychellois jurisprudence concluded that in conflict of law cases, French rules of private international law are to be followed in Seychelles: Rose v Mondon (1964) SLR 134; Morgan v Morgan (1972) SLR 79; Pillay v Pillay (1973) SLR 307; Pillay v Pillay (1978) SLR 217.

A more modern approach has been adopted in the case of Intelvision Network Ltd & Ors v Multichoice Africa Ltd (SCA 31/2014) [2015] SCCA 31 (28 August 2015), the Court of Appeal noted (emphasis added):

“[15] Rose decided that the judgment of the Court of Appeal of Seychelles in Austin v Bailey (1962) MR 115 had conclusively laid down the rules of private international law to be followed in Seychelles. In Austin, the Court of Appeal of Seychelles in Mauritius stated:

“Since the rules of private international law in any country must necessarily have their foundations in the internal laws of that country, those which are applicable must be based substantially on the provisions of our laws regarding civil rights and obligations. These laws are basically and almost entirely French so that, subject to any exceptions which may arise through litigation we must be guided by the French Rules of private international law.”

In 1975, we enacted our own Civil Code and although it is substantially based on the Code Civil of France, logically it is our Code and the Seychellois jurisprudence emanating from it that must now guide us on the question of private international law.

[24] In the case of *DF Project Properties (Pty) Ltd v Fregate Island Pvt Limited (SCA 56 of 2018, 63 of 2018) [2021] SCCA 28 (21 July 2021)* the Court of Appeal confirmed that “[i]t is thus clear that it is Seychellois law that applies to determine the proper law to apply in private international law matters.”

[25] With that said, Article 913 of the Civil Code is a public policy matter. The rule of forced heirship is well established under the old civil code and accepted by the courts. It is an action enforceable against the world. The property in issue under Article 913 being immovable property, by virtue of Article 3 of the Civil Code, it is subject to the jurisdiction of the Seychelles Courts.

[26] Accordingly, the plea in limine fails.

Post-Script:

I have considered the further submissions of the Defendant filed on 4th August 2023. They do not alter my views above. The only additional comments I wish to make is that the ability of a foreigner in law to inherit property in Seychelles without sanction is in my view subject to Article 913 of the Civil Code in line with Article 8 of the Code.

Furthermore, the document attached from the Cour de Cassation dated 27th September 2017 is based on public international law specifically EU Regulation 650/2012 which became effective in France in 2015. Though, the Cour de Cassation stated that excluding forced heirship is not in and of itself contrary to French international public order policy. It cautioned against the non-application of the forced heirship rule where it would result in a situation that is inconsistent with the principles of French law which are considered as fundamental in situations where the children are left in a precarious situation or in need.

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



Pillay J