

IN THE SEYCHELLES COURT OF APPEAL

**FRANKY D'UNIENVILLE**

**APPELLANT**

**VERSUS**

**FRANCIS PILLAY**

**RESPONDENT**

Civil Appeal No. 32 of 1996

(Before: *GOBURDHUN P., SILUNGWE, VENCHARD J.J.A.*)

Mr. B. Georges for the Appellant  
Mr. R. Valabhji for the Respondent



**J U D G M E N T**  
**Delivered by Venchard J.A**

This is an appeal from the decision of the Supreme Court (Bwana, J.) entering judgment for the Respondent, Francis Pillay, then plaintiff, against the appellant, Frankie D'Unienville, then defendant, in the sum of SR92,000 together with interest at the commercial rate of 17%.

The Respondent, in an infelicitously drafted plaint lodged before the Supreme Court, averred that:-

1. he runs the City Car Hire Company which imports goods from Japan;
2. the Appellant is engaged in exchanging local currency for foreign currency on the parallel market;
3. at the Appellant's request, he gave the latter Rs. 92,000 for conversion into Japanese Yen.

4. the Appellant in exchange gave the Respondent a post dated cheque in the sum of Yen 1826,000 drawn by C.R. Dierchx to the order of Suzuki Motors Corporation on an English Bank to which the cheque "was sent" for payment of goods ordered.
5. the cheque was returned with the mention "Refer to drawer Account closed".
6. the Appellant knew that the said C.R. Dierchx had no account existing at the English Bank and had acted fraudulently to deprive the Respondent of the sum of Rs.92,000.
7. Alternatively, the Respondent is liable to him in the said sum of Rs. 92,000.
8. The Respondent had requested a refund but to no avail.

In his defence, the Appellant traversed the main averments of the plaint, did not dispute that he had received the Rs. 92,000 but averred that he was acting as a go-between to enable the Respondent to obtain foreign currency.

In the course of his cross examination the Respondent had this to say (at page 8) -

Q: Mr. D'Unienville , is he known to you as a man who has foreign exchange accounts or foreign exchange personally? He is your friend, remember?

A: Yes, he is my friend. Frankly speaking, he had made a friend do a transfer for me and he (meaning the friend) had paid.

Q: Mr. Allain Horner?

A: That is right.

Q: ...Is he, Frankie D'Unienville, a person known to you as having foreign exchange reserves, personally?

A: I do not know whether he has it or not but he has made someone pay for me. Since he (meaning the someone) had paid, then I thought he could do it.

Q: (at page 9) But what you do now is that once before when you needed help he found somebody who helped you?

A: .... I was telling him that I was looking for something. That was when he made that chap, Horner, pay something for me.

Q: (at page 11.) When you gave him Rs. 92,000 did you think that it was his money that he was going to use?

A: He told me he could make me get it, he could pay into foreign exchange. Like he had done once before, he made Horner do it.

It was manifest from the Respondent's testimony that the Appellant was not providing the foreign currency. He arranged for third parties to provide the foreign currency. He conceded, in the instant case, that the Appellant had in his possession similar cheques drawn by the said C. R. Dierchx.

The cause of action (the *vinculum juris*) which the Respondent invokes is set out in paragraph 6 of the plaint and alternatively in paragraph 7. In order to succeed under paragraph 6, the Respondent had to prove that the Appellant knew that the account of the said C.R Dierchx at the English Bank had been closed or (as was averred) did not exist. We have carefully scrutinised the evidence on record and we are satisfied that there is no evidence that the Appellant had knowledge that the account at the English Bank had been closed. The alleged cause of action under paragraph 6 of the plaint must therefore fail.

On the other than, we have been at pains to find out the cause of action which is invoked, in the alternative, under paragraph 7 of the plaint. It is not sufficient merely to aver that a defendant is liable. The ground relied upon for the alternative liability should have been particularised. We have expressed our concern on the laxity in pleadings which we are not prepared to condone.

We have however considered the possible causes of action which could have been invoked by the Respondent but have reached the conclusion that they are of no avail to the Respondent not only because they have not been averred but that there is no evidence on record which could support them.

In the first place, we have considered, whether the claim could be enforced by the fact that a cheque is a negotiable instrument and the Respondent as a holder in due course can sue on the cheque. However as the cheque was drawn in the name of Suzuki Motors by C.R. Dierchx and contains no endorsement by the Appellant a claim under the Bills of Exchange Act can only succeed against Mr. C. R. Dierchx and not against the Applicant.

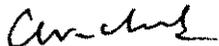
Secondly, it was open to the Respondent to aver and to prove that the Applicant had vouched for or warranted the payment of the foreign currency or the refund of the Rs.92,000. The evidence as set out in this case clearly establishes that the Respondent knew that the foreign currency was to be made available by a third party as was the payment made previously by Mr. Horner. The Respondent accepted the cheque in the full knowledge that it was Mr. C. R. Dierchx's account which would be debited.

In the absence of the averment and proof that the Appellant had guaranteed or vouched for the payment of the foreign currency no vinculum juris can exist between the parties.

The appeal must therefore be allowed with costs.

  
H. GOBURDHUN  
PRESIDENT

  
A. M. SILUNGWE  
JUSTICE OF APPEAL

  
L. E. VENCHARD  
JUSTICE OF APPEAL

Dated this .....<sup>3<sup>rd</sup></sup>..... day of .....<sup>April</sup>..... 1997.