**IN THE COURT OF APPEAL OF SEYCHELLES**

**CHEZ DEENU PTY LTD**

**APPELLANT**

**vs**

**SEYCHELLES BREWERIES LIMITED**

**RESPONDENT**

**SCA 22 of 2011**

==========

Counsel: Mr S. Rajasundaram for the Appellant
Mr F. Chang Sam for the Respondent

**JUDGMENT**

**DOMAH, S.,**

**[1]** The learned Chief Justice dismissed an action brought by the appellant against the respondent. Looking at the pleadings exchanged and the remark of learned counsel for the appellant, he concluded that the action was rooted in contract but was being pursued as one for unjust enrichment and these two causes being mutually exclusionary, the appellant was precluded by law to proceed further.

**[2]** The appellant has put up four grounds of appeal as follows:

1. The learned Chief Justice failed to appreciate that the contract between the Appellant and the Respondent was terminated, thus failed to accept the Appellant's stance that no contractual remedy was available to it for the Appellant to choose its claim also on "unjust enrichment." The Appellant, therefore submits that the dismissal of the Plaint only on the ground that the contractual remedy was available to it, hence "unjust enrichment" was not applicable is an error in law.
2. The learned Chief Justice erred in his findings in not looking into other aspects on which the Plaint was filed, besides "unjust enrichment" and the absence of any finding on the maintainability of the Plaint on the other grounds pleaded is also an

error. The Appellant's claim that the terms of an agreement binds the parties not only on the agreement terms but also on all the consequences which fairness, practice or the law imply as contemplated under the civil code.

3. The learned Chief Justice ought to have taken cognizance of the Plaintiff's claim on "opportunity loss" and erroneously concluded that it was unnecessary to review the evidence.
4. The learned Chief Justice omitted to appreciate the other footing of the Plaint namely "legitimate expectation" and further failed to analyze the Appellant's claim on this head.

**[3]** The respondent resists the appeal and maintains that the learned Chief Justice was correct in the decision he took. In his written submissions, learned counsel combined all the four grounds together.

**[4]** Learned counsel for the appellant combined grounds 1 and 2 together and grounds 3 and 4 separately.

**Grounds 1 and 2**

**[5]** The main thrust of the argument of learned counsel for the appellant under grounds 1 and 2 is that the contract was terminated on 14 August 2007 and what subsisted was an *ad hoc* arrangement which continued to govern the relationship between the parties.

**[6]** The mere fact that there was an *ad hoc* arrangement along which the appellant continued its distribution services without any fail until the end of November 2007 speaks volumes about the continuance of the contractual relations with the same or modified *quid pro quo* between the parties. It may amount to a *tacite reconduction* of the contractual relations, with the same or modified terms and conditions. The conduct between the parties show that contractual relations were continuing until 1 December 2007. That it was all secured by the same charge of SR4 million is consistent with the continuing existence of the contract. That is not all. The particulars of loss and damage date back to 2004 till 2007 which cover the period of the written agreement and the *ad hoc* agreement. It cannot be said, therefore, that the case was based on unjust enrichment based on article 1381-1 of our civil code.

**[7]** Article 1381-1 is quite clear on the elements which form the basis of a claim based on unjust enrichment. It reads:

> *"If a person suffers some detriment without lawful cause and another is correspondingly enriched without lawful cause, the former shall be able to recover what is due to him to the extent of the enrichment of the latter. Provided that this action for unjust enrichment shall only be admissible if the person suffering the detriment cannot avail himself of another action in contract, or quasi-contract, delict or quasi-delict; provided also that detriment has not been caused by the fault of the person suffering it."*

**[8]** This article is a cause of action in its own right. But it is one which opens the door to a litigant where he cannot establish a contract with his opponent, nor a quasi-contract, nor can he sue him in delict or quasi-delict. His cause of action arises by the mere fact that in his interaction with his opponent, he finds that the latter ended up enriched unjustly and at the expense of the former in a matter where they put their industry together. It is an action - as the article specifies - only admissible where the conventional forms of actions are not available to him on account of the nature of the relationship. Article 1381-1 is so clear on the matter.

**[9]** The proviso is to be specifically noted: an action "*for unjust enrichment shall only be admissible if the person suffering the detriment cannot avail himself of another action in contract, or quasi-contract, delict or quasi-delict; and provided also that detriment has not been caused by the fault of the person suffering it."* Our case law on the inadmissibility of a claim based on unjust enrichment where the facts suggest the existence of other actions is pretty well settled: see **Robert Labiche v Desita Ah-Kong SCA 33 of 2009** and **Macdonald Isaac v Andre Quilindo SCA 25 of 2009,** both of which were cited by the learned Chief Justice before he ruled in the matter. It is not necessary that it becomes apparent from the pleadings that the action is in contract or tort but where he is put to his election, he should state on which cause he is proceeding: see **Etienne Gill v James Gill SCA 4 of 2004.** This is exactly what had taken place in this case at hearing in the court below.

**[10]**Learned counsel also submitted that while considering the legal effects of article 1134, the learned Chief Justice failed to consider the legal effects of article 1135 which reads:

> *"Agreements shall be binding not only in respect of what is expressed therein but also in respect of all the consequences which fairness, practice or the law implying into the obligation in accordance with its nature."*

**[11]** Our answer to this argument is that once the learned Chief Justice was satisfied that the appellant's case was grounded in contract, he had no choice in the light of the wording and the proviso of article 1381-1 as well as our case law on the matter to decide as he did. He could not look beyond and call in aid article 1135 which is itself based on agreements: i.e. contractual relationships. He expressed the legal impediment and stated that he found it "unnecessary to review the evidence adduced by the parties."

**[12]** Article 1135, be it noted, speaks of the consequences of agreements so that one has to prove the agreement, in the first place. If there is an agreement as the appellant was averring he has, then his action is not in unjust enrichment which is a relationship independent of an agreement, whether express or implied. A classic case where this would arise today would be where a woman enters into a relationship with a man and assists him in the latter's business, including providing him with domestic and personal services as a result of which his business improves but she is impoverished in the process in her own *patrimoine*.

**[13]**We accordingly find no merit in grounds 1 and 2. We dismiss them.

**Grounds 3 and 4**

**[14]** Having decided that grounds 1 and 2 have no merits, we need not consider grounds 3 and 4 where learned counsel raises issues of opportunity loss and legitimate expectations under his claim of entitlement to damages. These, if at all maintainable in law and on the facts, would be subject-matter of consideration for the trial court after the appellant has decided on his proper cause of action other than unjust enrichment.

**Tacite reconduction**

**[15]**We may wish to highlight one aspect of the case which has not been envisaged by the parties but is latent on the facts and circumstances as revealed by the pleadings. We have referred above to the principle of *tacite reconduction* which in Seychelles Civil Code is found in its articles 1738 and 1759. These articles in an age of agricultural economy applied to leases but in our times apply generally to all forms of contract as French jurisprudence and Mauritian jurisprudence which have identical articles with the same numbering show.

**[16]**For an interpretation of the conditions in which *tacite reconduction* of an agreement arises, one may refer in French law to the comments in **Encyclopédie Numérique Dalloz, Contrats et Conventions, notes 453, 454, 456 to 458:**

> *"453. … lorsque les parties, malgré l'expiration du contrat, continuent à remplir leurs obligations «comme si de rien n'était», que se manifeste la tendance à la pérennisation de la situation contractuelle. Ce comportement des parties peut alors être analysé comme traduisant leur tacite volonté. En l'absence d'une manifestation contraire émanant de l'une d'elles, c'est devant un nouveau contrat identique à celui expiré que l'on se trouve; il y a ce qu'on appelle tacite reconduction (Pajet, La tacite reconduction, Thèse, Paris, 1926).*

**[17]**In other words, where parties, despite the expiration of a contract, continue to fulfill their obligations as if nothing had happened, the facts are suggestive of the perennial nature of the contract. The conduct of the parties is taken as their tacit consent. Unless, there is a clear expression emanating from one of the parties to the contrary, the parties are taken to have given their consent to a new contract. This is what is referred to as *tacite reconduction*.

**[18]***Tacite reconduction* is not a new principle of law. But in the French Civil Code, the Seychelles Civil Code and the Mauritian Civil Code, that principle was expressly provided for in agricultural and commercial leases:

> *"454. Cette solution est parfois expressément consacrée par la loi ; ainsi en matière de baux (C. civ., art. 1738, 1759 et 1775)."*

**[19]***Tacite reconduction* is today applicable to various situations unless the law excepts it. It applies to successive contracts with determinate terms, to contracts of supply as in the present case, to contracts of employment etc:

> *"… il est aujourd'hui admis qu'elle a une portée générale concernant, sauf exception, tous les contrats successifs à durée déterminée, contrats d'approvisionnement, contrats de travail, etc."*

**[20]** Because *tacite reconduction* has as its basis the consent of the parties, inference of consent may not be construed otherwise than from concrete evidence showing the continuation of previous contractual relations. For example, for a contract of employment, where the provision of the service has been continued from one side against payment of remuneration on the other side. These will be interpreted as evidence of the will of parties to maintain the contractual relationship. We read at paragraph 456, ibid.:

> *"Parce que la tacite reconduction a pour fondement la volonté des parties, elle ne peut s'induire que d'éléments concrets témoignant le maintien des anciennes relations contractuelles ; ainsi, pour le contrat de travail, si sont prolongées la prestation de travail d'un côté, la rémunération de l'autre; …….. ces circonstances s'interprètent comme marquant la volonté des intéressés de maintenir entre elles un lien contractuel."*

**[21]** Any fact or circumstance that comes to contradict the presumed willingness of the parties will go against the application of the principle of *tacite reconduction:*

> *"457. Encore faut-il qu'aucune circonstance particulière ne vienne démentir ou simplement rendre douteuse cette volonté presumé …".*

**[22]** There is no need for a formal protest against the operation of the principle. The absence of a positive consent may be inferred from various elements of which the trial court is the sovereign judge:

> *"458. Mais point n'est besoin d'une protestation formelle pour qu'il y ait obstacle à la tacite reconduction. L'absence de volonté positive peut resulter de tous ces éléments (Planiol et Ripert, t. 10, par Givord et Tunc, no. 627), les juges du fond appréciant ici souverainement (Civ., 3e, 16 mai 1973, Bull. Civ. III, no. 348) ……."*

**[23]** Reference may also be made of *tacite reconduction* as applied in Mauritian law under similar articles 1738 and 1759 of its Code Civil. We may find their recent application to facts identical to our case in the following decisions: **Soobooruth Tauckoor v Central Water Authority [2008 SCJ 255]; Mauritius Industries Ltd & Anor v Excelsior United Development & Ors [2012 SCJ 307]**.

**[24]**It is, accordingly, open to the appellant to bring its case under *tacite reconduction* and to show that, the facts and circumstances that: the contract which expired was renewed by the conduct of parties but that it was renewed with modifications. The modifications will depend upon which contention between the parties will prevail before the trial court.

**The nature of the order**

**[25]** It is of utmost importance to understand the nature of the order which was made and which should have been made by the learned Chief Justice in the result. The operative part of his decision is that he found the "action untenable in law." We agree with the decision of the learned Chief Justice and also with the reasons he gave for his determination based on the law as we have shown above. However, the learned Chief Justice should not have "dismissed" the action as such in the circumstances of the case. The appropriate order to make in a case where the court gives the option to a litigant to bring a proper case because the decision is based only in law and the evidence has not been heard on the merits of the case is to non-suit the action. This enables the litigant unsuccessful in law but with a possible success in another cause of action to bring a proper fresh action.

**[26]**We, accordingly, quash that part of his order which "dismissed" the action and substitute therefore an order for non suit, thus allowing the appellant to bring an action either in contract or in tort or in quasi-contract or quasi-tort but not in unjust enrichment.

**[27]**Since the appellant has succeeded partly in this appeal, we allow him half the costs.

**……**
**S. B. DOMAH**
**JUSTICE OF APPEAL**

**……**
**A. FERNANDO**
**JUSTICE OF APPEAL**

**……**
**M. TWOMEY**
**JUSTICE OF APPEAL**

*Dated this 30th August 2013, Victoria, Seychelles.*