

**Husser v Larue
(1998) SLR 89**

Jacques HODOUL for the Plaintiff
Philippe BOULLE for the Defendant

Judgment delivered on 17 June 1998 by:

AMERASINGHE J: The plaintiff sued the defendant to recover a sum of R103,181.40 for loss and damage on breach of contract, with interest and costs.

The defendant in paragraph 4 of the statement of defence, "admits that funds were transferred to her account in Seychelles. The defendant denies that it was on the basis of the alleged promise stated in paragraph 3 that funds were transferred. The defendant avers that the various transfers were in the form of gifts, free assistance, voluntary contribution for his stay at her Guest House, and that the plaintiff also gave her other things as gifts".

In paragraph 4 of the plaint the plaintiff avers that he transferred funds totaling Swiss Francs 26,000 to the defendant, and in paragraph 3 he avers that such transfers were made on the promise of the defendant to give him participation in a guest house project at Praslin known as "Colibri", for which the said funds were required.

After an earlier hearing, the learned Chief Justice on 29 July 1994 entered judgment for the plaintiff as prayed for with interest and costs of action. On an appeal by the defendant, the Court of Appeal by a judgment delivered on 18 May 1995 set aside the judgment and remitted the case for a rehearing. The Court of Appeal was unanimous in their finding that in reference to article 1356 of the Civil Code, the judicial admissions in the statement of defence is indivisible. Hence the admissions of the defendant in the statement of defence being all qualified admissions will not accrue to the benefit of the plaintiff in establishing his case. The plaintiff's case will be considered only on the evidence of the only witness at the hearing, the plaintiff, and the documents produced as exhibits.

The plaintiffs' testimony in court to prove the payment of the sum of Swiss Francs 26000, which is equivalent to Seychelles Rupees 93,181.40, to the defendant was objected to by counsel for the defence on the provisions of article 1341 of the Civil Code in the absence of any writing.

This Court in a ruling delivered on 28 January 1998 recorded the reasons and permitted oral evidence in proof of the matter, the value of which exceeded R5000, admitted as providing initial proof required under article 1347 of the Civil Code, which makes article 1341 inapplicable.

The plaintiff in his evidence said that he knew the defendant when she was working for

a bank in Switzerland for about 4 to 5 years from 1980. After she left Switzerland in 1991, when he was on vacation with his girlfriend in Mauritius, they had visited Seychelles during the month of April or May. While on Praslin he had seen the defendant's telephone number in the directory and called the defendant on the phone, to learn that she has purchased a guest house called 'Colibri' in Praslin. She had then given him her telephone number and her address. When he returned to France the plaintiff had written a letter to her, to which he received a reply in exhibit P 1 of 20 May 1991.

At the hearing the defendant did not challenge the plaintiff's evidence to the effect that the letter of 20 May 1991 (exhibit P1) was by the defendant.

The translation of P1 recorded in the proceedings without any objection is as follows;

"Thank you for your charming letter. As I have told you before I am giving the photographs of that wonderful place. But what work! I do not know what to do. There is much work for me to do and I need some money. I have spent so much to invest. That has been very difficult and I am asking you, me, who has never asked you anything to help me financially if you please to finish the project. I am not asking you for more details. I will explain to you everything on the phone. If truly you can help me, I would require something between 7000 or 8000 Swiss Francs. I am praying you Michel that I am not joking. If you decide I will give you, my account number in Praslin, Barclays Bank Account No 301049536 Colibri Guest House. Thank you in advance. Even a thousand thanks. I will explain everything to you on the phone. I think we can do quite a few things with the Colibri. Hence, very soon and I kiss you and I think very often at this coincidence of having finding me by a mere chance like this. Big kiss" (Emphasis added)".

After the receipt of this letter the plaintiff said that he did not act upon it until he received a telephone call from the defendant. He had then agreed to give her money. In the first instance the defendant has asked for five thousand Swiss Francs to be returned, or for him to spend a month vacation at her guest house for the money advanced. The plaintiff thereafter had transferred 5000 Swiss Francs on 24 June 1991 and had visited the defendant in October 1991. This was followed by three further transfers, 10,000 Swiss Francs on 27 November 1991, , 8000 Swiss Francs on 13 December 1991, , and 3000 Swiss Francs on 13 January 1992. . With each transfer he says that he enclosed a letter stating the words, 'for our future working together'. On his visit in October the plaintiff has brought articles at her request to the value of 1000 Swiss Francs and had stayed at the defendant's guest house, for which he had made no payments. The witness had stopped making further remittances when he had become aware of the sale of the guest house by the defendant.

The plaintiff under cross-examination revealed that he intended to invest half of the 100,000 Swiss Francs the defendant required to complete the project by building

bungalows. He went on to say that he intended to be a share holder owning 50% of the shares. On his visit in October, when he had asked the defendant to obtain the services of a lawyer to execute a written agreement, she had informed him that her lawyer was out of the Republic. He also expressed that he continued to transfer funds to the defendant in spite of the written agreement not being executed, on account of his trust placed in the defendant.

Counsel for the defendant highlighted in his cross-examination that the plaintiff had stated at the earlier hearing contrary to the evidence given before this Court, that the plaintiff has attributed his refusal to remit any more funds to the defendants' failure to certify in writing the receipt of funds and the agreement to his participation in the guest house project.

The plaintiff under cross-examination vehemently denied that he had an amorous relationship with the defendant and that the transfer of 26000 Swiss Francs was a gift to her. The plaintiff, being confronted with the fact that on his visit to Seychelles in May 1991 he was accompanied by his girlfriend but not in October 1991, explained that it was due to his girlfriend not having any leave from work to join him. I can find no reason for the plaintiff to make a deliberate untrue statement in respect of his terminating the transfer of funds to the defendant. Even if the plaintiff acted on the refusal of the defendant to provide him with an agreement in writing, as requested by him, to cease transferring further funds, I consider that the contradiction is not material and does not affect the credibility of the witness on the ground that it could be due to human error and lapses of memory. As the defendant never claimed a breach of contract on the part of the plaintiff the contradiction is of no material bearing to the plaintiff's case.

On the evidence of the plaintiff, uncontroverted by the defendant at the hearing, and on the consistency of the evidence with the relevant pleadings of both parties before the Court, the transfer of a sum of 26000 Swiss Francs to the defendant for her guest house project called 'Colibri' and that the letter dated 20 May 1991 was written by the Defendant (exhibit P1) are considered established on a balance of probabilities.

What is in issue and what was specifically denied by the defendant's pleadings is the assertion of the plaintiff that the aforesaid funds were transferred to the defendant on the promise of his participation in the said project.

In the absence of any evidence led for the defendant before the Court it is only in her pleadings and in cross-examination of the plaintiff that it was suggested that the amorous relationship between the parties caused the plaintiff to gift the 26000 Swiss Francs to the defendant. The plaintiff's visit to Seychelles without his girlfriend and staying with the defendant at the guest house is not conclusive evidence of the plaintiff's willingness to part with the money transferred without any conditions. The plaintiff disclosed in evidence that in addition to the transfer of funds, as referred to in paragraph 4 of the statement of defence he brought with him in October 1991 gifts for the defendant as well as for her friend to the value of 1000 Swiss Francs. He also testified

that at his expense during his stay at the guest house he flew to Victoria from Praslin to do shopping for her. Such conduct on the part of the plaintiff cannot be consistent with the defendants' averment in her statement of defence of a friend who contributes a large sum of money only for his occupation of the guest house and for the hospitality extended to him by the defendant free of charge. Although the defendant pleads that they were lovers from 1991 until March 1992, the evidence of the plaintiff only reveals that he stayed with her in the guest house in October 1991 for about 3 weeks, and he conceded that the 5000 Swiss Francs transferred in June 1991 was sufficient to meet the cost of lodging with full board at the guest house of the defendant. The plaintiff in fact admitted that the first transfer was made before the agreement for participation in the project, and that the defendant undertook either to provide him a vacation at the guest house free of charge or to refund the said amount. I therefore conclude that from the plaintiff's claim on the contact between the parties for the plaintiffs' participation in the project, the first transfer of 5000 Swiss Francs should be deducted, in view of the board and lodging provided to him at the guest house in October 1991, as well as for the reason that the transfer was prior to the alleged agreement.

The principal issue between the parties before the Court arose on the plaintiffs' assertion of a contract for participation in the guest house project for the contributions made by him after October 1991.

Apart from the plaintiffs' uncontroverted evidence before the Court, the letter written by the defendant on 20 May 1991 (exhibit P1) is considered for the determination of the issue. The letter P1 refers to the plaintiff having made contact with her by chance and that she has never asked him for anything in the past. In my view such references do not support the defendant's claim of the parties having had an earlier intimate relationship, which, if it happened at all, on the evidence was restricted to the period he spent at the guest house 'Colibri' in October 1991.

In the same letter (exhibit P1), statements of the nature of, "I am not asking you for more details", "I will explain everything on the phone" and "I think we can do quite a few things with the Colibri" in my view only suggest that neither the defendant nor the plaintiff were dealing with a future donation. It is my considered opinion that the sentence "I am not asking you for more details" can only mean that the plaintiff has laid down conditions for funds to be made available, which may not have been fully agreed upon at that stage. Her assurance that "I think we can do quite a few things with the Colibri" convey the inference that the defendant was thinking of the plaintiffs' involvement in the 'Colibri' project. The sentence "I will explain everything on the phone" in exhibit P1 cannot arise in relation to the request of the defendant for funds, if as she avers that whatever transfers made were meant to be donations and to be set off against his visits to the guest house. I therefore conclude that the contents of exhibit P1 very clearly and very distinctly establish that neither the plaintiff nor the defendant was considering a pure and a simple gift to assist the defendant. According to the available evidence the plaintiff spent not more than 3 weeks in Praslin with the defendant and during the said period he had sought to formalise their agreement but with no success on account of the non-availability of the defendant's attorney. His answer to counsel for

the defendant on cross-examination was that he left Seychelles in October 1991 without achieving his goal and continued to transfer funds, on account of the trust that he had in the defendant. In any event there is no evidence to suggest that the defendant changed her mind expressed on exhibit P1 after his visit to her guest house in October 1991. It is also observed that evidence has failed to establish that the plaintiff's visit to, and stay at the 'Colibri' was for any other purpose other than for his business interest in the intended joint venture. The defendant's contention that the parties were involved in an amorous relationship was never established before Court.

As rightly pointed out by counsel for the defendant, the plaintiff in his pleadings claimed that the funds were transferred to the defendant on the promise of his participation in the guest house project, but in answer to a request by the defence the nature of participation was described as a share in the business and a proposal to join the defendant in December 1992. In cross-examination the plaintiff expressed that he intended to hold 50% of the shares of a company to be formed to run the guest house. It was the contention of counsel for the defendant, in view of the Immovable Property (Transfer Restriction) Act, that for the plaintiff as a non-Seychellois to possess shares in a local company owning immovable property he had to obtain the sanction of the government. I cannot but agree with counsel for the Plaintiff that the parties had not reached that stage to seek government sanction before the guest house was sold by the defendant, and as a result giving any shares to the plaintiff in the project was put beyond any contention.

There is no doubt that the plaintiff had to establish a contract between the parties for him to succeed with his claim before court.

It is evidence that the parties never saw an attorney-at-law to discuss the terms of the contract for the plaintiff to participate in the guest house project, which explains the inability of the plaintiff to specifically state the nature of participation agreed upon. However as referred to earlier on evidence before this Court, the plaintiff's transfer of funds after his visit to Praslin in October 1991 amounting to 21000 Swiss Francs was made on the agreement that the plaintiff will have the right of participation in the guest house project. The evidence of the plaintiff and the intentions of the parties manifest in the defendant's letter (exhibit P1) establish that the offer and acceptance between the parties depict their consent to enter into a contract for the plaintiff to contribute the said funds and for the defendant to permit the plaintiff to participate in the business of the guest house project. The capacity of the parties to contract is not questioned by the defendant. The evidence of the plaintiff and the contents of the defendant's letter P1 reveal that the object of the contract was to make funds available to the defendant to complete her construction work and the plaintiff to participate in the guest house project of 'Colibri'. In spite of the fact that even if the plaintiff, being a non-Seychellois, needed the sanction of the government to engage in business that involved immovable property under the Immovable Property (Transfer Restriction) Act (Cap 95), no grounds exist to rule that the agreement was against public policy or that the object was unlawful. As the agreement preceded the determination of the plaintiff's method of participation in the project, it is necessary to conclude that the parties were alive to the requirement of

government sanction and the attendant uncertainty. I therefore find that it is inherent in the contract, the inference that if the plaintiff's participation in the project becomes impossible on account of the government refusing the necessary sanction, that the defendant was obliged to return the plaintiff's contribution of funds.

I therefore conclude that the parties to the action did enter into a contract when the plaintiff agreed to transfer 50,000 Swiss Francs to the defendant on the defendant giving him participation in the business project of a guest house called 'Colibri', and the defendant accepting the said offer. In spite of the fact that the parties had to agree to the specific terms of the plaintiff's participation, the defendant having accepted the offer acknowledged by the acceptance of the funds, her contractual obligations were established. The defendant having offered the plaintiff participation in the project for his contribution of funds has bound herself to give the plaintiff participation in the project and in the event of failure to do so due to any statutory provisions, she was liable to refund the funds when the contract became impossible to perform. It is an implied term of the contract that if the defendant was unable to give the plaintiff participation in the guest house project for whatever reason, the defendant was obliged to return the funds in the absence of any express term to the contrary.

The defendant on the other hand as testified to by the plaintiff sold the guest house 'Colibri' in breach of the contract by causing the performance of the contract to become impossible.

I therefore hold that on a balance of probabilities the defendant is in breach of contract by the sale of the guest house causing loss and damage to the Plaintiff in the said sum of R21,000.

The plaintiff is not entitled to any moral damages as the contract provides none. (See *Firma SAI etc and another v Hotel des Seychelles* (1978 to 1982) SCAR 122)

I therefore enter judgment for the plaintiff against the defendant in a sum of Seychelles Rupees 21000 x 3.5839 (at Rs 3.5839 per Swiss Franc) with interests and costs.

Record: Civil Side No 25 of 1993