

**Albert v Carolla
(2004) SLR 88**

Charles LUCAS for the Plaintiff
John RENAUD for the Defendant

Ruling delivered on 9 February 2004 by:

ALLEEAR CJ: Reyma Albert, of Montagne Posee Mahe, sued Terry Carolla, of Mont Buxton, Mahe, claiming a total sum of R125,000 with interests at the commercial rate and costs.

The suit was filed on 22 May 2000. The defence was filed on 12 March 2001. The case was then set for hearing. On several occasions the hearing was postponed for one reason or another. Eventually, a hearing date was set for 13 January 2003. On that day, Mr. Bonte representing the Defendant sought and obtained leave from the Court to withdraw from the case.

On 13 January 2003, on motion of Mr. Lucas for an ex parte hearing, the Court was satisfied that the Defendant on at least two occasions failed to appear in Court and leave was given to Mr. Lucas to proceed ex parte. Judgment was to be delivered on 7 February 2003.

On 10 February 2003, Mr. J. Renaud on behalf of the Defendant moved the Court for an order that "the order/or hearing the case be vacated and the Applicant be given leave to defend the action on the young that he did not know of the actual date fixed for the hearing having been wrongly informed".

At the hearing of the motion of the Defendant, Mr. C. Lucas for the Plaintiff intervened to query under which section of the Civil Procedure Code the Defendant's motion was grounded. In reply, Mr. J. Renaud stated that what the Defendant was in fact asking the Court was to allow him to defend the action after it had been tried ex parte.

Mr. J. Renaud submitted that all that he was seeking from the Court was that the judgment in the action be not delivered and the hearing ex parte be set aside so as to enable the Defendant to defend the action.

Mr. C. Lucas resisted the motion on the ground that it had no basis in law. Section 65 of the Seychelles Code of Civil Procedure, Cap 213 provides:

If on the day so fixed in the summons when the case is called on the Plaintiff appears but the Defendant does not appear or sufficiently excuse his absence, the Court, after due proof of the service of the summons, may proceed to the hearing of the suit and may give judgment in the

absence of the Defendant, or may adjourn the hearing of the suit ex parte.

Section 66 is expressed in the following terms:

If the Court has adjourned the hearing of the suit ex parte, and the Defendant, at or before such hearing, appears and assigns good cause for his previous non appearance, he may, upon such terms as the Court directs as to costs or otherwise, be heard in answer to the suit as if he had appeared on the day fixed for his appearance.

Section 69 of the Seychelles Code of Civil Procedure provides for the setting aside of judgment given ex parte:

if in any case where one party does not appear on the day fixed in the summons, judgment has been given by the Court, the party against whom judgment has been given may apply to the Court to set it aside by motion made within one month after the date of the judgment if the case has been dismissed, or within one month after execution has been effected if judgment has been given against the Defendant, and if he satisfies the Court that the summons was not duly served or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall set aside the judgment upon such terms as to costs, payment into Court or otherwise as it thinks fit and shall order the suit to be restored to the list of cases for hearing. Notice of such motion shall be given to the other side.

As Mr. C. Lucas rightly points out, there is no provision in our law which permits a motion to be made after an ex parte hearing but before judgment is delivered for the said judgment not to be delivered and to allow the Defendant the opportunity to defend the action which he failed to do.

I am accordingly of the opinion that this motion is premature. The Defendant has to wait for the delivery of judgment after which he can come to Court and seek to set it aside.

Record: Civil Side No 147 of 2000