

IN THE COURT OF APPEAL OF SEYCHELLES

Reportable

[2020] SCCA ...
SCA 43/2017

In the matter between

MARISA BANTELE-LEFEVRE
(rep. by Mr Divino Sabino)

Appellant

and

VERONICA LANZA
(rep. by Miss Alexandra Benoiton)

Respondent

Neutral Citation: *Bantele-Lefevre v Lanza* (SCA 43/2017) [2020] SCCA 16 October
2020

Before: Fernando (PCA), Twomey (JA), Robinson (JA)

Summary: Judgment by consent: section 131 of the Seychelles Code of Civil Procedure is the procedure for entering a judgment by consent - the procedure obtained in French jurisprudence with respect to a *contrat judiciaire* is not analogous to the procedure contained in section 131 - a judgment by consent entered under section 131 is an enforceable judgment of the court - a judgment by consent is subjected to the provisions of the law which apply to appeals from a judgment at first instance; the judgment cannot be challenged on the ground that the court has reached a wrong conclusion on the evidence, where the court has not adjudicated on the evidence - the avenue is also open to a party to go to the Supreme Court by way of plaint to set aside the judgment, where there are grounds to set it aside. Appeal is allowed.

Delivered: 16 October 2020

ORDER

1. The Appeal is allowed.
2. The Supreme Court Ruling of 4 September 2017 and the Court Order of 16 May 2018 are quashed in their entirety
3. The case is remitted to the Supreme Court, before the same learned Judge, to be either heard afresh or for the court to enter a judgment by consent in terms of section 131 of the Seychelles Code of Civil Procedure, as the case may be.
4. A copy of this judgment shall be sent to the Land Registrar, forthwith.
No order as to costs is made

JUDGMENT

F. Robinson (J.A)

1. This is an appeal to set aside "*the conditions on the termination of the right of way*" ordered by a learned Judge in paragraph [4] of his ruling of 4 September 2017, hereinafter referred to as "*The Ruling*". The Ruling is expressed to have been made according to the agreement of the respondent and the appellant in the course of court proceedings in a matter wherein the appellant, was the respondent, and the respondent was the petitioner. The appellant is also asking the Court of Appeal of Seychelles for costs and to make any other order that the Court of Appeal sees fit.

The proceedings before the Supreme Court

2. Veronica Lanza, the respondent, who is the aunt of Marisa Bantele-Lefevre, the appellant, made an application to the Supreme Court by way of petition supported by affidavit, under section 107 (2) of the Immovable Property Judicial Sales Act Chapter 94, for parcel V4648 situated at Beau Vallon, Mahe, Seychelles, of the extent of 648 square metres (hereinafter referred to as the "*Property*"), to be divided in kind between them.
3. AH-KONG Land Surveys had divided the Property into two parcels (parcel V18928 and parcel V18929) as illustrated on a plan drawn up in January 2013, showing the proposed subdivision of the land comprised in the title no V4650 (*sic*), situated at Beau Vallon, Mahe. It is common cause that parcels V18928 and V18929 are sub-divisions of the Property.
4. The appellant's answer to the application objected to the division in kind on the basis that the plan of AH-KONG Land Surveys did not illustrate a right of way. The appellant pleaded that a new plan should be drawn up, setting out a right of way across the property for vehicle access to and from the public road.

5. In the course of the respondent's examination-in-chief, the respondent and the appellant through their respective Counsel agreed to settle the matter, upon which the testimony of the respondent was discontinued.
6. After that, Veronique Bridgitte Lanza, the daughter of the respondent, testifying on behalf of the respondent, testified in-chief to the effect that she is the owner of parcel V5587, and that she is desirous of giving a right of way across parcel V5587 to parcels V18928 and V18929. She tendered in evidence, a document, dated 4 September 2017, exhibit P7, which contained the conditions to which the proposed right of way would be subjected.
7. In the course of the testimony of Veronique Bridgitte Lanza in-chief, the learned Judge entered the discourse —

"COURT CONTINUES

[...]

Q. Do you wish these conditions to be entered as restrictions under the relevant provisions of the Land Registration Act?

A. Yes.

Court: Any other witnesses, Mrs Benoiton?

A. Mrs Benoiton: No, my lord.

Court: So, what do the parties propose now?

Mr Bonte: Now I would like the Court to enter judgment in favour of the granting of the right of way.

Court: As per the consent of the Court today

Court: So I will reserve judgment?

Mr Bonte: Yes".

8. After that, the learned Judge, in The Ruling, made orders based on the agreement of the respondent and the appellant that parcels V18929 and V18928 would benefit from a right of way across parcel V5587. The record of proceedings revealed that the appellant did not testify. It is worthy of note that the learned Judge referred briefly to the testimony of

Veronique Bridgitte Lanza in The Ruling. He proceeded to find, based on the agreement of the respondent and the appellant, that this right of way would disenclave parcels V18929 and V18928. Further, the learned Judge stated in The Ruling — "[1]... [i]t was agreed that it will dispose of the cause of action filed between the parties to their full and final satisfaction, and that they would be bound by any ruling of this Court to that effect". He proceeded to make the following orders —

"[3] The Court therefore orders that as of today a right of way will henceforth exist encumbering Parcel V5587 belonging to Ms Veronique Christina Lanza in favour of parcel V18928 and V18929, belonging to the Petitioner and the Respondent, respectively.

[4] The "assiette de passage" of this right of way will exist starting from the disused Beau Vallon beach front road now known as (the Golden Mile Promenade) and it will end at Parcel V18929. This right of way is subject to the following conditions (a) It shall be a motorable and pedestrian used right of way only for the private use of parcels V18928 and V18929 (b) This right of way would end if Mrs Marisa Bantele Lefevre decides to transfer parcel V18929 onto any other persons or amalgamate the said parcel to any other parcels.

[5] The Land Registrar is ordered to enter this right of way as an encumbrance a restriction against parcel 5587 in favour of Parcel V18925 and V18929 accordingly

[6] I make no order as to cost".

The appeal proceedings

9. The appellant has appealed against *"the conditions on the termination of the right of way"* ordered by the learned Judge in paragraph [4] of The Ruling, on two grounds —

"(1) The Learned Judge erred in setting the conditions on the right of way as such conditions would render parcel V18929 enclaved.

(2) The Learned Judge erred in setting right of way conditions that are based in personam instead of in rem."

10. At the appeal on the 5 August 2020, Counsel for the respondent informed us that the respondent had filed an *ex parte* application, MA64/2018, before the Supreme Court, on the 12 March 2018, to amend The Ruling, and that the learned Judge had granted the application. For his part, Counsel for the appellant informed us that he was unaware of the

said application, and requested an adjournment to consider the appellant's position in light of this information. As we were also unaware of the existence of the application, we viewed it necessary to grant Counsel's application for an adjournment.

11. At the hearing of the appeal on the 29 September 2020, Counsel for the appellant informed us that the Court Order of 16 May 2018, did not affect the rights of the appellant and had no bearing on the issues to be decided at the appeal.
12. I note that the *ex parte* application had asked the learned Judge to order the Land Registrar to register parcels V18928 and V18929 in the names of the respondent and the appellant, respectively. The learned Judge by Court Order of 16 May 2018, had amended The Ruling, by ordering the Land Registrar to "*register property V18928 in the name of Veronica Lanza and property V18929 be registered in the name of Marisa-Bantele-Lefevre*".
13. It is against this background that I consider the merits of the appeal.
14. After having scrutinised The Ruling and the record of proceedings, I have noted that the learned Judge had made orders in The Ruling, which encapsulated the agreement of the respondent and the appellant, but had not adjudicated on any evidence. I observe that the grounds of appeal and the heads of argument submitted on behalf of the appellant challenged "*the conditions on the termination of the right of way*", ordered by the learned Judge in paragraph [4] of The Ruling, on the basis that he had reached wrong conclusions. In light of this curious situation, I have identified the issue to be whether or not the procedure adopted by the learned Judge in the present case was legally correct. Before I consider the question at issue, I turn to the law of Seychelles dealing with the procedure for entering a judgment by consent, which will assist a better understanding of the issue for consideration.
15. It is settled law that the procedure for entering a judgment by consent under the law of Seychelles is contained in section 131 of the Seychelles Code of Civil Procedure, which provides — "*131. The parties may at any stage of the suit before judgment, appear in court*

and file a judgment by consent signed by both parties, stating the terms and conditions agreed upon between them in settlement of the suit and the amount, if any, to be paid by either party to the other and the court, unless it sees cause not to do so, shall give judgment in accordance with such settlement" see, for example, the Court of Appeal case of *Gill v Freminot and anor SCA 4 of 2006* (29 November 2006). I respectfully adopt the pronouncement in **Gill**, *supra*, and opine that it removes much of the misunderstanding about the procedure for entering a judgment by consent, which has prevailed in this jurisdiction.

16. I pause there to consider the pronouncement of the Court of Appeal in *Jessley Cecile v M. T. Rose & Ors SCA 8 of 2009* (14 August 2009) and **Gill**, *supra*, in which the Court of Appeal opined — "*the court agreement reached between the parties to a dispute [under section 131 of the Seychelles Code of Civil Procedure] results in a "contrat judiciaire"*". I respectfully disagree with this pronouncement. I give reasons as to why I disagree.
17. In **Jessley Cecile**, *supra*, the Court of Appeal's pronouncement was supported by the French Jurisprudence and Doctrine. The Court of Appeal stated at paragraphs [29] and [30] of **Jessley Cecile**, *supra* —

"[29] On these matters, We are comforted to read identical pronouncement from French Courts as may be gathered from Dalloz, Contrats et Conventions, Jugements et Arrêts, 2673, at para 238:

"Le contrat judiciaire (suppose) un accord entre les parties constate par le juge....." ¹ Cass. Soc. 19 juin 1958: J. C. P. 58, IV, ed. G., 113; Bull. Civ. IV, no. 753, p. 559)

[30] The above proposition of law expressed by French jurists on the decisions of the Cour de Cassation we regard as persuasive authority for our jurisdiction. As may be seen at para. 238. (ibid), French Jurisprudence and Doctrine are also agreed that:

"Lorsque, par conclusions régulièrement signifiées, le défendeur a déclaré accepter la demande et a demandé acte de son offre, il y a eu entre les

¹ *Unofficial translation: "The judicial contract (supposes) an agreement between the parties viewed by the judge..."*

*parties échange des consentements dans les conditions qui mettent fin au litige et le tribunal ne peut que consacrer cet accord:*²

Trib. Gr. Inst. Seine 5 mai 1961: Gaz. Pal. 1961, 2, 341)." Verbatim

18. The French Jurisprudence and Doctrine referred to in paragraph [17] hereof, are agreed that the two fundamental elements required for the formation of a *contrat judiciaire* are the *convention* of the parties and the *constatation* by the *juge*. The role of the *juge* is to *donner acte*³ to the agreement of the parties *Dalloz Répertoire de Procédure Civile et Commerciale Tome I Absence - Exploit Paris Jurisprudence Générale Dalloz Contrat Judiciaire n° 21* at page 676, states —

*"21. [...]. Le juge joue alors le rôle d'un officier public, tel un notaire. Il suffit de sa signature et de celle du greffier pour parfaire le contrat. La signature des parties n'est pas nécessaires (Req. 28 mars 1866, D. P. 66. 1. 494 ; Civ. 9 avr. 1866, D. P. 67. 1. 327 ; 21 mars 1882, D. P. 83. 1. 214; [...]. En outre, la décision ne comporte pas à proprement parler de motifs; le juge se borne à rappeler les éléments de l'accord intervenue entre les parties et leur en donne acte dans le dispositifs".*⁴ Emphasis supplied

Concerning this procedure, French Jurisprudence and Doctrine, as gathered from *Dalloz Répertoire de Procédure Civile et Commerciale*⁵ n^{os} 21, 22, 25, are agreed that the *convention* of the parties prevails, and that as a *convention*, the *contrat judiciaire*, in principle, is submitted to the rules of contract and binds the parties as a *convention ordinaire*: see *Civ. 19 mars 1879, S.P. 79. 1. 180 ; V. également Civ. 24 juill. 1867, D. P. 67. 1. 327*. In addition, as a *convention*, a *contrat judiciaire* takes effect only between the parties to it. It is also worthy of note, as stated in *Dalloz Répertoire de Procédure Civile et Commerciale*⁶ n° 29, that "... [l]e *contrat* peut être attaqué par la voie en nullité, notamment pour cause d'erreur (Orléans, 11 juill. 1950, Rép. Commaille 1950. 2.

² *Unofficial translation*: "Where the defendant has declared that he has accepted the *demand* and has requested deed of his offer, there has been an exchange of consent between the parties concerned under the conditions which put an end to the dispute and the court can only consecrate this agreement."

³ *Unofficial translation*: "to register the agreement of the parties"

⁴ *Unofficial translation*: "The judge then plays the role of a public officer, much like a notary. His signature and that of the Registrar suffice to complete the contract. Signatures of the parties concerned are not necessary. In addition, the decision does not, strictly speaking, contain or address reasons; the judge confines himself to recalling the elements of the agreement reached between the parties and acknowledges them in the dispositifs"

⁵ *Op. cit.*

⁶ *Op. cit.*

18061").⁷ Hence, an "*action en nullité [dirigée contre la convention-elle-meme]* suffit à faire tomber le contrat judiciaire"⁸: see *Touen*, 11 mars 1910, S. P. 1911. 2. 140 ; *Req.* 29 avr. 1931. 1. 123, note E. P. ; 24 févr. 1932, *Rec. Sirey* 1932. 1. 152 ; *CUCHE et VINCENT*, n° 75 ; *Morel*, n° 554. Emphasis supplied

19. After a careful reading of the French Jurisprudence and Doctrine and section 131 of the Seychelles Code of Civil Procedure, I opine that the procedure obtained in French jurisprudence is not analogous to the procedure contained in section 131 of the Seychelles Code of Civil Procedure. Under section 131 of the Seychelles Code of Civil Procedure, the role of the court is to enter a judgment by consent in accordance with the settlement of the parties. Thus, the settlement of the parties entered as a judgment by consent, under section 131 of the Seychelles Code of Civil Procedure, becomes an enforceable judgment of the court⁹.
20. It follows, therefore, that, as a judgment of the court, it is subjected to the provisions of the law which apply to appeals from a judgment at first instance, although with an essential exception. Where the court has not adjudicated on the evidence, its judgment cannot be challenged on appeal on the ground that the court has reached a wrong conclusion on the evidence before it. This conclusion should not be construed as suggesting that there is no right of appeal as of right. Nonetheless, where there are grounds to set aside a judgment by consent entered, I ought to conclude that the avenue open to a party would be to go to the Supreme Court by way of plaint (fresh action) to set aside the judgment by consent.
21. I now turn to the grounds of appeal. In light of the above analysis, I conclude that the procedure adopted by the learned Judge, in this case, is unknown to the law of Seychelles and should not be followed. As mentioned in paragraph [15] hereof, it is settled law that the procedure for entering a *judgment by consent* is provided under section 131 of the Seychelles Code of Civil Procedure. I mention in passing that this judgment did not

⁷ *Unofficial translation*: "... a party could ask for the nullity of the contract, on the ground of error"


⁸ *Unofficial translation* "... a nullity action [directed against the convention itself] suffices to get rid of the contract."

⁹ See *Pardiwalla v Pardiwalla* 1993 SLR 126, in which the Supreme Court held that — "*the judgment by consent was in effect a contract binding on the parties which had become an enforceable judgment of the Court*". I agree.

consider the question of whether or not the procedure obtained in French jurisprudence finds application in Seychelles.

22. Therefore, having come to the conclusion stated in paragraph [21] hereof, I conclude that the contentions contained in the two grounds of appeal do not arise for consideration.

The Decision

23. For the reasons stated above, I allow the appeal but for the reason that the procedure adopted by the learned Judge is unknown to the law of Seychelles, which consequently rendered the ruling of 4 September 2017, null, 
24. I quash the ruling of 4 September 2017 (The Ruling) and the Court Order of 16 May 2018, of the learned Judge, in their entirety, and remit the case to the Supreme Court, before the same learned Judge, to be either heard afresh or for the court to enter a judgment by consent in terms of section 131 of the Seychelles Code of Civil Procedure, as the case may be. A copy of this judgment shall be sent to the Land Registrar, forthwith.
25. I do not make an award as to costs.

Signed, dated and delivered at Ile du Port on 16 October 2020

Robinson Justice of Appeal



I concur : Fernando President



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Reportable

[2020] SCCA ...
SCA 43/2017

In the matter between

MARISA BANTELE-LEFEVRE
(*rep. by Divino Sabino*)

Appellant

and

VERONICA LANZA
(*rep. by Alexandra Benoiton*)

Respondent

Neutral Citation: *Bantele-Lefevre v Lanza* (SCA 43/2017) [2020] SCCA 16 October
2020

Before: Fernando (PCA), Twomey (JA), Robinson (JA)

Summary: Judgment by consent: judgment entered by the court suo sponte and not
reflective of parties' intention – setting aside by appeal- right of way is a right
in rem and applies to the dominant tenement and not a person

Delivered: 16 October 2020

ORDER

The Supreme Court Order of 16 May 2018 is set aside and the case is remitted to the Supreme Court for rehearing or for entering judgment by consent in terms of section 131 of the Seychelles Code of Civil Procedure.

JUDGMENT

M. Twomey (J.A)

1. I have read my sister JA Robinson's judgment and I am largely in agreement with her findings on the facts, the law and the ensuing orders in the instant appeal.
2. My views however on the "judgment by consent" entered by the learned trial judge are of a different nature. I reserve my opinion on whether a judgment by consent and a *contrat*

judiciaire are different and whether the latter is applicable in our jurisdiction as I am not of the view that this debate or its resolution is determinative of the issues raised in the present appeal.

3. It is common ground that in the course of proceedings the Respondent's daughter testifying on the Respondent's behalf indicated she was desirous of giving a right of way across Parcel V5587 to Parcels V18928 and V18929. In this regard, she tendered in evidence, a document, dated 4 September 2017, exhibit P7, which contained the conditions to which the proposed right of way would be subjected.
4. It is also common ground that the learned trial judge then enquired of the parties what their wishes were. The Respondent indicated that they wished the right of way to be granted in accordance with conditions they had stated in Exhibit P7 whereas the Appellant simply stated that they wanted a right of way granted.
5. Subsequently the learned trial Judge, in his orders granted a right of way as proposed by the Respondent and subject to the condition, inter alia, that the "*right of way would end if Mrs Marisa Bantele Lefevre decides to transfer parcel V18929 onto any other persons or amalgamate the said parcel to any other parcels.*"
6. It is clear from the transcript of proceedings and the submissions of the parties during the course of this appeal that there was no consensus *ad idem* on the agreement for a right of way; thus the judgment entered by the Court was not a judgment by consent of the parties but rather a judgment entered by the Court based on its interpretation of what the parties had agreed. This judgment was not only a foul the provisions of section 131 of the Seychelles Code of Civil Procedure but also a misrepresentation of the parties' common intention. Whether viewed as a *contrat judiciaire* or a judgment by consent it is clear that there was neither contract nor consent of the parties.

7. Moreover, the specific condition outlined above in paragraph 5 imposed on the right of way by the learned trial judge is not lawful as it limits the right of way impermissibly. Article 688 provides as follows:

“Easements are either continuous or discontinuous .Continuous are the easements the use of which continues or could continue without human intervention; such are water mains, drains, ancient lights and other easements of that kind.

Discontinuous are those which need human intervention for their use; such are rights of way, drawing water, grazing, and others of a similar kind. (Emphasis added)

8. A right of way binds a dominant tenement and not its ownership by a particular person (see Articles 697, 698, 701 of the Civil Code). The extinction of rights of way are provided by Articles 703 *et seq* of the Civil Code. There is *jurusprudence constante* that rights of way are rights *in rem* and not *in personam* (*Sinon v Dine* (2001) SLR 88, *Leite v Republic of Seychelles* (1981) SLR 191, *Barbier v Morin & Ors* (SCA 17/2017) (appeal from CS 28/2014) [2019] SCCA 37 (23 August 2019). In *Leite*, the Court of Appeal specifically held, *inter alia*, that an easement is a right granted in favour of a dominant tenement and not its owner, against a servient tenement and not its owner, and that it is a right appurtenant to the dominant tenement, and the benefit of such right accrues to the transferee or grantee of the dominant tenement. Hence, the right is appurtenant to properties and not to parties having ownership of the properties.
9. In the circumstances, I grant the appeal and quash the Court Order of 16 May 2018 of the learned Judge, in its entirety, and remit the case to the Supreme Court for rehearing or for entering a judgment by consent in terms of section 131 of the Seychelles Code of Civil Procedure, as the case may be.

Signed, dated and delivered at Ile du Port on 16 October 2020



M. Twomey
Justice of Appeal