

IN THE SEYCHELLES COURT OF APPEAL

[Coram: S. Domah (J.A) , M. Twomey (J.A) , J. Msoffe (J.A)]

Civil Appeal SCA 34/2013

(arising in Supreme Court Decision CS 347/2010)

Antonia Marie

Appellant

Versus

Lawrence Marie

1st Respondent

Valetta Marie

2nd Respondent

Heard: 03 August 2016

Counsel: S. Rajasundaram for the Appellant

Leslie Boniface for the Respondents

Delivered: 12 August 2016

JUDGMENT

M. Twomey (J.A)

[1] The Appellant appeals against the judgment of learned trial judge Burhan in which he dismissed a plaint to set aside a deed of transfer on the basis of *lesion* by the Respondents. Instead, the learned trial judge ordered that the sum of SR205, 000, being part of the unpaid balance of the purchase price for the land transferred by the Appellant to the Respondent, be paid to the Appellant by the Respondents together with interests and costs.

[2] The Appellant has now appealed against this decision on four grounds summarised as follows:

1. The learned judge failed to appreciate the settled law and the legal requirements of *lesion* for rescission of a sale.
2. The learned judge has failed to appreciate that two out of the three valuation reports submitted were uncontroverted.
3. The learned Judge findings on duress were *ultra petita*.
4. The learned judge erred in not appreciating that the intention of the transfer from the Appellant to the Respondents was for subdivision of the land.

[3] The facts of this case, ably summarised by the trial judge, are to the effect that the Appellant, being the mother of the 1st Respondent and mother-in-law of the 2nd Respondent, transferred the bare interest in Parcel J2987 to the Respondents on 15th January 2007. The registered deed of sale states the purchase price as being SR250, 000.

[4] It is the Appellant's contention that the aim of the transfer was to permit the Respondents to obtain a loan from HFC, a mortgage company, and that the land was to be subsequently divided and one of the subdivisions which would comprise the land where her house was situated to be transferred back to her.

[5] It is also her contention that she only received SR 45,000 for the transfer unlike what is stated in the transfer document and that the land was neither subdivided nor transferred to her as promised.

[6] The Respondents admitted only paying SR45, 000 to the Appellant. They stated that the only agreement was that the Appellant would transfer the land to them for the sum of SR50, 000 and that she would retain the usufruct of the land. The rest of the money was for the building of their house by loan granted from the mortgage company.

[7] The 1st Respondent also testified that the Appellant's land had previously been subdivided into two parcels – one parcel was transferred to the Respondents and the other to his younger sibling, Brian Marie. They were however unable to explain why the loan amount of SR250, 000 was paid to the Appellant and not to them.

Grounds 1 and 2

- [8] We shall treat the first two grounds of appeal together as they relate to one central issue, namely whether there was *lesion* suffered by the Appellant.
- [9] In his submissions on appeal, Mr. Rajasundaram for the Appellant stated that since the Appellant had produced three uncontroverted valuation reports to the court showing the inferior value of the land transferred to the Respondents, the Appellant is entitled to the subdivision of the land and transfer of the subdivided land to her. He has also submitted that given the size of the land (2,201 square metres), the sum of SR50, 000 paid by the Respondents for its transfer to them bears out the *lesion*.
- [10] Counsel for the Respondents, Mr. Boniface, has submitted that *lesion* had not been made out procedurally or substantively by the Appellant and that the claim for rescission was therefore rightly dismissed by the trial judge.
- [11] Lesion provides for limited judicial intervention in contractual agreements where an unfair advantage may have been availed of by one party. In this respect the Civil Code provides in relevant part:

Article 1118

1. If the contract reveals that the promise of one party is, in fact, out of all proportion to the promise of the other, the party who has a grievance may demand its rescission; provided that the circumstances reveal that some unfair advantage has been taken by one of the contracting parties. The loss to the party entitled to the action for lesion shall only be taken into account if it continues when the action is brought.

...

Article 1675

In order to establish whether there is a lesion of more than one half, the value of the property shall be calculated according to its condition at the time of the sale.

...

Article 1679

The Court shall not admit any claims that a contract is vitiated by lesion unless the plaintiff is able to make out a prima facie case that the circumstances are sufficiently serious to warrant an investigation by the Court.

Article 1680

To satisfy the Court that a prima facie case exists the plaintiff must submit a report by three experts who shall be bound to draw up a single report and to express an opinion by majority.

- [12] The provisions therefore provide procedural and substantive requirements to be observed where lesion of a sale is claimed.
- [13] In terms of the procedure to be adopted when a claim for *lesion* is made, Sauzier J in *Adrienne v Adrienne* (1978) SLR 88, set out the following steps to be pursued in terms of the provisions of Article 1679:

Before the plaintiff may be allowed to prove lesion it is necessary that she be granted permission to do so by the court in a preliminary judgement. Such permission however will not be granted unless the plaintiff has set out in her pleadings facts which are sufficiently probable (“vraisemblables”) and serious (“graves”) to allow the court to presume a prima facie case of lesion. It is not sufficient that those facts should only be alleged in the plaint. To found a prima facie case of lesion the facts alleged must also be supported by evidence...

- [14] *Adrienne* reiterates persuasive French authority in respect of the procedure for hearings involving claims of *lesion*. It is a two stage process:

134- La preuve de lésion se fait en deux étapes:

135-Tout d’abord le demandeur doit établir la probabilité de la lésion; c’est cette procédure, que prévoit l’article 1677 du Code civil (our article 1679)...

136- *Les tribunaux ont un pouvoir souverain pour admettre ou pour refuser que soit faite la preuve de la lésion, notamment si les faits articulés ne leurs paraissent ni assez vraisemblables ni assez graves pour faire presumer la lésion, ils peuvent rejeter la demande sans expertise*(Cass. req.20 déc. 1810:d. jur.gén., V^o Vente, n.1622...) (see Jurisclasseur Civil 1438-1707).

- [15] An interlocutory judgment on the issue of whether a case for *lesion* is made out is necessary before one can proceed to hear the matter on substantive issues. As pointed out by Sauzier J (in *Adrienne* supra), the essential elements that must be made out by evidence at that interlocutory hearing is whether the facts are probable and serious enough for the court to presume *lesion*. Then and only then can the case on *lesion* be heard, including the calling of experts for the valuation of the property sold.
- [16] In the recent case of *Houareau v Houareau* (2012) SLR 239, the Court of Appeal in a majority decision affirmed *Adrienne*, finding that the rules relating to establishing whether a prima facie case of *lesion* exists are imperative.
- [17] In the present case the Appellant pleaded *lesion* only at paragraph 12 of her Complaint in the alternative to a breach of contract. Indeed the main plank of her case is that the contract of sale between the parties was breached as the Respondents had agreed to subdivide the land subsequent to the transfer and then to re-convey the subdivided portion back to her. Only oral evidence of such agreement was produced by the Appellant.
- [18] No particulars of the *lesion* is made out including why the price paid by the Respondents is out of proportion with what was expected for the land in issue, bearing in mind the relationship between the parties and the fact that the usufruct of the property was retained by the Appellant.
- [19] *Lesion*, in our view, seems to have been afterthought to the case. It certainly cannot be an alternative to a case for breach of contract. Either the parties agreed the price for the sale of the land regardless of the fact that it was low in consideration of the subdivision taking place and the subsequent re-transfer of a subdivided portion to the Appellant or the price paid by the Respondents was so low as to evidence the unfair bargain, hence the *lesion* of

the sale and the rescission of the contract. They could have only had one intention, not both.

- [20] Having in any case failed to make out a case for *lesion*, the consideration of the valuation reports for the property did not arise and for this reason need not and did not trouble the learned trial judge. Grounds 1 and 2 of this appeal are therefore rejected.

Ground 3

- [21] The Appellant has submitted that the learned trial judge erred in considering duress when it was not pleaded.

- [22] It must be noted however, that it was the Appellant herself who led the evidence of duress in her testimony, in particular at P 13, of the record of proceedings:

Q. Did they apply for any loan from the Government or from Housing?

A. Loan was taken from Nouvobanq and it was there that I was forced; I do not know how to sign the paper.

Q. And you were forced to sign the paper?

A. Yes

...

Q. Because you were forced to sign the paper did you do any legal action (sic) against the defendants?

- [23] At this point the Respondents' Counsel intervened to object. The objection was upheld by the trial judge who asked the Appellant's Counsel to elect whether he wanted to proceed on the ground of breach of contract for non-payment of the contract price or duress. Counsel for the Appellant indicated that he was not proceeding on duress but this did not stop the Appellant from further testifying on the point. It is also noteworthy and troubling at the same time that Counsel for the Appellant had been the conveyancing attorney in this matter. The professional ethical issues raised by this fact are not lost on the Court.

[24] In this respect, we are of the view that the learned trial judge was correct in pronouncing on the issue as raised. He had this to say at page 5 of his decision:

I am not inclined to accept learned Counsel for the plaintiff's contention that the transfer was signed as a result of duress, considering the fact that the plaintiff had decided to file this case in 2010 somewhat belatedly, when the transfer was done in the year 2007. Further there is no allegation of duress in the pleadings of the plaintiff.

[25] We are therefore not of the view that the learned trial judge overlooked specific pleadings to render findings on duress. There is no merit in this ground of appeal and it is dismissed.

Ground 4

[26] The final ground of appeal concerns the quarrel the Appellant has with the trial judge finding that the sum of SR205,000 remained due and owing to the Appellant instead of confirming that there had been an agreement to subdivide and transfer a subdivision of the land to the Appellant.

[27] It is the Appellant's submission that given the size and valuation of the land it was clear that the intention of the parties was that Title J2987 was to be transferred to the Respondents and then divided with a portion of the land kept for their use and the other on which stood the 1st Respondent's house to be re- transferred to her.

[28] This submission however, is misconceived and unsustainable as it runs afoul the provisions of the Civil Code and the Land Registration Act relating to back letters.

[29] Article 1321 of the Civil Code provides:

1. *Back letters shall only take effect as between the contracting parties; they shall not be relied upon as regards third parties.*
2. *Where a third party has an interest in declaring null a contract affected by a back letter, he may apply to the Court to set aside the ostensible transaction.*
3. *Back letters purporting to show that the real consideration for the sale or exchange of immovable property or commercial property or office is greater than the consideration set down in the deed of sale or exchange, or that a gift inter vivos of immovable property,*

commercial property or office is in reality a sale, exchange, mortgage, transfer or charge, shall be deemed to be fraudulent and shall in law be of no force or avail whatsoever.

4. Any back letter or other deed, other than a back letter or deed as aforesaid, which purports to vary, amend or rescind any registered deed of or agreement for sale, transfer, exchange, mortgage, lease or charge or to show that any registered deed of or agreement for, or any part of any registered deed of or agreement for, sale, transfer, mortgage, lease or charge of or on any immovable property is simulated, shall in law be of no force or avail whatsoever unless it shall have been registered within six months from the date of the making of the deed or of agreement for sale, transfer, exchange, mortgage, lease or charge of or on the immovable property to which it refers.”(Emphasis ours)

[30] Section 82 (6) of The Land Registration Act contains mirror provisions. In relevant part in states:

“82.(1)Any counter letter (contrelettre) or other deed sous seing privé which purports to show that the real consideration for the sale or exchange of an immovable property, fonds de commerce, or ministerial office is greater than the consideration set down in the deed of sale or exchange, or that a donation inter vivos of an immovable property, fonds de commerce or ministerial office is in reality a sale, exchange, mortgage, transfer, or charge, shall be deemed to be fraudulent and shall in law be of no force or avail whatsoever.

(2)(a) Any counter letter or other deed other than a counter letter or deed as aforesaid which purports to vary, amend, or rescind any registered deed of or agreement (promesse) for sale, transfer, exchange, mortgage, lease or charge or to show that any registered deed of or agreement for, or any part of any registered deed of or agreement for, sale, transfer, mortgage, lease, or charge on any immovable property is simulated (simulé) shall in law be of no force or avail whatsoever unless it shall have been registered within six months from the date of the making of the deed or of agreement for sale, transfer, exchange, mortgage, lease, or charge of or on the immovable property to which it refers.

...

(4) The Supreme Court may, on the grounds of ignorance of the law due to illiteracy, fraud of any party not being the holder, incapacity of the holder due to unsoundness of mind, or

imprisonment of the holder at the appointed day, extend the maximum period within which a counter letter or other deed must be registered under this section for a further period not exceeding three months in the case of fraud, incapacity, unsoundness of mind or imprisonment at aforesaid, from the time of the discovery of the fraud or the termination of the incapacity or imprisonment and, in the case of ignorance of the law through illiteracy for such further period as the court may think reasonable under the circumstances.

...

(6)Articles 1321, 1322, 1323, 1324, 1326 and 1327 of the Civil Code of Seychelles in so far as they relate to the transactions mentioned in subsections (2), (3) and (4) of this shall be read subject to this section.(Emphasis ours).

[31] The cases of *Ruddenklau v Botel* (unreported) SCA 4/1995, *Hoareau v Hoareau* (unreported) SCA 38/1996, *Adonis v Larue* (unreported) SCA 39/1999, *Aarti Investments [Proprietary] Limited v Peter Padayachy and Anor* (unreported) SC 5/2012 and *Guy v Sedgwick and anor* [2014] SCCA comprise a long line of settled authority for the following principles:

1. Back-letters are admissible against agreements (subject to certain conditions) except where these agreements concern deeds relating to immovable property.

2. In such cases, a back-letter cannot be proved by oral testimony as it is a formal and not an evidentiary requirement.

*3. Written back-letters are only admissible where they have been registered within 6 months of the making of the deed or agreement relating to immovable property (see *Guy v Sedgwick and anor* (supra)).*

[32] The oral evidence of the Appellant relating to the agreement of both the alleged promised subdivision and re transfer to her cannot therefore be admitted against the written evidence contained in the title of transfer. The only agreement that the court was entitled to take into account in this case was the transfer document between the parties.

[33] It was precisely this finding that the learned trial judge came to at page 6 of his decision when he stated:

“Therefore whatever the price or portion the plaintiff or the defendants may state, the agreed price is documented in P1 and D10 is 250,000 for the entire parcel. In respect of the price of Parcel J2987, this court would rather rely on the price stated in the document... rather than evidence of either the plaintiff or the defendants...”

[34] Although the evidence at trial showed that the Appellant had only received SR39, 550 of the sale price of her land, with SR210, 450 owing, she only claimed SR205, 000 in her Plaintiff. In the circumstances the trial judge could only grant her the maximum of what she had claimed.

[35] We uphold his decision and do not disturb his award of SR 205,000 to be paid by the Respondents jointly with interests and costs from the date of transfer of the property.

[36] This appeal is without merit and is therefore dismissed in its entirety.

M. Twomey (J.A)

I concur:. S. Domah (J.A)

I concur:. J. Msoffe (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 12 August 2016