

**Delcy v Camille
(2002) SLR 84**

Frank CHANG SAM for the Plaintiff
Philippe BOULLE for the Defendant

Ruling delivered on 27 September 2002:

PERERA CJ: This ruling concerns the admissibility of oral evidence on a matter, the value of which exceeds R5000, as envisaged in Article 1341 of the Civil Code. The Plaintiff is the mother of the Defendant. There are three claims averred in the plaint. First, the Plaintiff avers that she was the holder of a Bank Account with Banque Nationale De Paris in Reunion, and at the material time had FF 300,000 to the credit of that account. She avers that by a letter of authority to the bank, she "authorised the Defendant to operate the account on her behalf". She also avers that there was an oral agreement between them that the Defendant would use the letter of authority, in particular for the purpose of withdrawing money from the account, upon specific instructions given by her. She acknowledges that FF 15,000 was withdrawn on instructions pursuant to that oral agreement, but alleges that the Defendant had withdrawn the balance FF 285,000 without any authorisation from her. The Defendant admits paragraph 3 of the plaint regarding the authorisation but avers that she operated the account on behalf of the Plaintiff for the reason that the account was in the name of the Plaintiff, she was the owner of the funds and operated the account for their own benefit.

Secondly, the Plaintiff avers that pursuant to another oral agreement that the Defendant will accommodate and maintain her during her lifetime, she deposited FF 200,000 in the name of the Defendant in an account with the same bank in Reunion. She avers that the Defendant has breached that oral agreement by not providing her with accommodation and maintenance, and hence she seeks a refund of the whole sum of FF 200,000.

Thirdly, she avers that she left a sum of R20,000 in the custody of the Defendant for the purposes of meeting her burial expenses, and that the Defendant has failed to return that amount though demanded.

The present ruling arises from replies given by the Plaintiff in the course of her examination in chief concerning the circumstances under which the Defendant was authorised to make withdrawals in respect of the first claim. The relevant question and answer, as recorded, are as follows:

- Q. Subsequent to your putting the money into the account, what happened afterwards?

- A. When the money was placed in the bank, it was not to be removed,

but in case something happens to me.

Mr Boulle, Learned Counsel for the Defendant objected to this reply as violating the provisions of Article 1341 as it explains the conditions of the withdrawal. Paragraph 4 of the plaint avers that withdrawals were to be upon specific instructions of the Plaintiff.

Objection was also raised on the same grounds in respect of the following reply given by the Plaintiff:

Q. Do you know how much money – how many times you asked your daughter to remove?

A. I asked my daughter to remove money on two occasions.

Q. Do you know what amounts?

A. For the first time I asked her to remove 10,000 but she removed 15,000.

Mr Boulle submitted that this was evidence of breach of instructions, and that since the amount was over R5000, oral evidence was not admissible pursuant to Article 1341.

Mr Chang Sam, Learned Counsel for the Plaintiff thereupon sought to establish on a voir dire, the moral impossibility of the Plaintiff to obtain written documents, which is an exception contained in Article 1348 to the Rule in Article 1341. At the voir dire, the Plaintiff testified that at the time of the oral agreement, she was living with the Defendant, who was her eldest child and that she trusted her as she had promised to her father before his death that she would look after her. The arrangement regarding the authority to be given to the Defendant was made in the presence of Mr Bernadin Renaud, who was her Attorney and a friend of the family. She further stated that the Defendant came to Mr Renaud's Office voluntarily. Mr Renaud, in his testimony stated that the Plaintiffs father was his former teacher and had later worked with him. He came to know the family very well. Mr Delcy asked him, before his death, to assist the family. Accordingly, Mrs Delcy always consulted him and obtained his advice and assistance on any matter. He further testified that the Plaintiff, the Defendant and her husband came to his office and discussed the arrangement concerning a certain sum of money in an account in Reunion. He acted as a friend of the family. He further stated that the question of a written document did not arise as he was aware of the closeness, of the relationship between the Defendant and his parents. On being questioned by Mr Chang Sam as to why, as a lawyer, he did not advise them to reduce the agreement to writing, Mr Renaud said that, because of the trust the family members shared, he did not consider it necessary to advise any writing. Cross-examined by Mr Boulle he stated that if he had advised them to draw up a document they would have agreed. Mr Renaud however said that he was a witness to the conversation regarding the arrangement to withdraw money from the bank.

The Law

Article 1348 contains one of the exceptions to the Rule of evidence in Article 1341. Article 1348 recognises two types of impossibilities, (1) where the creditor has not been able to secure written proof of the judicial Act, (2) where the creditor has lost the written document through unforeseen and inevitable accident or through an Act of god. The instant ruling concerns the first type where the creditor has not been able to secure a written document due to moral impossibility, that is, due to the closeness of the relationship between the parties. The "fait juridique" or the juridical Act is the Act which manifests the will. Hence in the present case, the juridical Act is what the Plaintiff intended when she authorised the Defendant to operate her account. Was it to be done only upon specific instructions given by her or was it a carte- blanche? Since the amount involved was over R.5000, that "fait juridique" must be proved by a document. The exception to that requirement established by jurisprudence, lies primarily in the relationship between the parties. But that relationship, per se is not the deciding factor. The Court has a wide discretion to decide what constitutes moral impossibility on the facts of each case. In the case of *Rene Françoise v Raymond Herminie* (C.S.115 of 1991), it was held that the basis of applying Article 1348 by judges would be the intimate relationship of the parties concerned and also that the proximity of the "lien de parenté" which binds them that was considered as a vital factor. It was also held that the further the "lien de parenté" between the parties, the lesser the chance for one to invoke the provisions of Article 1348.

Mr Boule however sought to extend the scope the inquiry by the Court in considering moral impossibility, by submitting that the subject matter was as important as the relationship. In that respect, he relied on the dicta in the *Françoise* case (supra) which was an action for specific performance of an oral agreement to sell immovable property. The Court held that there was nothing special in the relationship between two brothers in law to establish moral impossibility, and proceeded to state obiter, that -

Besides, the sale or purchase of immovable property does not fall into the category of obligations where the insistence by one party for a written document could be interpreted as a "méfiance" or mistrust by the other. On the contrary, the insistence of writing is proof that the party or parties is/ are indeed serious in his or their enterprise.

Mr Boule however conceded that he was not equating a bank authorisation such as this with the formalities required in respect of a sale or promise to sell immovable property. He submitted that the Court should not readily conclude that in the present matter the reduction of the agreement to writing would have been considered as a mistrust of the daughter. The evidence of Mr Renaud that had he advised them to reduce the agreement to writing they would have complied, is evidence of the trust the family members had on him. It cannot be considered as a derogation of the trust the family members had for each other. Mr Renaud qualified his statement by stating that knowing the family relationship well, he would not have so advised.

It is averred that the Plaintiff authorised the bank to permit the Defendant to operate her account on her behalf. In these circumstances, the bank would be unconcerned about

any agreement between the Plaintiff and the Defendant as to the circumstances under which specific withdrawals would be made. Hence unlike in situations where there is a legal requirement that parties must express their intentions or agreements in writing, the only factor to be considered when deciding on moral impossibility would be the relationship between the parties and the closeness of that relationship.

In the case of *Andre Esparon v Serge Esparon & Or* (C.S. 157/90 decided on 27 September 1991). The Plaintiff was a 72 years old man. The first Defendant was his nephew (*brother's son*) and the second Defendant was the first Defendant's concubine. The Plaintiff lived alone in his house which was close to the house occupied by the two Defendants. During illness the second Defendant assisted the Plaintiff. Once when the Plaintiff was in hospital, the second Defendant cleaned the Plaintiffs house with his consent. Later she told the Plaintiff that she took R27,000 which was in an unlocked box for safekeeping. Upon leaving hospital, the Plaintiff resided with the Defendants for sometime, but the second Defendant assured the Plaintiff that the money was safe with her. Later, consequent to some quarrel, the Defendants chased the Plaintiff out of the house. On a claim by the Plaintiff to recover the money, the Court ruled that there were "blood ties" between the uncle and nephew. As regards the second Defendant, the Court ruled that she had been looking after the Plaintiff when he was ill, and hence due to the trust, it was not reasonable to expect him to have obtained any writing in the circumstances still on circumstances, the Court ruled that the Plaintiff was ill in hospital, and that alone was sufficient reason why the Plaintiff could not have obtained a writing even if he so wished. The Court concluded that "it was obvious that trust played a prominent part in the occurrence."

In the present case, too, the Court is satisfied on the basis of the evidence at the voir dire that trust was the essence of the oral agreement.

In these circumstances the legal point raised by Mr Chang-Sam that in paragraph 3 of the defence, the Defendant has made a judicial admission that she was authorised by the Plaintiff to operate her account, and that consequently oral evidence could be adduced in circumstances other than as provided in Article 1348, need not be considered for present purposes.

I therefore rule that oral evidence is admissible by the Plaintiff as regards the "specific instructions" given to the Defendant, as averred in paragraph 4 of the plaint.

Record: Civil Side No 55 of 2001