IN THE SEYCHELLES COURT OF APPEAL

[Coram: A. Fernando (J.A), M. Twomey (J.A), J. Msoffe (J.A)

Civil Appeal SCA06/2013

(Appeal from Supreme Court Decision30/2008)

Berard Monthy — Appellant

Versus

Alex Buron — Respondent

Heard: 09 April 2015

Counsel: Frank Elizabeth for the Appellant

S. Rajasundaram for the Respondent

Delivered: 17 April 2015

JUDGMENT

M. Twomey (J.A)

[1] The Appellant entered into an agreement with the Respondent on or around 20th October 2005 for the construction of a three bedroom house at Gaza, Anse aux Pins, Mahé. The agreement was evidenced by a quotation from the Appellant submitted by e-mail to the Respondent on 15th April 2005 and accepted by the Respondent by fax on 19th April 2005. It is not disputed that the contract price was SR 864,000. No date was given for the commencement or termination of the construction works in the quotation. However, the Respondent confirms in his fax of 19th April that the quotation is now a "biding (sic) contract."

[2] A fax from the Respondent to the Appellant on 11th April, i.e. before the written quotation above was sent out, confirms that the Respondent approves the plan of the Architect and gives the go ahead for its completion. We note that the same quotation clearly mentions that

the Architect drawing, engineer etc amounts to SR 14, 800 and this was accepted by the Respondent in his fax of 19th April 2005.

[3] The sum of £25,000 was transferred into the Appellant's account on 27th April 2005 by the Respondent. On 19th December another fax was sent by the Respondent stating that he was transferring £8000 into the Appellant's account and that he would make the final payment on the completion of the house less a 15% retention fee to be paid after 18 months should no building defects materialise. Hence, a total of £33,000 was paid to the Appellant by the Respondent for the construction of the house at the date when the contract was unilaterally rescinded by the Appellant.

[4] There is evidence that a further £10,000 was also paid by the Respondent to the Appellant to the Appellant but both confirm that this was in relation to the Respondent transacting foreign exchange with the Respondent at a time when foreign exchange was hard to come by in Seychelles and was in no way connected to the building agreement which is the subject matter of the present appeal. It however confirms that the two parties had actively engaged in black market foreign exchange practices.

[5] On the 3rd September 2007, the Respondent again wrote to the Appellant in the following terms:

> *"I refer to my client's contract with you for you to construct the house and retaining wall on parcel S 4374 at Anse aux Pins, Mahé pertaining to the approved drawings of DC336/05. I also refer to my earlier letter of 23rdMay 2007 and 20th June 2007.*
>
> *While I have received replies from your Attorney on our behalf, dated 15th June 2007 and 23rd July 2007, my client has perused those replies and denies the claims made therein.*
>
> *My client has instructed me to inform you that your contract with him is hereby terminated with immediate effect as you caused inordinate delay in the project and the house remains incomplete for the last few years and this has caused financial loss to my client. My client reserves his right to institute legal proceedings against you for necessary remedies available in law."*

[6] It is only at trial that the evidence of both parties get to the real issue of this matter and it is a simple one: although the contract price was expressed in Seychelles rupees there was an agreement between the parties that the contract price would be paid in pound sterling but that rate would be the one obtaining on the black market at the time and not the legal bank rate. In other words this is a black market deal gone bad.

[7] The evidence of the parties on this issue is at variance. The Appellant deponed that the rate of the rupee against the pound sterling agreed by the parties in 2005 was SCR23 whilst the Appellant maintains that it was SR12 or SR 14. The Central Bank has confirmed to this Court that the average official rate for the year 2005 at the time was 1GBP = 9.6126 SR

[8] The learned trial judge Renaud preferred the evidence of the Respondent over that of the Appellant and found that £33,000 x 23 (black market rate in 2005) = SR759, 000 (about 88% of the contract price) was paid by the Respondent for the construction of the house. He accepted the surveyor's report that only 40% of the construction work on house had been completed. He concluded therefore that as the Appellant had received nearly 88% of the contact price but had only performed 40% of the building work, he should pay the value of the works left to be performed. He found that the sum of SR780, 000 was due together with moral damages of SR50, 000 and costs of the action.

[9] The Appellant has now appealed against this decision on 7 grounds altogether but we do not see the need to reiterate them as we believe that the crux of this appeal rests on one issue and one issue alone - Can the court enforce an agreement, the *object* of which is against public policy?

[10] It is essential to set out the law in relation to this issue and to understand the difference between the Seychellois law on this point and both the laws of England and France. Seychellois law as revised in the recodification of 1975 by Chloros removed the concept of *cause* from Seychellois contracts. Whereas the elusive French concept of *cause* continues to result in consternation as one struggles between whether it means the intention of the parties to the contract or the purpose of the contract, and English law has a very different concept of *consideration* for contracts; Chloros in dealing away with the whole law stated:

"It will be observed that, in comparison with the original Code and the Code Civil, the Civil Code has been considerably simplified by the omission of cause. Cause is no longer required… Cause in the sense of an unlawful motive for a transaction can now be dealt with by reference to the object of the contract and to public policy. Of course there is already provision for public policy in the Code (Article 6) and the relevant section, uses in part, the terminology of cause in order to specify the role of public policy in contract"
(A.G. Chloros, Codification in a Mixed Jurisdiction: The Civil and Commercial Law of Seychelles (North Holland Publishing 1977) 103-104).
Hence, in our view, cause has been subsumed within the provision relating to public policy.

[11] The provisions relating to public policy (illicit cause and object) are contained in articles 6, 1131, 1132 and 1133 of the Civil Code of Seychelles which state:

"Article 6 It shall be forbidden to exclude the rules of public policy by private agreement. Rules of public policy need not be expressly stated.

Article 1131 An obligation which is against public policy shall have no legal effect.

Article 1132 An agreement shall be valid although the reason for not making is not stated.

Article 1133 The object of an agreement is unlawful when it is prohibited by law or when it infringes the principles of public policy.

[12] The term object is vaguely defined by the Code as follows

"Article 1126: Every obligation shall have as its object something which one party binds himself to deliver or perform or fail to perform.

Article 1129: An obligation must have as it object a thing which may at least be specified in kind.
The quantity of the thing may be uncertain provided it can be specified."

The term *public policy* suffers the same fate with Chloros boldly but unhelpfully stating that

> *"No attempt is made to define public policy for such a definition, assuming that it were possible, would have unduly restricted the discretion of the Courts and would have prevented the constant adaptation of this concept to the needs of a changing society." (Chloros supra, p. 17).*

[13] Unlike Chloros, this Court has to come up with a definition of both concepts for the purpose of deciding this appeal. We are guided by the provisions of the Code on public policy in relation to agreements and on the rules of interpretation in general. Whereas Article 1108 of the French Code Civil provides that the four constituent elements of a valid agreement are:

> *"Le consentement de la partie qui s'oblige ;*
> *Sa capacité de contracter ;*
> *Un objet certain qui forme la matière de engagement ;*
> *Une cause licite dans l'obligation",*

Article 1108 the Seychelles Civil Code provides:

> *"Four conditions are essential for the validity of an agreement-*
> *The consent of the party who binds himself,*
> *His capacity to enter into a contract*
> *A definite object which forms the subject matter of the undertaking,*
> *That is should not be against the law or against public policy."*

[14] As we have stated above, public policy has been substituted for *cause* in Seychellois law. Yet Sauzier J in *Jacobs and anor v Devoud* (1978) SLR 164 stated that *cause* cannot be ignored altogether. He added that where the cause is against the law or against public policy, the obligation is invalid under article 1108. In *Corgat v Maree* (1976) SLR 109, Sauzier approximated *cause* to the reason for making an agreement. Whether it is *cause* or public policy, our understanding of public policy as expressed in the Code is of one denoting a principle of what is for the public good or in the public interest. In this sense we agree with

Chloros that public policy is not a static concept. Whichever way we consider the matter, we remain firmly of the view that dealing with currency at the black market rate cannot be a valid reason for entering into a contract. It clearly offends against the provisions the Exchange Control Act 1954 which was replaced by the Foreign Exchange Act 2009.

[15] Whilst the object of the contract between the Appellant and the Respondent was the construction of a house, the reason that drove the parties to the agreement was that payment for the contract would be made in foreign exchange at the black market rate. Both parties testified to this. What they now disagree on is the black market rate applicable in 2005.

[16] A Court cannot endorse an agreement that is against public policy. The rule is contained in the maxim of *ex turpi causa* which is also a concept known to the English common law. In *Euro-Diam Ltd v Bathurst* [1990] 1 QB 1, the Court of Appeal held

> *"The ex turpi causa defence ultimately rests on a principle of public policy that the courts will not assist a plaintiff who has been guilty of illegal (or immoral) conduct of which the courts should take notice. It applies if in all the circumstances it would be an affront to the public conscience to grant the plaintiff the relief which he seeks because the court would thereby appear to assist or encourage the plaintiff in his illegal conduct or to encourage others in similar acts"*

[17] The Respondent has argued however that the Appellant cannot raise his own turpitude as a bar to the contract. Barry Nicholas states that

> *"… a party is allowed to invoke his own wrongdoing to the extent he can obtain a declaration that the contract is null. What he cannot do…is to obtain restitution of his own performance"*
>
> (Barry Nicholas, The French Law of Contract (2nd ed. Oxford University Press 1992) 154).

We are therefore of the view that the Appellant was right to raise the defence of *ex turpi causa*. We believe however that the defence cannot benefit the Appellant in terms of his counter claim and counter appeal for money due under the contract. We refuse to be drawn

into considering the merits and demerits of a contract that is against public policy.

[18] In the circumstances we partly allow the appeal and dismiss the counter appeal. We set aside the decision of the Supreme Court. We make no order as to costs.

M. Twomey (J.A)

I concur:. **…….** A. Fernando (J.A)

I concur:. **…….** J. Msoffe (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on17 April 2015