

SUPREME COURT OF SEYCHELLES

Reportable/ Not Reportable/ Redact
[2025]

CS 79/2020

In the matter between:

THE ESTATE OF THE LATE ANDRÉ DELHOMME

herein represented by its Executor Véronique, Marie, Hilda
Huguette, Maryan Green-Delhomme represented by
Allen, André, Joseph Hoareau.
(rep. by F. Elizabeth)

Plaintiff

and

THE ATTORNEY GENERAL

(rep. by Stefan R. Knights)

Defendant

Neutral Citation: *Estate of the late Andre Delhomme v AG* (CS79/2020) [2025] (28 March 2025).

Before: Carolus J

Summary: Action for rescission of contract of sale of immovable property – non – payment of part of purchase price – Burden of proof – Article 1315 Civil Code 1976 – Article 1184 Civil Code 1976 – Proof of non-payment –.

Delivered: 28 March 2025

ORDER

- A. The Defendant shall, not later than two months from the date of this judgment, pay to the plaintiff the sum of SCR1,500,000.00 with interest at the rate of 4% per annum as from the date of filing of this suit i.e. 24th August 2020 up to the date of payment.

Each party shall bear its own costs.

JUDGMENT

Carolus J

Background

- [1] The plaintiff is the estate of the late André Delhomme. It is represented in these proceedings by Véronique Marie Hilda Huguette Maryan Green-Delhomme the executrix of the estate, appointed by a court order dated 14th September 2000 (Exhibit P1). The executrix is in turn represented by Allen André Joseph Hoareau by virtue of a power of attorney dated 2nd March 2020 and registered on 5th June 2020 (Exhibit P2). The plaintiff is suing the Attorney General in its capacity as representative of the Government of Seychelles.
- [2] Véronique Marie Hilda Huguette Maryan Green-Delhomme and Helene Marie Amelie Gabrielle Delhomme are the daughters of the late André Delhomme and his wife Doctor Hilda Stevenson Delhomme. All three of them survived him when he passed away on 15th August 2000 in France.
- [3] The undisputed facts of the case are that the late André Delhomme (“the deceased”), before his death, had absolute ownership of $\frac{3}{4}$ and bare ownership of $\frac{1}{4}$ of Coetivy Island (“the property”), Madeleine Hery having been granted usufructuary interest of $\frac{1}{4}$ of the property. André Delhomme and Madeleine Hery obtained their rights in the property from Myriam Helene Delhomme nee Hadee in terms of her will transcribed in Vol.39/97. By deed of sale dated 13th December 1979 and transcribed in Vol 64 No.157, and registered in Register B30 No.3641 on 18th December 1979, the vendors (Andre Delhomme and Madeleine Hery) agreed to sell and the Government of Seychelles agreed to take the property at the price of Rupees Four Million (R4,000,000.00). According to the deed of sale the vendors acknowledged receipt of Rupees Two Million Five Hundred Thousand (R2,500,000.00), and the Government undertook to pay the outstanding sum of Rupees One Million Five Hundred Thousand (R1,500,000.00) as follows:
- I) Rupees Three Hundred Thousand (R300,000.00) by 15th January 1980*
 - II) Rupees Three Hundred Thousand (R300,000.00) by 15th February 1980*
 - III) Rupees Three Hundred Thousand (R300,000.00) by 15th March 1980*
 - IV) Rupees Three Hundred Thousand (R300,000.00) by 15th April 1980*
 - V) Rupees Three Hundred Thousand (R300,000.00) by 31st May 1980.*

- [4] In terms of the deed of sale, it was further agreed that in the event of the Government failing to make any two consecutive payments, the outstanding sum or part thereof remaining unpaid would immediately become due and payable. The Government also granted the vendors a seller's privilege under Article 2103 of the Civil Code to secure payment of the outstanding sum of Rupees One Million Five Hundred Thousand (R1,500,000.00).
- [5] In terms of the plaint, the plaintiff avers that in breach of the agreement, the defendant has failed, refused or neglected to pay the plaintiff the sum of Rupees One Million Five Hundred Thousand (R1,500,000.00) as agreed, and that consequently the agreement has become frustrated, null and void. The plaintiff prays for a declaration to that effect. The Plaintiff further prays for rescission of the contract of sale, cancellation of the registration of Coetivy Island in the name of the Government of Seychelles, and for an order directing the Land Registrar to rectify the Land Register by cancelling, deleting and replacing the name of the Government of Seychelles as the registered owner of the island and replacing it with the name of the plaintiff. Further and in the alternative the Plaintiff seeks an order for the defendant to pay the plaintiff the sum of Rupees One Million Five Hundred Thousand (R1,500,000.00) together with interest at the commercial rate of 12% from the date of the said contract of sale namely 13th December 1979 until the date of judgment.
- [6] The defendant, raised a preliminary plea of prescription claiming that the plaintiff is time barred from bringing the cause of action. On the merits it denies that it has failed to pay the plaintiff the sum of Rupees One Million Five Hundred Thousand (R1,500,000.00) and puts the plaintiff to strict proof that the payments stipulated in the deed of sale were not paid. It avers that the defendant has never acknowledged any debt owing to the plaintiff nor is there any evidence of the plaintiff making a demand or claim against the defendant at any time within the period of five years from the date that an instalment became due and payable for any debt owed by the defendant to the plaintiff in respect of the sale. The defendant further denies that the agreement has become frustrated, null and void and contends that it has never asserted or pleaded frustration of contract in any dealings with the plaintiff and that in any event frustration of contract is a defence to a breach of contract which is up to the defendant to raise and prove. It denies being liable to the plaintiff in any

sum and avers that the plaintiff is not entitled to the relief prayed for. The defendant prays for dismissal of the plaint with costs.

[7] The matter was heard by this Court both on the plea of prescription raised in *limine litis* and on the merits. However, the matter was dismissed solely on the plea of prescription without a determination of the matter on the merits. This court found that the action was prescribed, having been filed more than 20 years after the accrual of the cause of action (Vide *Estate of the late André Delhomme & Ors v AG* (CS 79/2020) [2021] SCSC 227 (18 May 2021)). The Court of Appeal allowed the appeal against the decision of the Supreme Court: it quashed the Supreme Court's decision and substituted therefor an order dismissing the plea in *limine litis*, and further remitted the matter to the Supreme Court to deal with the action on the merits only (Vide *The Estate of the late André Delhomme & Ors v The Attorney General* (SCA 15/2021) [2023] SCCA16 (26 April 2023)).

[8] The matter was accordingly remitted to the Supreme Court. At the sitting of the Supreme Court of the 21st June 2023, Mr Elizabeth informed the Court that the plaintiff/appellant had, in the course of proceedings before the Court of Appeal, withdrawn its first prayer in the plaint, namely for a declaration "*that the contract of sale has become frustrated, null and void by reason of the Defendant's failure to pay the Plaintiff the balance of the purchase price in the sum of SCR1,500,000.00*". It follows that together with this prayer, the last paragraph of the plaint (paragraph 12) should also be deleted. Paragraph 12 reads:

12. By reason of the matters aforesaid, the Plaintiff avers that the agreement of sale has become frustrated, null and void.

[9] Consequently, the only remedies sought from this Court by the plaintiff are rescission of the contract of sale and, in the alternative, the payment of the sum of SCR1,500,000.00 which is alleged to remain unpaid by the defendant, with interest. In terms of the plaint, these remedies are as follows:

*WHEREFORE, the Plaintiff prays this Honourable Court to make the following orders:
[...]*

2. *Make an order of rescission of the contract of sale, cancelling the registration of the island of COETIVY in the name of the Government of Seychelles and ordering the Registrar of Lands, to rectify the Land Register by cancelling, deleting and replacing the name of the Government of Seychelles as the registered owner of the said island and replacing the name of the Plaintiff;*

FURTHER AND IN THE ALTERNATIVE

3. *Order the Defendant to pay the Plaintiff the sum of SCR1,500,000 together with interest at the commercial rate of 12% from the date of the said contract of sale, 13th December 1979, until the date of judgment;*
4. *Make any further or other order the Court deems fit.*

The Evidence

- [10] Allen André Joseph Hoareau a semi-retired marine engineer of 60 years of age, testified on behalf of the plaintiff. He stated that he was raised by Mr. and Mrs. Delhomme from the age of three and therefore considers their daughter Véronique Marie Hilda Huguette Maryan Green-Delhomme, executrix of the estate of Mr. Delhomme, as his sister. Throughout his testimony he referred to Mr. Delhomme as his father.
- [11] He confirmed that Mr. Delhomme transferred Coetivy Island to the Government of Seychelles for the sum of Rupees Four Million (R4,000,000.00) and in support produced collectively a covering letter dated 8th January 1980, together with a transcription of the deed of sale dated 13th December 1979 and transcribed in Vol 64 No.157, and registered in Register B30 No.3641 on 18th December 1979 (Exhibit P3). He confirmed that according to the document, there was an outstanding amount of Rupees One Million Five Hundred Thousand (R1,500,000.00) remaining unpaid which was to be paid as stated at paragraph 3 above. He also confirmed that there was a charge registered against the property for the debt owed by the Government to the deceased. Mr. Hoareau stated that he could not truthfully say whether or not the outstanding balance of Rupees One Million Five Hundred Thousand (R1,500,000.00) had been paid but said that according to what is stated in the transcript it has never been paid.

- [12] Mr. Hoareau testified that he only had knowledge that the estate of Mr. Delhomme had a claim against the Government when he returned to Seychelles five years ago and had sight of the transcription of the deed of sale and realised that the Government had not fully paid the deceased. He also stated that the charge over the property in the sum of Rupees One Million Five Hundred Thousand (R1,500,000.00) still subsists.
- [13] In cross examination he stated that in 1979 he was 19 years old and was living with Mr. and Mrs. Delhomme and although he was not fully aware of all the details of the agreement between Mr. Delhomme and the Government, he knew that that the Government was taking away their land. He only saw the agreement two years ago. He got to know about the agreement when he was about to leave France for Seychelles in 2014, and he told Veronique that after he had settled in he would start finding out what happened to the land owned by Mr. and Mrs. Delhomme. In response to whether Veronique knew about the agreement before, he stated that she must have as she is the executrix, but that the children of the deceased would not get involved in matters relating to Seychelles as they live in Europe.
- [14] In reply to whether he knew whether the Government had paid any money to the deceased for Coetivy Island, he stated that according to the deed of sale only Rupees Two Million Five Hundred Thousand (R2,500,000.00) was paid, and that this sum was presumably paid into a bank account. He stated that he did not know where the bank statements of the deceased's bank accounts were and admitted that he did not have any papers where Mr. and Mrs. Delhomme are concerned. He stated that he has not had time to try to get the bank statements from the bank but now that he has a power of attorney he can try. In addition, the Notary who dealt with the affairs of the late Mr. Delhomme no longer has any documents regarding Mr. and Mrs. Delhomme.
- [15] Mr Hoareau admitted that he had no letter from Mr. Delhomme demanding payment from the Government of the Rupees Two Million Five Hundred Thousand (R2,500,000.00) owing to him. He explained that payment of the last instalment under the deed of sale was due in May 1980, and just after that in June 1980 Government acquired another piece of Mr. Delhomme's land. Mr. and Mrs Delhomme were therefore afraid to go and ask

Government for anything. He admitted that he had no letter from Government acknowledging any debt due to the deceased but maintained that according to the “official Government papers” the outstanding debt of R1.5 million had not been paid to Mr. Delhomme.

- [16] Mr. Hoareau was unable to show any charge or mortgage on the deed of sale. As for the seller’s privilege granted to the vendors, he stated that Mr and Mrs. Delhomme never acted on it because they were scared to go the Government for anything. After 1993, they left the country because Mr. Delhomme was very ill and they were unable to do anything.
- [17] In re-examination, Mr. Hoareau explained Mr. Delhomme’s fear of the Government. According to him Mrs. Delhomme had been involved in politics until 1974, and belonged to the political party “Parti Seychellois”. Being in charge of the Victoria District Council, she was the next important person after the Governor. In order of importance after the Governor she ranked first, former President Mancham ranked as number 2 and former President Rene ranked as number 3. Mr. Rene was against her for many reasons including that he considered them as “grands blancs” and because they owned islands and other properties.
- [18] He stated that Mr and Mrs. Delhomme left Seychelles in 1993 or 1994 because of poor health since they had been beaten up three times. He clarified that their property that was compulsorily acquired by Government in June 1980 consisted of two plots situated on both sides of the road at St. Louis. He stated that both Mr. and Mrs. Delhomme died in France and never came back to Seychelles. Mr. Delhomme died soon after leaving for France and Mrs. Delhomme’s death followed two to three years later. Mr. Hoareau was living in Spain but went to see them two to three times a year when they were living in France. They never discussed the issue of payment of land whether in relation to Coetivy Island or other land as Mr. and Mrs. Delhomme were not in a state to talk about Seychelles.
- [19] The defendant’s sole witness was Mr. Patrick Lablache, a 63 year old consultant with the Ministry of Habitat, Infrastructure, Land and Transport. He testified that in 1979 Government bought Coetivy Island from Mr. Delhomme after negotiations between the

two. Mr. Lablache recalls going to the island with Mr. Delhomme's representative who at the time was Mlle Marie-Therese Desaubin to make an inventory of the shop on the island and proceed with employment of the people working there. The purchase of the island was on a walk-in walk-out basis meaning that Government walked in and took possession of the island and Mr. Delhomme walked out leaving everything on the island including the personnel.

[20] As to the reason why the island was sold to Government, he explained that in 1979 Government had a policy of returning ownership of most of the privately owned outer islands to itself, so that they became state owned. Coetivy was the first island that Government attempted to buy. At the time, Mr. Delhomme had also been trying to undertake some sort of project on the island which did not materialise. He pointed out that in 1979 the copra industry had basically failed and most of the outer islands relying on it as a source of income were facing financial difficulties.

[21] He stated that as far as he could remember, Mr. Delhomme negotiated the sale of the island personally and not through a representative. The representative only went to the island to conclude the practical aspects of the hand-over. He recalled that the negotiations were conducted in a civilised manner and that Mr. Delhomme was very pleasant. They exchanged letters and Mr. Delhomme started off with a very high price which was eventually reduced to Rupees Four million after various communications between him and Government, and which he agreed to.

[22] He confirmed that Rupees Two Million Five Hundred Thousand was paid and that Government effects payment directly to bank accounts and never in cash. He stated that he does not know to which bank the payment was made as payments are made by the Treasury Department.

[23] Mr. Lablache stated that after the agreement was entered into he would occasionally talk to Mr. Delhomme as the Government had other dealings with him after that. He remembers that Government subsequently bought the St. Louis property from him although he does not recall if it was in the same year that Coetivy was purchased. He emphasised that the St.

Louis property was purchased and not acquired. After the purchase of the St. Louis property he states that he probably bumped into Mr. Delhomme, greeted him and chatted casually to him although he could not recall exactly when, but that was as far as it went.

- [24] He agreed with defendant's counsel that if Government owed a person money for the purchase of a plot of land and missed one payment, the person would make a demand for such payment. However, he himself had never come across a case where Government had defaulted on such payments although he could not confirm that this had never happened. Moreover, he was unaware of any default in payment in regards to Coetivy Island and had never seen any demand for payment.
- [25] In cross-examination Mr. Lablache stated that in 1979 he was 23 years old and was working as Lands Officer for the Government, and in that capacity negotiated the purchase of Coetivy with Mr. Delhomme on behalf of the Government. He subsequently also went to the island. At the time he had only been six months in the job. The price for the island was arrived at following negotiations based on correspondence between the parties and his recollection was that he finally made an offer of Rupees Four Million on behalf of Government which was accepted by Mr. Delhomme who sent an acceptance to Mr. Lablache. It was put to him that he had no communication or letters to prove all this, to which he replied that there was a file concerning the transaction which had been given to the defendant's counsel.
- [26] He confirmed that payment of money owed by the Government is dealt with by the Treasury and not the Lands Department. He explained that the Ministry responsible for land is allocated a budget for acquisition of land but that it is the Ministry of Finance which actually holds that budget. Whenever there was a need for payment from that budget the Lands Department would make a request to the Ministry of Finance for payment which would then effect the payment through Treasury.
- [27] He stated that he was never present when agreements for sale of land to Government were signed, and that at the time of the sale it was the President of the Republic who signed on

behalf of the Government before the Attorney General as Notary. He was therefore not present when the deed for the sale of Coetivy was signed by Mr. Delhomme.

[28] He agreed with plaintiff's counsel that if any payment had been made by Government to Mr. Delhomme, it would have been made by the Ministry of Finance and not the Lands Department and that such payment would have been made by cheque and not by cash payment but admitted that he did not actually see the payment being made. He stated that he never witnesses those transactions. With regards to whether payment was made to Mr. Delhomme he stated that the fact that he signed the transfer deed before the official Notary is an acknowledgement by him that he received the first part of the payment in the sum of Rupees Two million Five Hundred Thousand (R2,500,000). As to whether he had any evidence to show that the outstanding sum of Rupees One Million Five Hundred Thousand (R1,500,000) agreed to be paid by instalments by end of May 1980, was actually paid, he stated that he did some research on the matter and managed to find a letter giving instructions to the Chief Accountant and Treasury to effect these payments. He then went back to treasury to find out whether they had any record of the payments but was informed that they did not keep records extending that far back. He reiterated that the amount was paid as he cannot remember any cases of that nature where payment was not effected.

[29] In re-examination Mr. Lablache clarified that if there is a schedule of payments and the Lands Department has already notified the Ministry of Finance of such schedule with the dates for payment, the Ministry of Finance would execute the payments on the said dates without coming back to the Lands Department. With regards to the document giving instructions for payment, he was unable to obtain full records for such payment because he was informed by the Ministry of Finance that they only kept such records for up to ten years.

Analysis

Submissions

[30] Counsels representing both parties filed written submissions which I have carefully examined, and which I will refer to as appropriate in this Analysis. It is to be noted that following the initial hearing of the matter before the Supreme Court, counsels for the

defendant and the plaintiff filed written submissions dated 20th November 2020 and 8th January 2021 respectively. Thereafter, counsel for the plaintiff filed additional written submissions dated “16th day of 2021”. Following the Court of Appeal decision pursuant to which the matter was remitted to the Supreme Court, this Court allowed the motion of the defendant to file additional submissions (Vide *The Attorney General v The Estate of the Late André Delhomme* (MA278/2023) [2023] (26 April 2024)). Additional written submissions were filed on behalf of the defendant dated 11th June 2024 and counsel for the plaintiff filed “*Counter Submissions*” on 16th September 2024. All these submissions have been considered.

Prescription

[31] Before dealing with this matter on the merits, I find it necessary to put the issue of prescription to rest insofar as it concerns proceedings before this court. As explained in this Court’s Ruling on the motion of the defendant to allow filing of additional submissions (Vide *The Attorney General v The Estate of the Late André Delhomme* (MA278/2023) [2023] (26 April 2024), and as stated at paragraph [7] above, the Court of Appeal quashed the Supreme Court’s decision dismissing the plaintiff/appellant’s action in *limine litis* on the ground that the action is prescribed having been filed more than twenty years after the accrual of the cause of action, and “*substitute[d] therefor an order dismissing the plea in limine litis*”. The Court of Appeal further remitted the matter to the Supreme Court “*to deal with the action on the merits only*”. It is clear therefore that this court cannot make any further determination on the issue of prescription, contrary to the defendant’s submissions that “[T]he Defendant pleaded prescription in its defence and argued that the claim is barred by prescription, which should be considered in the final judgment” (See para 7 of defendant’s further submissions dated 11th June 2024) and further that “*despite the Court of Appeal’s judgment, prescription remains an issue for the this Court to consider in its determination of the suit on the merits*” (See para 16 of defendant’s further submissions dated 11th June 2024).

[32] Counsel for plaintiff, in his “*counter submissions*”, correctly submitted that that the defendant had not paid heed to this Court’s Ruling allowing filing of additional

submissions by addressing the issue of prescription. However, counsel for the plaintiff also submitted that the defendant had also raised other legal issues not addressed in their previous submission, and asks this Court to disregard the defendant's additional submissions insofar as they concern these other legal issues. Counsel seems to be under the mistaken impression that the additional submissions were only to address "*the issues of burden of proof and article 1315 specifically*". This Court was very clear that it allowed the motion to file submissions "*insofar as it concerns relevant issues*" and went on to state that "[I]n that regard, I note that neither party has addressed the issue of burden of proof in the light of Article 1315 in much depth". The issue of "*burden of proof in the light of Article 1315*" is only one among other "*relevant issues*" which the parties were entitled to address in terms of this Court's Order allowing the filing of additional submissions. The defendant was therefore entitled to address, in its additional submissions, matters not addressed in its previous submissions as long as they pertained to relevant issues.

- [33] As for para 6 of the further submissions dated 11th June 2024 made on behalf of the defendant, that "[T]he Court of Appeal held that the 20-year prescription considered by this Court was acquisitive prescription, not extinctive prescription, and thus the Learned Trial Judge wrongfully applied the time limit", suffice it to say that this is not the case, as shown by para 57 of the Court of Appeal's judgement which reads:

57. It follows, therefore, that the question of whether or not the learned Judge was correct to conclude in her judgment that the Appellant's action is "*une action réelle*"/ a real action and not "*un action personelle*"/ a personal action and whether or not the action is time-barred, does not arise for consideration. This judgment does not express any views on the correctness of the learned Judge's conclusions. Emphasis added.

On the Merits

- [34] The deed of sale made on 13th December 1979 (Exhibit P3) shows that the consideration for the transfer of Coetivy Island from the late Andre Delhomme and Madeleine Hery to the Government was SCR4,000,000.00 "*of which sum the Vendors acknowledge receipt of Rupees two million five hundred thousand, (R.2,500,000)*". The deed also contains an

undertaking by the Government “to pay to the Vendors the outstanding sum of Rupees one million five hundred thousand, (R.1,500,000) in the following manner:

- I) Rupees Three Hundred Thousand (R300,000.00) by 15th January 1980*
- II) Rupees Three Hundred Thousand (R300,000.00) by 15th February 1980*
- III) Rupees Three Hundred Thousand (R300,000.00) by 15th March 1980*
- IV) Rupees Three Hundred Thousand (R300,000.00) by 15th April 1980*
- V) Rupees Three Hundred Thousand (R300,000.00) by 31st May 1980.*

- [35] It was also a term of the deed of sale, that in the event of the Government failing to make any two consecutive payments, the outstanding sum or part thereof remaining unpaid would immediately become due and payable.
- [36] The plaintiff claims that the Government has failed to pay the outstanding balance of SCR1,500,000.00 of the purchase price of SCR4,000,000.00, and on that basis seeks rescission of the contract of sale of Coetivy Island to the Government and, in the alternative, the payment of the sum of SCR1,500,000.00 which is alleged to remain unpaid by the defendant, with interest. The defendant on the other hand denies that it has failed to pay the plaintiff the sum of Rupees One Million Five Hundred Thousand (R1,500,000.00), and puts the plaintiff to strict proof that the payments stipulated in the deed of sale were not paid. It is averred in the statement of defence that the defendant has never acknowledged any debt owing to the plaintiff nor has the plaintiff made any demand for the same.
- [37] It has been submitted on behalf of the plaintiff that it has discharged the burden of proof imposed upon it by Article 1315 of the Civil Code of Seychelles Act, Cap 33, (“the Civil Code”) as the vendor, whereupon the burden had shifted on the defendant as the buyer to prove that such payment had been made, which the defendant had not discharged. Counsel for the defendant submitted that the burden was on the buyer to show that the outstanding sum had not been paid and that it did not shift to the defendant. He submits that since the plaintiff had not done so, it failed to prove its case.
- [38] Two issues arise for the court’s consideration. Firstly, whether the plaintiff has proved its case to the required degree, which requires an assessment of whether the burden of proof

has been discharged by the party who bears that burden. Secondly, if the plaintiff has proved its case, whether rescission of the contract of sale should be ordered or alternatively specific performance. Both issues shall be discussed below.

Has the Plaintiff proved its case?

[39] Article 1315 of the Civil Code of Seychelles Act, Cap 33, (“the Civil Code”) provides:

Article 1315

A person who demands the performance of an obligation shall be bound to prove it.

Conversely, a person who claims to have been released shall be bound to prove the payment or the performance which has extinguished his obligation.

[40] The plaintiff relies on this provision to submit, in its submissions dated 8th January 2021, that “once the seller asserts that he has not been paid, the burden shifts on the buyer to provide proof of payment”. He submits that having alleged that the purchase price had not been paid, the burden shifted to the defendant to prove that the whole sum has been paid, so as to extinguish his obligation to pay, which burden the defendant failed to discharge in contravention of Article 1315.

[41] In its “*Counter submissions*” filed on 16th September 2024, the plaintiff goes further and states that in order to discharge the burden of proof imposed by Article 1315 upon it as the claimant/seller, which is limited to proving the existence of the defendant’s legal obligation to pay, it suffices for it to produce the title deed evidencing the debt whereupon the burden shifts on the defendant to bring proof of payment. It is submitted that the law does not require a seller to prove a negative fact, i.e. non-payment, but rather allows the seller to rely on the existence of the obligation to pay and shifts the burden on the buyer to prove that he has discharged the obligation. The plaintiff further submits that the defendant is best placed to provide such proof of the discharge of its obligation as opposed to requiring the seller to provide evidence of non-payment.

[42] The defendant on the other hand, in its submissions of 20th November 2020, states that under Article 1315, the onus is on the plaintiff to show that the obligation of the defendant

to make payment under the contract was not performed, and that the onus does not shift to the defendant. It is the defendant's case that the plaintiff has not discharged that burden to the required standard, and that the plaintiff's sole witness Mr Hoareau was only speculating that the outstanding balance of SCR1,500,000.00 was not paid.

[43] It falls to this Court to determine whether, in terms of Article 1315, it is sufficient for the plaintiff to prove the defendant's obligation to pay by producing the deed of sale which shows that at the date of signature of the deed the defendant had paid the sum of SCR2,500,000.00 and still had a balance of SCR1,500,000.00 outstanding which was to be repaid in accordance with the terms of the deed, and it is up to the defendant to bring evidence that it has discharged its obligation of paying the outstanding balance, or whether in addition to proof of the defendant's obligation to pay the outstanding sum, the plaintiff also has to bring evidence of non-payment by the defendant.

[44] The matter is not as straightforward as it would seem. It does not appear that in every case where a defendant contests an allegation of non-execution of its contractual obligation that the burden of proof shifts to such defendant to prove that the payment was made, which is what a literal reading of Article 1315 seems to suggest. It would seem that while there are circumstances where this is the case, there are other circumstances where the plaintiff who claims non-execution of the other party's obligation has to bring evidence of such obligation as well as evidence that it was not executed.

[45] This issue is dealt with in **Dalloz Encyclopédie Juridique, Répertoire de Droit Civil, 2^e Édition, Tome V1, Preuve**. At CHAP. 2 ("*Objet et Charge de la Preuve*") a distinction is made between the "*objet de la preuve*" and "*charge de la preuve*". The link between the two when determining the "*charge de la preuve*" is also addressed, as follows:

54. L'objet et la charge de la preuve sont deux notions distinctes, entre lesquelles existent cependant les rapports étroits. Préciser l'objet de la preuve répond à la question: « que faut-il prouver? » ; déterminer la charge de la preuve répond à la question: « qui doit prouver? ». Mais on s'aperçoit bien vite qu'une des difficultés essentielles soulevées par la charge de la preuve consiste à déterminer ce que chaque plaideur doit prouver, c'est-à-dire l'étendue de l'objet de la preuve qui lui incombe [...]. Emphasis added.

[46] In the present case, the “*objet de la preuve*” is either the payment or non-payment of the balance of SCR1,500,000.00 of the purchase price, while the “*charge de la preuve*” will determine which party has to bring proof of such payment or non-payment. We are told in **Dalloz (supra)** at para 54 that the difficulty with the issue of the “*charge de la preuve*” lies in determining what each party has to prove i.e. “*l’étendue de l’objet de la preuve*”, which in certain circumstances involves the “*Déplacement de l’objet de la preuve*” which is dealt with below.

[47] We are told that the “*Objet de la preuve*” i.e. what has to be proved, “*consiste en un fait, un fait contesté, un fait pertinent*” (CHAP. 2, SECT. 1^{re}, paragraph 55).” The fact that has to be proved may be proved in a manner of ways: for instance by “*Preuve directe et preuve indirecte*”. The fact to be proved may also be a “*fait négatif*”. Both issues are examined from the perspective of “*Déplacement de l’objet de la preuve*”, as follows:

A.- *Preuve directe et preuve indirecte;*

67. *En principe, le fait à prouver est celui-là même qui déclenche l’application de la règle de droit produisant le résultat dont le plaideur réclame le bénéfice. On appellera preuve directe celle qui a pour objet le fait à prouver lui-même. Ainsi, le fait d’un accord de volontés est directement prouvé par l’écrit, destiné à le constater, signé par les parties; de même, le fait à prouver peut être relaté par un témoin.*

68. *Mais il est assez fréquent que la preuve directe du fait à prouver ne soit pas rapportée. Ce sont seulement des faits voisins ou connexes qui sont établis et, par un raisonnement, il en est inféré l’existence du fait à prouver. En pareil cas, la preuve est indirecte : son objet a été déplacé du fait à prouver à d’autres faits plus ou moins proches (AUBRY et RAU, t. 12, par ESMEIN, § 749, p. 56). Tel est le cas, par exemple, de la preuve d’indices, tels que les traces de freinage et la position d’un véhicule après un accident, qui permettent au juge de considérer comme établi le comportement du conducteur qu’il qualifiera de fautif. Le fait à prouver était ce comportement ; il n’a pas été prouvé directement mais il a été induit de la preuve de faits différents.*

69. *La certitude obtenue quant à la réalité du fait n’est pas nécessairement plus grande en présence d’une preuve directe que lorsqu’il s’agit de preuve indirecte : c’est là*

une question de force probante et la conviction du juge peut être plus sûrement formée à partir de certains indices que sur le fondement d'un témoignage direct entaché de suspicion. Mais il reste que le déplacement de l'objet de la preuve crée par lui-même un risque d'incertitude, puisque le passage des faits prouvés au fait à prouver est le fruit d'un raisonnement qui ne donne jamais qu'une plus ou moins grande probabilité. Si le détour s'allonge, le risque s'accroît. C'est sans doute pourquoi le législateur n'autorise pas toujours un tel déplacement de l'objet de la preuve. Ainsi, lorsque l'article 1341 du code civil impose la préconstitution d'une preuve écrite pour établir l'existence d'un accord de volontés portant sur une valeur supérieure à 50 F (V. infra, nos 172 et s.) il s'agit certes de limiter les modes de preuve admissibles, mais cette disposition renferme également une prohibition du déplacement de l'objet de la preuve. A l'inverse, la loi prévoit parfois elle-même un tel déplacement de l'objet de la preuve en instituant des présomptions. Lorsque la loi garde le silence, c'est au juge qu'il appartient d'apprécier dans quelle mesure il peut se satisfaire d'une preuve dont l'objet n'est pas directement le fait à prouver (sur le contrôle de la pertinence du fait offert en preuve, V. infra, nos 91 et s.). Emphasis added.

- [48] The above paragraphs 67 to 69 from **Dalloz (supra)** explain that the fact that has to be proved/ fact in issue i.e. the “*objet de la preuve*”, in this case the non-payment of part of the purchase price, may be proved directly – by direct proof of such fact, or indirectly - by inference of such fact from “*des faits voisin ou connexes*” which have to be established. Such indirect proof operates a “*déplacement de l'objet de la preuve*” in that the fact in issue is not proved by means of evidence which proves that fact directly. Paragraphs 80 to 82 consider the “*déplacement de l'objet de la preuve*” in the context of “*Preuve d'un fait négatif*”. It is to be noted that counsel for the plaintiff has argued that proof of a negative fact i.e. that the buyer has not paid the price, is nearly impossible for the seller whilst the buyer is in a far better position to bring proof that it has paid. On the issue of “*Preuve d'un fait négatif*” paragraphs 80 to 83 read as follows:

C. – Preuve d'un fait négatif.

80. *La preuve d'un fait négatif est parfois réputée impossible. L'expérience a démontré le contraire. Il suffit de citer la preuve de la non-paternité résultant d'un examen comparatif des sangs de l'enfant et du père prétendu (LARGUIER, La preuve d'un fait négatif, Rev. trim. dr. civ. 1953. 1). Mais il est vrai que l'établissement d'un*

fait négatif est un secteur où le déplacement de l'objet de la preuve s'impose le plus souvent.

81. *Il ne s'agit pas d'un véritable déplacement de l'objet de la preuve lorsque le fait négatif comporte une antithèse immédiate sous forme d'une proposition positive contraire : en pareil cas, les faits à prouver ne sont présentés comme négatifs que par l'artifice d'une construction grammaticale ; « on peut dire alors que sous l'enveloppe d'une négative se cache une affirmative bien tranchée » (LARGUIER, loc.cit., no 3). Ainsi, l'ayant cause d'un assuré, qui veut démontrer que le décès de celui-ci n'a pas eu pour cause un suicide, établira de façon positive la cause du décès et prouvera de cette façon qu'elle est indépendante de la volonté de son auteur (Req. 29 oct. 1940, D. H. 1940. 195 ; Comp. pour la preuve du caractère involontaire d'un accident : Civ. 29 oct. 1958, Bull. civ. I, n° 458). En ce cas, il n'y a aucun effort de raisonnement à faire pour passer du fait prouvé au fait à prouver : la preuve du fait négatif résulte immédiatement et directement de la preuve de son contraire. Telle est l'interprétation de la preuve de l'absence de possession d'état d'enfant légitime donnée par l'instruction du 26 avril 1974 modifiant l'instruction générale relative à l'état civil : une reconnaissance de paternité étant nulle si l'enfant a la possession d'état d'enfant légitime, le procureur de la République devra faire connaître à l'auteur de la reconnaissance que celle-ci ne peut être mentionnée en marge de l'acte de naissance de l'enfant, que s'il lui est produit un acte de notoriété établissant que l'enfant jouit de la possession d'état à l'égard de son père naturel, ce qui établit par contre-coup l'absence de possession d'état d'enfant légitime (n°301).*
82. En revanche, la preuve d'un fait négatif ne peut généralement se faire que par induction à partir de la preuve de faits positifs plus ou moins proches, lorsqu'il s'agit d'une proposition négative indéfinie, c'est-à-dire qui ne comporte pas d'antithèse immédiate (LARGUIER, loc. cit.). Ainsi, la preuve directe de l'absence de faute ne pourrait-elle être rapportée que par les dires d'un témoin ayant partout et toujours accompagné la personne, ce qui est pratiquement impossible ; force est donc de recourir en ce cas à la preuve indirecte. Tel est le cas, par exemple, de la preuve exigée des parents pour les exonérer de la responsabilité qui pèse sur eux du fait de leurs enfants mineurs habitant avec eux : aux termes de l'article 1384, alinéa 7, du code civil, ils doivent prouver « qu'ils n'ont pu empêcher le fait qui donne lieu à cette responsabilité ». La preuve directe de l'absence de faute étant pratiquement impossible, on se contentera de la démonstration d'un faisceau de faits positifs d'où le juge inférera le caractère irréprochable de la conduite des parents. Comme l'énonce la cour de Paris, il faut que le père prouve « que, compte tenu de l'âge et du degré de maturité de l'enfant, il a organisé sa vie scolaire et de

loisirs avec soin ; qu'il s'est couvert contre les risques éventuels ; qu'il a conseillé et guidé son enfant ; qu'enfin il a établi avec lui des relations de confiance qui donnent à celui-ci une stabilité morale, preuve d'une bonne éducation » (Paris, 11 oct. 1971, Gaz. Pal. 1972. 1. 130).

- [49] Hence, proof of a “*fait négatif*”, only operates a “*déplacement de l’objet de la preuve*” where the “*fait négatif*” amounts to a “*proposition négative indéfinie*” (as defined at paragraph 82 above) i.e. where the “*fait négatif*” cannot be directly established by an opposite positive fact, as in the examples given above. Paragraph 83 goes on to explain how proving a “*fait négatif*” amounting to a “*proposition négative indéfinie*” by way of “*preuve indirecte*” could instead of operating a “*déplacement de l’objet de la preuve*” operate a “*renversement de la charge de la preuve*” so that the burden of proving such “*fait négatif*” falls on the other party, which is open to criticism as it amounts to dispensing the party making the claim from bringing such proof. It reads:

83. Mais la tentation est grande d'aller encore plus loin et de passer du déplacement de l'objet de la preuve à un véritable renversement de la charge de la preuve. Si l'on conserve l'exemple de la responsabilité des père et mère, il est facile de voir comment un glissement insensible peut s'opérer : les faits positifs d'où résulte la preuve indirecte du comportement correct des parents sont assez vagues ; il suffit parfois de fort peu de choses pour étayer le raisonnement sur lequel le juge fonde la preuve de l'absence de faute ; à la limite, il n'y a plus aucune preuve positive et le juge présume ab initio la rectitude de la conduite des parents, rejetant ainsi sur la victime la charge de prouver l'attitude fautive. La jurisprudence cède parfois à cette tentation (Crim. 27 oct. 1964, Gaz. Pal. 1965. 1. 186, Rev. trim. dr. civ. 1965. 349, obs. Rodière ; RODIÈRE, La disparition de l'alinéa 4 de l'article 1384 du code civil, D. 1961, Chron. 207). Une telle attitude est critiquable, car si la difficulté de prouver un fait négatif justifie le déplacement de l'objet de la preuve, quelle que soit la souplesse du procédé il n'est pas possible d'aller jusqu'à la dispense de preuve. Seul le législateur pourrait établir une telle dispense. A défaut d'indication dans la loi, le fait négatif doit être prouvé (LARGUIER, loc. cit. ; MARTY et RAYNAUD, t. 1, no 214).

- [50] The following paragraphs address the point that only disputed facts need to be proved. It reads as follows:

84. En matière juridique, la preuve réglementée est une preuve judiciaire. Or, « prouver en matière judiciaire, c'est déterminer, au moyen de procédés admis par la loi, la conviction du juge par rapport à un fait litigieux. Pour que se pose la question de preuve, il faut donc une contestation ; un fait reconnu ou simplement non contesté n'a pas besoin d'être prouvé » (MOTULSKY, Principes d'une réalisation méthodique du droit privé, thèse, Lyon, 1947, no 115 ; dans le même sens, AUBRY et RAU, t. 12, par ESMEIN, 749, p. 52 ; NORMAND, Le juge et le litige, n° 290 ; Cf. Civ. 5 mai 1976, Bull. civ. III, no 189).
85. C'est à Henri MOTULSKY que revient le mérite d'avoir clairement distingué les deux tâches différentes qui incombent aux plaideurs dans la construction de « l'édifice de fait » soumis au juge : l'allégation et la preuve (thèse préc., n° 83 et s. ; Le rôle respectif du juge et des parties dans l'allégation des faits, Etudes de droit contemporain, travaux et recherches de l'institut de droit comparé de l'Université de Paris, 1959, t. 15, 2^e vol., p. 355 et s. ; Prolégomènes pour un futur code de procédure civile : la consécration des principes directeurs du procès civil par le décret du 9 septembre 1971, D. 1972, Chron. 91). Celui qui réclame le bénéfice de l'application une règle juridique doit indiquer les faits qui, selon lui, fondent le droit prétendu. [...]. A ce stade, il n'est pas question de preuve. Un examen des allégations doit déjà être fait par le juge, car la prétention ne peut être accueillie que s'il y a coïncidence entre les allégations du plaideur et les « éléments générateurs » d'un droit pouvant produire le résultat réclamé (MOTULSKY, thèse préc., no 107). C'est la question de la pertinence ou du caractère concluant des faits allégués (V. infra, nos 91 et s.). Mais l'examen porte sur de simples affirmations. La question de preuve n'apparaît qu'avec la contestation et son étendue est limitée à celle de la contestation.
86. Il n'est pas rare qu'un plaideur qui dispose de moyens de preuve en fasse état à l'appui de ses allégations sans attendre la contestation de son adversaire. Cependant, la contestation est logiquement un préalable à toute question de preuve. [...] C'est précisément cette contestation qui circonscrit l'objet de la preuve. Il en résulte souvent une décomposition plus ou moins poussée des faits généralement allégués sous le couvert d'une notion « complexe » (MOTULSKY, op. cit., n° 90). Par exemple, à un plaideur invoquant l'existence d'une vente, son adversaire répond en niant qu'un prix ait été fixé ; la contestation pénètre dans l'analyse de la notion globale de vente, pour n'en retenir qu'un élément : seule la preuve d'un prix devra être rapportée.
87. La contestation n'est pas toujours possible sur tous les points allégués par l'adversaire. Il faut, en effet, tenir compte des présomptions légales qui affirment

l'existence de certains faits lorsque d'autres faits sont établis. La seule contestation efficace est alors celle qui porte sur les faits qui déclenchent la présomption. Si ces faits ne sont pas déniés, ils doivent être considérés comme établis et le résultat prévu par la loi s'impose, sans qu'une contestation de ce résultat ait la moindre portée.

88. Il faut cependant bien préciser que lorsque nous parlons de contestation, il s'agit d'une simple dénégation et non d'une preuve contraire. La seule contestation d'un fait allégué suffit à interdire de considérer que ce fait est établi par la déclaration de celui qui se prévaut de son existence. Le fait contesté ne peut être retenu que s'il est prouvé, c'est-à-dire lorsque, par des moyens adéquats, le juge a été convaincu de la véracité de l'allégation. [...]

90. On remarquera, enfin, combien les règles de la preuve judiciaire peuvent donner des faits une image déformée par rapport à la réalité. Non seulement les moyens de preuves sont imparfaits, en ce sens que, s'ils sont propres à entraîner la conviction du juge, il ne s'agit cependant que d'une approximation qui ne permet pas d'atteindre à la certitude absolue, mais le juge devra considérer comme établis les faits allégués par un des plaideurs, dès lors qu'ils ne sont pas contestés par son adversaire [...].

[51] In the present case, it is averred at paragraph 11 of the plaint that “*In breach of the agreement, the Defendant has failed, refused or neglected to pay the Plaintiff the sum of SCR1,500,000.00 as agreed or at all*”. The Defendant denied this averment but did not aver that it had paid the sum of SCR1,500,000.00. At paragraph 4 of the statement of defence, the defendant avers that –

4. The Defendant denies paragraph 11 and puts the Plaintiff to strict proof that the payments as stipulated in clauses 2 and 3 of the Deed of Sale are unpaid. The Defendant avers that the Defendant has never acknowledged any debt owing to the Plaintiff nor is there evidence of the Plaintiff making a demand or claim whatsoever against the Defendant at any time within any period of five years from the date that an instalment was due and payable by the Defendant to the Plaintiff for any debt owed in respect of the sale referred to in paragraph 8 of the Plaint.

[52] According to the rules relating to pleadings what is simply denied is taken to be admitted. Section 75 of the Seychelles Code of Civil Procedure provides that:

75. *The statement of defence must contain a clear and distinct statement of the material facts on which the defendant relies to meet the claim. A mere general denial of the plaintiff's claim is not sufficient. Material facts alleged in the plaint must be distinctly denied or they will be taken to be admitted.*

[53] It is arguable whether the averment in the Statement of Defence that the defendant did not acknowledge any debt to the defendant or the absence of a letter of demand by the plaintiff amount to a “*statement of the material facts on which the defendant relies to meet the claim*”. However, there is no doubt that it fulfils the requirement of a “*dénégation*” which according to paragraph 88 of ***Dalloz (supra)*** requires that the fact that was denied to be proved. In this case, the averment of the plaintiff that the sum of SCR1,500,000 was not paid has to be proved.

[54] Having dealt with the issue of the “*objet de la preuve*” (CHAP. 2, SECT. 1^{re}), the issue of “*charge de la preuve*” is then addressed (CHAP. 2, SECT. 2.) It is pointed out that it is the “*répartition de la charge de la preuve*” which seems to present a difficulty rather than the “*charge de la preuve*”, in other words, how the burden of proving a fact is shared between the parties (paragraph 105). The issue of “*imputation du risque de la preuve*” is also raised: it is pointed out that Article 1315 in designating who proves what, also answers the question as to who will win the case if a party does not prove what they are required to under that provision. The relevant parts of SECT. 2., are reproduced below:

SECT. 2. – Charge de la preuve.

105. *La signification même de l'expression « charge de la preuve » doit être précisée. Mais c'est surtout la répartition de ce fardeau entre les plaideurs qui fait difficulté.*

ART. 1^{er} - ORDRE DE LA PREUVE ET RISQUE DE LA PREUVE

106. *L'article 1315 du code civil, relatif à la preuve des obligations, est considéré comme exprimant un principe général: « celui qui réclame l'exécution d'une obligation doit la prouver. Réciproquement, celui qui se prétend libéré doit justifier le paiement ou le fait qui a produit l'extinction de son obligation ». Tel qu'il est rédigé, ce texte envisage donc la charge de la production des preuves, en désignant un ordre chronologique dans l'administration de la preuve. Mais,*

quoique moins apparente, une autre solution se trouve également dans la formule légale: le sort du procès lorsque la preuve n'aura pu être faite. En exposant « qui doit prouver? », l'article 1315 donne aussi une réponse à la question « à qui le juge devra-t-il donner satisfaction, lorsque la lumière ne sera pas faite? ». (LEGEAIS, *Les règles de preuve en droit civil*, thèse Poitiers, 1954, p. 101; MOTULSKY, *Principes d'une réalisation méthodique du droit privé*, thèse, Lyon, 1947, n° 117; F. Boulanger, *Réflexions sur les problèmes de la charge de la preuve*, *Rev. trim. dr. civ.* 1966. 736, n° 5). Cette « imputation du risque de la preuve » (LEGEAIS, *op. cit.*) est délicate et fait toute la difficulté du problème de la charge de la preuve.

- [55] The following is stated in regards to the impression given by Article 1315 as to the “*ordre de la preuve*” i.e. the order in which proof of disputed facts is brought, so as to support the case of the respective parties’ and negate the proof advanced by the opposing party:

107. *Il est classique de tirer de l'article 1315 du code civil le schéma suivant. Le demandeur allègue un fait à l'appui de sa prétention. Si le défendeur le conteste par une simple dénégation, il appartient au demandeur de faire la preuve de son allégation : actori incumbit probatio. Lorsque le demandeur a rapporté la preuve qui était exigée de lui, le défendeur peut opposer une exception ; Si celle-ci est déniée par le demandeur, il appartient au défendeur de prouver les faits sur lesquels il fonde l'exception qu'il allègue : reus in excipiendo fit actor. Ainsi, au cours du procès, la charge de la preuve peut peser alternativement sur chacune des parties, au fur et à mesure qu'elles allèguent de nouveaux faits : onus probandi incumbit ei qui dicit (BEUDANT et LEREBOURS-PIGEONNIÈRE, t. 9, par PERROT, n° 1160).*

[...]

109. *Mais la présentation classique de « l'ordre de la preuve » qui donne « l'impression de rôles réglés l'avance sur le théâtre juridique » (F. BOULANGER, *Réflexions sur le problème de la charge de la preuve*, *Rev. trim. dr. civ.* 1966. 736, n° 1) est très théorique. Elle revient à dire qu'un plaideur, en présence de l'allégation de son adversaire, n'a pas d'autre initiative à prendre qu'une simple dénégation ; il lui suffira d'attendre que la preuve de cette allégation soit rapportée ; ensuite seulement, s'il y a lieu, il avancera d'autres faits qu'il devra prouver. [...] Mais la réalité est assez différente. Il est rare qu'un plaideur puisse se borner à adopter une position d'attente purement passive jusqu'à ce que son adversaire ait satisfait aux exigences de preuve mises à sa charge. [...]*

110. Il faut tenir compte du débat qui s'instaure naturellement sur l'administration de la preuve elle-même. Celui sur qui pèse la charge de la preuve doit tenter d'entraîner la conviction du juge. Hormis les cas où la loi attache une force probante absolue à certains modes de preuve, la certitude totale, objective, ne peut jamais être atteinte. Tout ce que peut espérer un plaideur est de proposer au juge des moyens de preuve propres à le persuader de la véracité de ses allégations. Si l'adversaire se borne à une simple contradiction, il est probable que la conviction du juge sera assez facilement obtenue. Par conséquent, le défendeur aura tout intérêt à combattre les moyens de preuve du demandeur en proposant ses propres preuves, de façon à empêcher la conviction du juge de se former en faveur de son adversaire. A mesure que cette conviction prend corps, il devient urgent pour le défendeur de produire les preuves qui étayent ses dénégations. De sorte que « dans la pratique, chacun prend position sur le point de fait et aligne ses preuves. Celui-là même qui soutient n'avoir rien à prouver ne manque pas de pousser son offensive pour ruiner adverse » (MIMIN, note sous Soc. 10 avr. 1941, D. C. 1942. 35).

111. [...] l'ordre théorique de la production des preuves n'est généralement pas suivi par les parties elles-mêmes qui, volontairement, apportent leur contribution à la recherche de la vérité même lorsqu'elles n'y sont pas obligées... [...] on s'aperçoit combien est devenue inexacte l'image d'une seule partie aux prises avec le fardeau de la preuve, tandis que son adversaire [...] assiste[nt] passif[s] à ses efforts. [...] Le schéma classique de l'alternance des initiatives des parties dans la production des preuves est très loin de la réalité.

112. Ainsi, en dépit de ce que semble laisser croire la formule de l'article 1315 du code civil, la question de la charge de la preuve n'est pas, ou n'est plus, celle d'un ordre de production des preuves. Peu importe, au fond, d'où proviennent les éléments de conviction sur lesquels le juge peut fonder sa décision. Envisagé sous l'angle de la production des preuves, le problème de la charge de la preuve s'évanouit, le plus souvent (LEGEAIS, op. cit., p. 177). La véritable question est celle de l'imputation du risque de la preuve.

[56] As stated at paragraph 112, it is concluded that despite the impression given by Article 1315 as to the importance of the order in which proof of disputed facts is brought i.e. “*ordre de la preuve*” in the context of discharging the “*charge de la preuve*”, it is “*l'imputation du risque de la preuve*” which is of import. This is discussed below :

113. « Lorsque la conviction du juge est établie, dans un sens ou dans l'autre, il est, en somme, indifférent de savoir à laquelle des deux parties incombaient la tâche de la provoquer. Mais quand la balance reste en suspens, quand la vérité même cette vérité restreinte que permet la procédure ne peut pas être découverte, c'est alors qu'il importe de déterminer sur qui pèse le fardeau de la preuve. Comme le juge n'a pas (ou n'a plus en droit moderne la ressource de renoncer à prendre partie et qu'il doit, dès lors, toujours se prononcer pour l'une et contre l'autre des parties, la carence de celle qui se trouve sous le coup de cette charge suffit à entraîner une décision favorable à son adversaire » (MOTULSKY, Principes d'une réalisation méthodique du droit privé, thèse, Lyon, 1947, n°117). Ainsi que l'énonce la Cour de cassation : « L'incertitude et le doute subsistant à la suite de la production d'une preuve doivent nécessairement être retenus au détriment de celui qui avait la charge de cette preuve » (Soc. 31 janv. 1962, Bull. civ. IV, n°105 ; 15 oct. 1964, ibid. IV, n° 678). Tel est le véritable intérêt de la question de la charge de la preuve (PLANIOU et RIPERT, t. 7, par GABOLDE, N°1417; LEGEAIS, Les règles de preuve en droit civil, thèse, Poitiers, 1954, p. 100 et s.)
114. Cette façon d'envisager la charge de la preuve permet de restreindre la question à ses exactes dimensions en éliminant de la discussion de nombreuses hypothèses où les principes gouvernant la répartition du fardeau de la preuve entre les plaideurs sont invoqués hors de propos. Il est fréquent que la Cour de cassation doive rejeter le moyen d'un pourvoi invoquant la violation de l'article 1315 du code civil, alors qu'en l'espèce la preuve a été faite. Dès lors que les juges ont pu se forger une conviction à l'égard des allégations des parties, il est sans intérêt de rechercher sur qui pesait la charge de la preuve.
[...]
117. Si des preuves sont produites, quelle qu'en soit l'origine, et si elles permettent au juge de se forger une conviction, une solution peut être donnée au procès. Mais il faut encore trancher lorsque le doute subsiste, car le juge ne peut, sous peine de commettre un déni de justice, refuser de statuer au motif qu'il est incapable de discerner laquelle des prétentions contradictoires des parties est fondée. L'analyse classique déterminant un « ordre de la preuve » (V. Supra, n° 107) fournirait une réponse : dans l'alternance des allégations, dont chacune doit être prouvée par celui qui l'avance, on s'arrête lorsqu'une des parties n'est pas en mesure d'établir le fait qu'elle énonce ; comme, par hypothèse, au point où en était arrivé le litige, la démonstration de ce fait était nécessaire au succès de la prétention de celui qui l'avait allégué, l'échec de la preuve entraîne la perte du procès pour le plaideur qui était, à ce moment, en position de demandeur. Cette vision trop abstraite du débat judiciaire ne correspond pas à la réalité.

Mais, même débarrassé de ce cadre inutile d'un ordre de la preuve, le principe « actori incumbit probatio » conserve sa valeur : indépendamment du point de savoir si l'on est en présence d'une demande initiale ou non, une allégation nécessaire au soutien de sa prétention n'a pu être prouvée (ce qui peut être le cas pour les deux parties, si chacune avance une prétention distincte et échoue dans sa démonstration : Com. 10 mai 1977, Bull. civ. IV, n° 134).

118. *Malheureusement, on s'aperçoit vite que cette règle est trop sommaire pour fournir une solution satisfaisante dans tous les cas. Elle implique que le risque de la preuve pèse sur celui qui allègue un fait et non sur celui qui le conteste. Mais où s'arrête la contestation et où commence l'allégation d'un fait nouveau ? Lorsqu'un plaideur réclame l'exécution d'un contrat et que son adversaire invoque la nullité de cette convention, s'agit-il de la part de ce dernier d'une contestation de la validité du contrat, imposant à l'autre partie la preuve de cette validité, ou de l'allégation de la nullité qu'il lui appartiendrait de prouver ? De plus, mettre à la charge du demandeur, en toute hypothèse, le risque de la preuve est une règle trop brutale. « Si le procès, dans une société civilisée, ne doit pas être un combat judiciaire, mais une occasion de définir ce qui est juste, il n'y a aucune bonne raison de faire peser systématiquement toutes les obligations de preuve sur le demandeur qui, même s'il est digne d'intérêt, n'aura pas les moyens suffisants pour les remplir » (LEGEAIS, op. Cit., p. 170). On conçoit que certaines nuances puissent s'imposer.*

119. *Loin du bel ordonnancement classique, la répartition du risque de la preuve entre les plaideurs est une question très délicate, qui suscite bien des controverses et introduit souvent un regrettable élément d'incertitude dans le droit de la preuve.*

[57] It would seem from what is stated in **Dalloz (supra)** at paragraph 113, that where the case of both parties is evenly balanced and the Judge is not swayed or convinced by the case of one party or the other or the probative value of their evidence, is when the “*charge de la preuve*” i.e. “*sur qui pèse le fardeau de la preuve*” as set out in Article 1315 becomes important.

[58] In the present case the plaintiff alleges that the defendant has not paid the outstanding sum of SCR1,500,000. The oral testimony of the plaintiff's sole witness, Mr Hoareau, is not convincing on that score. According to his testimony the plaintiff's claim of non-payment appears to be based on what was stated in the deed of sale in that regard, and not from any

personal knowledge or other reliable information of the same. He also relied on an undischarged charge which he claimed was registered against the property to secure payment of the outstanding sum of which no evidence was produced to this Court. He testified that *according to the deed of sale* (Exhibit P3) there was an outstanding amount of SCR1,500,000.00 on the purchase price of SCR4,000,000.00 but that he could not truthfully say whether or not it had been paid. He stated that however *according to what was stated in the deed of sale* the outstanding sum had never been paid, and that he only realised this when he saw the transcription of the deed of sale about two years ago. He admitted that he had never discussed the issue of such payment with Mr. and Mrs. Delhomme and acknowledged that he did not know how the sum of SCR2,500,000.00 had been paid to them. He further admitted that he did not have any documents including bank documents belonging to them. The Notary who dealt with their affairs no longer had any of their documents either. I agree with counsel for the defendant that the claim that the sum of SCR1,500,000.00 remained unpaid by the Government seems to be founded purely on speculation on the part of Mr Hoareau, and not on any reliable information or evidence. In addition to his oral testimony he has produced the title deed which shows that the defendant had an obligation to pay an outstanding sum of SCR1,500,000.00. This is obviously not sufficient to show non-payment of the debt by the defendant.

- [59] Counsel for the plaintiff also submitted that the fact that a charge is still registered against the property in favour of the plaintiff as well as a privilege adds credence to the plaintiff's case that the defendant has, in breach of the agreement, failed to make full payment of the purchase price, as agreed under the sale agreement. As stated, no evidence has been adduced as to the existence of a charge against the property. Furthermore, I fail to see how a privilege could *add credence* to the plaintiff's case that the defendant failed to pay the outstanding sum of SCR1,500,000.00. Clause 4 of the deed of sale stipulates that: "*The Government also grants to the Vendors a Seller's Privilege under Article 2103 of the Civil Code to secure the payment of the outstanding sum of R.1,500,000*". Article 2095 defines a privilege as "*a right which the nature of the claim confers upon a creditor to enjoy a priority over other creditors, even those whose debts are secured by a mortgage*". According to Article 2096 "*[A]mongst creditors entitled to a privilege the priority is settled*

in accordance with the class of privilege applicable”, and Article 2097 further provides that “[T]he creditors entitled to a privilege of the same class shall be paid in proportion to the amount of their claims”. The “Seller’s Privilege” mentioned in the deed of sale is provided for in Article 2103 alinea 1 which provides that the seller of immovable property is entitled to a privilege on the immovable property sold, for the payment of the price. What this means is that if the Government were to sell Coetivy Island without having paid the plaintiff the outstanding sum of SCR.1,500,000, the plaintiff would have priority over other creditors of the Government for the price paid to the Government for the sale of the island, in settlement of the outstanding sum owed to plaintiff by the Government. In the event of several successive sales, the plaintiff as the first seller would have priority over the second seller who in turn would have priority over the third seller and so on. This does not in any way show failure to pay the balance of the purchase price by the Government.

[60] The defendant, on its part has not brought any evidence to show that it has discharged its obligation by paying its debt to the plaintiff. Mr Lablache the defendant’s sole witness was unable to state with any certainty that the balance of SCR1,500,000.00 had been paid by the defendant or produce documentary evidence to show the same. He testified that payments were effected by the Treasury Department and not by the Ministry of Lands where he worked at the time. Although he had never come across a case where the Government had defaulted on its repayments for land purchases, he could not confirm that this had never happened. However, he was unaware of any default in regards to the repayments for Coetivy, nor had he seen any demand for payment for the same. Although he stated that he had found a letter giving instructions to the Chief Accountant and the Treasury to effect the payments, he stated that he was unable to obtain any records of such payments as the Treasury only kept such records for up to ten years. The letter was not produced.

[61] This is obviously a situation envisaged by paragraph 113 **Dalloz (supra)** where “*quand la balance reste en suspens, quand la verité même cette verité restreinte que permet la procédure ne peut pas être découverte, c’est alors qu’il importe de déterminer sur qui pèse*

le fardeau de la preuve. [...] la carence de celle qui se trouve sous le coup de cette charge suffit à entraîner une décision favorable à son adversaire”.

[62] Following the “*presentation classique de l’ordre de la preuve*” as set out in Article 1315, the plaintiff having alleged non-payment, the defendant denied such allegation. The plaintiff is then required to bring evidence of such non-payment: he adduced evidence of the defendant’s obligation to pay the sum of SCR1,500,000.00 but no evidence that the defendant had not paid that sum. The defendant in its turn did not bring any evidence to show that it had paid the said sum thereby discharging its obligation under the contract of sale. In light of the plaintiff’s submission, this raises the question of whether it was sufficient for the plaintiff to bring proof of the obligation and not of its non-execution.

[63] In **Dalloz (supra)** an examination of relevant “*solutions jurisprudentielles*” is carried out. I find that the following provide useful guidance:

141. 3°*Inexécution d’une obligation. - La responsabilité contractuelle suppose, pour sa mise en oeuvre, que soit établie l’inexécution totale ou partielle des obligations du débiteur. La preuve de cette inexécution incombe au créancier demandeur en dommages- intérêts. Un élément de doute pourrait à cet égard, provenir de l’article 1315 lui-même. En énonçant que celui qui réclame l’exécution d’une obligation doit la prouver, ne présume-t-il pas l’inexécution, de sorte qu’il suffirait au créancier d’établir l’existence de l’obligation et, que ce serait au débiteur de prouver l’exécution? Mais la jurisprudence distingue l’action en exécution de l’obligation régie directement par l’article 1315, et l’action en dommages - intérêts pour inexécution de l’obligation. Dans ce dernier cas, le demandeur doit établir toutes les conditions de la responsabilité, c’est-à-dire outre l’existence de l’obligation, le fait de l’inexécution (par ex. : Com. 22 mars 1977, Bull. Civ. IV, n°92).*

[64] The plaintiff in the present case has not filed an “*action en dommages - intérêts pour inexécution de l’obligation*” presumably under Article 1146, for which, it would seem from what is stated at paragraph 141 above, that he would have to prove both the existence of the obligation and “*le fait de l’inexécution*”. It appears therefore that the plaintiff only has to prove the existence of the defendant’s obligation to discharge its burden. The plaintiff having done so, the defendant bearing the “*risques de la charge*” of proving that it has

discharged its obligation, has to prove the execution of its obligation i.e. the payment of the outstanding sum of SCR1,500,000. Failing that “*la carence de celle qui se trouve sous le coup de cette charge [i.e. sur qui pèse le fardeau de la preuve] suffit à entraîner une décision favorable à son adversaire*”, and for judgment given against the defendant.

[65] The following “*solutions jurisprudentielles*” relating to “[E]xceptions opposées a la demande” are also relevant to the present case:

144. 4° Exceptions opposées a la demande. – La question de la liberation du débiteur est directement réglée par l'article 1315 du code civil, selon lequel celui qui se pretend libéré doit justifier le paiement ou le fait qui a produit l'extinction de son obligation. Ainsi, doit-être censuré un arrêt qui, pour débouter une salariée de sa demande en paiement d'indemnités de transport, que son employeur soutenait avoir toujours versées, se contente d'observer que cette employee n'apporte pas de justifications à l'appui de sa demande : la charge de la preuve du paiement incombait à l'employeur qui se prétendait libéré (Soc. 4 mai 1966, Bull. civ. IV, n°406). Dès lors qu'un gérant non salarié de succursale a reconnu, en signant des bordereaux de livraison correspondants, avoir reçu les marchandises dont le règlement lui est réclamé par la société succursaliste et qu'il ne justifie ni de leur restitution ni de leur paiement, les juges du fond ne renversent pas la charge de la preuve en décidant que le gérant reste débiteur de la valeur de ces marchandises (Com. 13 nov. 1972, Bull. civ. IV, n° 287, J. C. P. 1973, II. 17468, note J. H.). C'est au bailleur, tenu de délivrer au preneur la chose louée, qu'il appartient de prouver qu'il s'est libéré de cette obligation, et lorsque le preneur allègue une délivrance partielle, le bailleur doit établir qu'il a satisfait entièrement à son obligation (Civ. 30 oct. 1972, Bull. Civ. III, n° 563). Des associés doivent prouver la réalité de leurs apports bien qu'ils soient défendeurs à l'instance, car étant débiteurs envers la société de tout ce qu'ils avaient promis d'y apporter, ils allèguent leur liberation (Civ. 1^{er} juill. 1971, Bull. civ. III, n° 438). La preuve de la novation de la dette par changement de débiteur principale incombe à un donneur d'aval qui se pretend ainsi libéré du paiement d'une lettre de change (Com. 26 juin. 1972, Bull. civ. IV, n° 202). Il appartient à une partie qui a été condamnée à faire cesser des troubles de voisinage et à payer aux demandeurs une somme fixée par jour de retard, de justifier avoir mis fin aux troubles, fait qui aurait produit l'extinction de son obligation ainsi judiciairement déterminé (Civ. 15 dec. 1971, Bull. Civ. III, n° 632). Même lorsqu'une convention autorise le créancier a prélever d'office à chaque échéance les sommes dues sur le compte bancaire du débiteur, ce n'est pas au créancier qu'il incombe d'établir

que sa créance ne peut être honorée faute de provision, mais c'est au débiteur qui se prétend libéré d'en justifier (Com. 26 oct. 1976, Bull. civ. IV, n° 272 D. 1977. 490, note Cabrillac, J. C. P. 1978. II. 18832, note Lucas de Leyssac). [...]

147. *D'une façon générale, il résulte de l'article 1315, alinéa 2, du code civil, que si le défendeur oppose une exception à la demande de son adversaire, il doit en rapporter la preuve. Ainsi en est-il lorsqu'un acheteur prétend échapper à l'obligation de payer le prix en alléguant le défaut de conformité de marchandises à la commande (Com. 27 avr. 1966, Bull. civ. III, n° 206 ; 14 oct. 1969, ibid. IV, n° 294) ; lorsque le maître de l'ouvrage, assigné en paiement du solde du prix des travaux, allègue des malfaçons (Com. 21 juin. 1965, Bull. civ. III, n° 385); lorsqu'un acquéreur, assigné en restitution de la somme à valoir sur le prix d'une vente non réalisée, tente de se soustraire à l'obligation de remboursement en prétendant que le versement a été fait à titre de dédit (Civ. 21 juin. 1968, Bull. Civ. III, n° 296) [...].*

[66] In view of all the above, it appears as contended by the plaintiff that, in terms of Article 1315, the plaintiff only has to prove the obligation of the defendant i.e. the obligation to pay the outstanding sum of SCR 1,500,000.00, and having done that it is for the defendant to prove that he has paid the sum. This view is confirmed in **Précis Dalloz, Droit Civil, Les obligations, 8^e édition, p. 1255**, on the subject of proof of payment ("*Preuve du paiement*") (See also Dalloz Encyclopédie Juridique, Répertoire de Droit Civil, 2^e Édition, Tome V1, Paiement), as follows:

1354. *1° Charge de la preuve ◇ Il résulte des termes de l'article 1315 du Code Civil que, s'il appartient au créancier de rapporter la preuve de l'existence de l'obligation dont il entend obtenir l'exécution, le débiteur peut y échapper en prouvant que l'obligation est éteinte par une cause quelconque, en particulier par le paiement qu'il prétend avoir fait.*

[67] As to how such proof is to be brought, it is stated at pp. 1256 and 1257 that:

1355. *2° Modes de preuve ◇ Il est généralement admis que s'applique au paiement le droit commun de la preuve des actes juridiques et qu'un écrit doit donc être produit dès lors que la somme à payer ou la valeur de l'objet de l'obligation dépasse le seuil prévu à l'article 1341 du code civil. Cette solution se justifie*

pleinement si, conformément à la doctrine dominante, le paiement doit être considéré comme un acte juridique.

[...]

Conformément au droit commun, l'exigence d'une preuve écrite, cesse si le débiteur se trouve dans l'impossibilité matérielle ou morale de rapporter une preuve de cette nature (art.1348). Il en est ainsi notamment s'il existe entre le créancier et le débiteur des liens de subordination ou de parenté empêchant le débiteur de requérir une quittance de son paiement. La jurisprudence reconnaît aussi que les usages interdisent de demander quittance du paiement d'honoraires dans certaines professions libérales. La preuve du paiement peut alors être faite par tous moyens.

[68] It is noted that Article 1341 of our Civil Code also requires proof by documentary evidence for “*any matter the value of which exceeds 5000 Rupees*” and prohibits oral evidence against such writing, subject to the exceptions provided under Articles 1347 (where there is writing providing initial proof) and 1348 (where it is impossible for the creditor to obtain written proof of an obligation undertaken towards him in certain prescribed circumstances). It is doubtful that the fact that the defendant was unable to bring any evidence of payment of the sum claimed because of the time that has elapsed, would be considered as an “*impossibilité matérielle ou morale*” justifying proof by means other than a writing as required by Article 1341. In any event, no proof of any kind was brought to show such payment. Mr Lablache’s testimony in that regard was at best, equivocal.

[69] In view of the above, I find that the plaintiff having proved the debt of the defendant, and the latter having failed to prove that it has paid that debt in accordance with Article 1315, the plaintiff has made out its case on a balance of probabilities.

Remedies

[70] The remedies sought by the plaintiff in terms of the plaint are rescission of the contract of sale and, in the alternative, the payment of the sum of SCR1,500,000.00 which is alleged to remain unpaid by the defendant, with interest.

[71] The plaintiff, in its submissions dated 8th January 2021, relied on the following excerpt from the majority judgment (per Twomey JA, Msoffe JA concurring) in the Court of

Appeal case of *Charlemagne Grandcourt and others vs Christopher Gill* (SCA 7 of 2011) [2012] SCCA 31 (07 December 2012):

12. *It is true that the deceased was right to avail of the provisions of the Civil Code in relation to l'exception d'inexécution until 19th May 1994. This right of non performance (non adimpleti contractus) is contained in Article 1612 of the Civil code of Seychelles:*

“The vendor shall not be bound to deliver the thing if the purchaser has not paid the price, provided that the vendor has not granted him time”.

[72] On that basis it submitted that in the present case, given the thing had already been delivered even though the purchaser had not paid the price, the vendor/ seller is conversely entitled to demand the thing delivered from the buyer, subject to the refund of the part payment of the purchase price. The plaintiff does not state in its submissions, the legal provision on the basis of which he makes this demand. It would seem that he is relying on some sort of reverse application of the “*exception d'inexécution*”. In any event, such remedy is not sought for in the plaint and can therefore not be granted, both the parties and the court being bound by the pleadings. Furthermore, it does not seem that this solution is possible from the following in **Droit civil, Les Obligations, 8^e édition, Editions Dalloz – 2002** in regards to “*l'exception d'inexécution*”.:

630. *Définition* ◇ *En principe, les prestations promises par les contractants doivent être exécutées simultanément, trait par trait. Par exemple l'acheteur doit payer le prix en même temps qu'il prend livraison de la chose, ou encore chaque coéchangiste doit livrer la chose au même moment. Il en résulte que, si l'un des contractants réclame l'exécution de ce qui lui est dû sans pour autant payer ce qu'il doit, l'autre contractant peut refuser d'exécuter sa propre prestation en lui opposant l'exception d'inexécution, encore nommée exception non adimpleti contractus (exception du contrat inexécuté). En d'autres termes, l'exception d'inexécution est le droit qu'a chaque partie à un contrat synallagmatique de refuser d'exécuter la prestation à laquelle elle est tenue tant qu'elle n'a pas reçu la prestation qui lui est due ...*

[...]

L'exception d'inexécution entraîne non la disparition des obligations, mais un simple ajournement de leur exécution. Elle ne détruit pas le contrat, mais en

suspend l'exécution. Le contractant entend ainsi se garantir contre la situation très défavorable dans laquelle le placerait une exécution unilatérale de ses obligations et faire pression sur son partenaire pour l'amener à s'exécuter. La situation qui résulte du jeu de l'exception d'inexécution est provisoire: soit le moyen de pression se révèle efficace, et chaque partenaire exécute finalement ses obligations, soit l'inexécution apparaît définitive et on aura recours à la résolution pour inexécution afin de dénouer la situation.

- [73] It would seem that the return of the property to the plaintiff with the corresponding refund to the defendant of the sums already paid, by application of the remedy of “*exception d'inexécution*” does not find its application simply because the vendor has already executed its obligation of delivery. Furthermore, it is only a temporary relief. This is confirmed by Twomey JA in *Charlemagne Grandcourt and others vs Christopher Gill* (*supra*) when she states:

12. [...] *When the purchaser does not make payment for the goods or property sold, the vendor can resort to non performance, in this case refuse to transfer the land. However, that right of non-performance is only temporary; it only suspends the obligation of the vendor not to transfer until payment of the contract price [...]*

- [74] The plaintiff, in its submissions further relied on Article 1658 alinea 1 to submit that it has the right to rescind the contract “*by reason of insufficiency of the price*”. Article 1658 provides:

Article 1658

1. *Apart from the grounds of nullity or rescission already explained in this Title, and those which are common to all contracts, the contract of sale may be rescinded by the exercise of the option to redeem and by reason of the insufficiency of the price.*

- [75] Suffice it to say the issue of “*insufficiency of the price*” does not arise in the present case. The reference thereto in Article 1658 alinea 1 is clearly made in the context of rescission for lésion, which is dealt with in the subsequent Articles 1674 to 1684. The pleadings in this case do not disclose an action for rescission for lesion.

[76] The defendant has also raised the point in its submissions dated 11th June 2024 that the plaintiff's claim should not be treated as an *action en revendication*. I agree. The pleadings do not disclose such an action. In *Nolin v Nolin* (SCA 4 of 2014) [2016] SCCA 13 (22 April 2016), Twomey JA explained that:

13. In practical terms, a classical case of “action en revendication” would start off with each proprietor coming to court with a competing document of title where the court is called upon to determine which title overrides the other. There are variations of this standard scenario admittedly. As the Doctrine lays down: “la question posée est uniquement celle de la preuve du droit de propriété.” Note 47, Encyclopédie Dalloz, ibid. In an action en revendication, the sole issue is the right of ownership between competing title-holders.

[77] Finally, counsel for the plaintiff, invokes Articles 1183 and 1184 to ground his prayer for rescission; These Articles provide, in relevant part:

Article 1183

A condition subsequent is the condition which, when fulfilled, rescinds the obligation and restores the things in the same state as they would have been if the obligation had never existed.

It does not suspend the performance of the obligation; it only binds the creditor to restore what he has received, if the event envisaged by the condition occurs.

Article 1184

1. A condition subsequent shall always be implied in bilateral contracts in case either of the parties does not perform his undertaking.

[...]

In that case, the contract shall not be rescinded by operation of law. The party towards whom the undertaking is not fulfilled may elect either to demand execution of the contract, if that is possible, or to apply for rescission and damages. If a contract is only partially performed, the Court may decide whether the contract shall be rescinded or whether it may be confirmed, subject to the payment of damages to the extent of the partial failure of performance. The Court shall be entitled to take into account any fraud or negligence of a contracting party.

Rescission must be obtained through proceedings but the defendant may be granted time according to the circumstances.

[...]

- [78] In his submissions on behalf of the plaintiff, counsel again relied on *Charlemagne Grandcourt and others vs Christopher Gill (supra)*, in particular the following per Twomey J.A., after she had carried out a review of relevant legal provisions namely Articles 1583, 1134, 1183, and 1184:

13. *The comment on Article 1183 in Dalloz Codes Annotés, Nouveau Code Civil III states: “La condition résolutoire est celle qui, lorsqu’elle s’accomplit, opère la revocation de l’obligation, ce qui remet les choses au meme état que si l’obligation n’avait pas existé. Elle ne suspend point l’exécution de l’obligation: elle oblige seulement le créancier à restituer ce qu’il a reçu, dans le cas où l’événement prévu par la condition arrive.”*

14. *From the above we can summarise:*

1. *Contracts are of an obligatory nature.*
 2. *Contracts cannot be unilaterally revoked.*
 3. *Where a party to a bi-lateral contract fails to perform his obligation, the other party can suspend the performance of his own obligation but only until the other party performs his corresponding obligation.*
 4. *Where a party to a contract fails to perform his obligation, the other party cannot of his own rescind the contract, he must seek the remedy in court. The exceptions to this rule are commercial contracts and contracts where the parties have inserted a term in the contract providing for rescission.*
- [...]*

15. *If we are to apply these principles to the present case it is clear that the Respondent breached the contract by not paying the last instalment on time. The letters of 4th and 5th May indicate that he was given time to meet his obligation. The deceased would have been entitled to bring an action under article 1183 of the Civil Code to bring an action for rescission and damages. This he did not do.*

- [79] On the basis of the above pronouncements by Twomey JA, counsel for the plaintiff submits that contrary to the case of *Charlemagne Grandcourt and others vs Christopher Gill (supra)* where the remedy sought by the plaintiff was for specific performance under article

1142 of the Civil Code, in the present case the plaintiff has brought an action for rescission of the contract on the basis of the breach of the contract of sale by the defendant pursuant to Articles 1183 and 1184, as he is entitled to do. It is to be noted that the primary remedy sought is for rescission but that the plaintiff has also prayed for specific performance in the alternative i.e. the payment of the balance of the purchase price.

[80] Counsel further submitted that the condition subsequent implied in the contract of sale, as per Article 1184, was for the defendant to make monthly instalment payments of SCR300,000.00 until all payments due were made, and that the defendant, in breach of the contract failed to do so. In *Estate of the late André Delhomme & Ors v AG* (CS 79/2020) [2021] SCSC 227 (18 May 2021) at paras [82] to [83] this Court explained the following in regards to the condition subsequent:

81. *So much for the condition precedent. I now turn to Article 1184 alinea 1 which provides that “[a] condition subsequent shall always be implied in bilateral contracts in case either of the parties does not perform his undertaking”. A condition subsequent (“condition resolutoire”) is defined in Article 1168 as a future and uncertain event the occurrence or non-occurrence of which cancels the obligation which is subject to such condition.*

82. *The plaintiff claims that the defendant has failed to pay the outstanding sum of Rupees One Million Five Hundred Thousand (R1,500,000.00) due under the deed of sale. In terms of Article 1184 alinea 1, the non-performance by the defendant of its obligation to pay the price amounts to a condition subsequent. The non-payment of the price by the defendant is the event which gives rise to the cancellation of the defendant’s obligation in terms of Article 1168.*

83. *According to Article 1183 the effect of the fulfilment of the condition subsequent (i.e. the non-payment of the price by the defendant) is the rescission of the obligation and restoration of things in the same state as they would have been if the obligation had never existed. It does not suspend the performance of the obligation but only binds the creditor to restore what he has received, if the event envisaged by the condition occurs.*

[81] **Dalloz, Encyclopédie Juridique, Répertoire de Droit Civil, 2^e Édition, Tome VI, Vente (l'obligations de l'acheteur), CHP. 2 – Résolution pour inexécution des obligations de l'acheteur** explains that:

106. *Le code civil a spécialement prévu la résolution de la vente pour défaut de paiement du prix (art.1654), car le prix est l'obligation de l'acheteur la plus importante [...]*

107. *Lorsqu'un acheteur ne paye pas le prix à l'échéance, le vendeur peut, soit agir en paiement par les modes de contrainte du droit commun, soit agir en résolution, soit opposer une des garanties que lui confère la loi: l'exception d'inexécution, le droit de retention lorsqu'il s'agit d'un meuble, le privilège du vendeur.*

[82] It goes on to explain that:

109. *En principe, la résolution de la vente pour défaut de paiement du prix doit être prononcée par jugement. Aux termes de l'article 1654 du code civil : « si l'acheteur ne paye pas le prix, le vendeur peut demander la résolution de la vente ». Règle qui applique le principe général posé par l'article 1184 du code civil, selon lequel, lorsque l'une des parties ne satisfera pas à son engagement, le contrat n'est pas résolu de plein droit ; « la résolution doit être demandée en justice, et il peut être accordé au défendeur un délai selon les circonstances ». L'article 1655 du code civil reproduit cette règle pour la vente d'immeubles. « La résolution de la vente d'immeubles est prononcée de suite, si le vendeur est en danger de perdre la chose et le prix. Si ce danger n'existe pas, le juge peut accorder à l'acquéreur un délai plus ou moins long suivant les circonstances. Ce délai passé sans que l'acquéreur ait payé, la résolution de la vente sera prononcée ».*

[83] Articles 1654 and 1655 are referred to in Dalloz (supra) (see paragraph [80] of this judgment) in regards to rescission for non-payment of the price. It is stated that Article 1654 applies the general principle enunciated in Article 1184. These provisions provide as follows:

Article 1654

1. *If the buyer does not pay the price, the seller may demand rescission of the sale.*

2. *However, after the extinction of any privilege that the seller may have upon the property, his right to claim rescission cannot be exercised to the detriment of third parties having over the property to which the privilege applied rights derived from the purchaser, and having conformed to the law for preserving their said rights.*

Article 1655

The rescission of the sale of immovables shall be ordered forthwith if the seller is in danger of losing both the thing and the price.

If that danger does not exist, the Judge may grant to the buyer a time-limit, long or short, according to the circumstances.

If this time-limit expires without the buyer having paid, the rescission of the contract shall be ordered.

- [84] This Court found at para [69] that the plaintiff had made out its case on a balance of probabilities.
- [85] The plaintiff has prayed for rescission of the contract of sale in terms of Article 1184. In the alternative it prays for the payment of the sum of SCR1,500,000.00 which is alleged to remain unpaid by the defendant, with interest.
- [86] Under Article 1184 the plaintiff is entitled to “*elect either to demand execution of the contract, if that is possible, or to apply for rescission and damages*”. The plaintiff has opted for rescission. Article 1184 further provides that “*[i]f a contract is only partially performed, the Court may decide whether the contract shall be rescinded or whether it may be confirmed, subject to the payment of damages to the extent of the partial failure of performance*”, and further that “*[t]he Court shall be entitled to take into account any fraud or negligence of a contracting party*”. It appears that in the case of partial performance of the defaulting parties’ obligation, as is the case here, the Court is given the power to decide whether to order rescission of the contract or to confirm the contract subject to payment of damages, notwithstanding that the plaintiff’s claim is for rescission (although I do take note that there is a claim for payment of the outstanding sum with interest in the alternative).
- [87] In *Ceccaldi c. Albertini* Civ. 14 avril 1891 the Cour de Cassation held that:

Lorsque le contrat ne contient aucune clause expresse de resolution, il appartient aux tribunaux de rechercher, dans les termes du contrat et dans l'intention des parties, quelles sont l'étendue et la portée de l'engagement souscrit par celle d'entre elles, qui y aurait manqué complètement, et, en cas d'inexécution partielle, d'apprécier, d'après les circonstances de fait, si cette inexécution a assez d'importance pour entraîner la résolution ou si elle ne sera pas suffisamment réparée par une condamnation à des dommages-intérêts; et, à cet égard, le pouvoir d'appréciation des juges du fait est souverain(C. civ., art. 1184).

[88] In the circumstances of the present case, the entire purchase price amounted to SCR4,000,000.00, out of which the larger sum of SCR2,500,000.00 was paid and a sum of SCR1,500,000 remained to be paid. The court based its finding that the plaintiff had proved its case on the basis of Article 1315 which imposed on the defendant proof that it had paid the outstanding balance of the purchase price. This suit was filed some forty years after the sale of Coetivy Island, and the defendant claims that it was unable to bring any evidence that it had settled the outstanding balance because such evidence is not kept for such a long period, which is a plausible explanation. Mr Hoareau's testimony regarding the non-payment of the balance of the purchase price was less than convincing. I also note that no fraud or negligence on the part of the defendant has been alleged or proven by the plaintiff. In the circumstances, I am of the view that the partial failure of the defendant to perform its obligation does not warrant the rescission of the contract, especially given the long period that has elapsed since the purchase of the property by the defendant. The payment of damages to the plaintiff to the extent of the partial failure of performance of the defendant, is in my view sufficient. Accordingly, I decline to order rescission of the contract of sale.

[89] The plaintiff is entitled, in terms of Article 1184, to the sum of SCR1,500,000.00 being the unpaid balance of the purchase price of the property. The plaintiff has claimed interest at the commercial rate of 12% from the date of the contract of sale 13th December 1979 until date of judgment. Under the Interest Act, Cap 100, unless the interest rate is fixed by contract, the legal rate of interest in civil or commercial matters is 4% per annum. No interest rate having been stipulated in the sale agreement, the legal rate of 4% is the applicable rate. The defendant not having been served with a *mise en demeure* prior to the

filing of this suit, interest shall run as from the date of filing of this suit i.e. 24th August 2020 until payment is effected. In that regard **Dalloz, Encyclopédie Juridique, Répertoire de Droit Civil, 2^e Édition, Tome VII, Vente (l'obligations de l'acheteur), CHP. 2 – Résolution pour inexécution des obligations de l'acheteur** states that:

185. Il n'est pas nécessaire que la demande en résolution soit précédée d'une mise en demeure, ou que l'acheteur ait été préalablement sommé d'avoir à payer le prix, car l'assignation vaut mise en demeure (Com. 28 févr. 1972, D. 1972. Somm. 140, Bull. civ. IV, n° 75 ; Civ. 6 févr. 1973, ibid. III, n° 95).

[90] Accordingly, I make the following orders:

- B. The defendant shall, not later than two month from the date of this judgment, pay to the plaintiff the sum of SCR1,500,000.00 with interest at the rate of 4% per annum as from the date of filing of this suit i.e. 24th August 2020 up to the date of payment.
- C. Each party shall bear its own costs.

Signed, dated and delivered at Ile du Port on 28 March 2025.

Carolus J