THE SEYCHELLES LAW REPORTS

DECISIONS OF THE SUPREME COURT, CONSTITUTIONAL COURT AND COURT OF APPEAL

2012

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THE SEYCHELLES JUDICIARY

THE COURT OF APPEAL

Hon F MacGregor, President
Hon J Hodoul
Hon SG Domah
Hon A Fernando
Hon M Twomey
Hon J Msoffe

THE SUPREME COURT
(AND CONSTITUTIONAL COURT)

Hon F Egonda-Ntende, Chief Justice
Hon D Karunakaran
Hon B Renaud
Hon D Gaswaga
Hon M Burhan
Hon G Dodin

CONTENTS

DIGEST OF CASES

DHANJEE v MICHEL

Karunakaran Ag CJ, Renaud, Dodin JJ
17 January 2012 Constitutional Court 15/2011

Constitution – Appointment of judges – Exceptional circumstances

This is an application for judicial review. Domah J, a non-Seychellois judge, applied to the Constitutional Appointments Authority for a renewal of his term on the Supreme Court. The President of the Court of Appeal wrote to the Constitutional Appointments Authority in support of the appointment of Domah J for a second term in office due to 'exceptional circumstances' pursuant to art 131(4) of the Constitution. The Constitutional Appointments Authority considered Domah J's application before his current term of office had expired and recommended that the President of the Republic 'extend' Domah's appointment for a further two years. Domah J was then appointed for a second term under art 131(4), and was sworn in before his first term in office ended. The petitioner contended that the Constitutional Appointment Authority's recommendations, either to appoint Domah J for a second term in office, or to extend his term for a further period of two years, was contrary to and inconsistent with art 131(4) of the Constitution.

JUDGMENT Declaration granted – recommendations of Constitutional Appointments Authority found to be ultra vires and unconstitutional and the appointment made on those recommendations was null and void ab initio.

HELD

1 The Constitutional Appointments Authority, in the performance of its functions, ought not to be subject to the direction or control of any external person, and, particularly in matters of judicial appointments, ought to function without interference from any of the branches of Government. Any such interference renders the appointments arbitrary and suspicious in the eye of the general public.
2 There is nothing improper for the Constitutional Appointments Authority to acquire information about a potential candidate from members of the Bench, or of the Bar, to assist it in forming an opinion of its own about a prospective appointee, but it should not go as far as to formally consult them for appointments, or to seek others' opinions and then to rely solely and act upon them.
3 Article 131(4) of the Constitution cannot be invoked until after art 131(1)(e) of the Constitution has become effective, ie at the end of the term for which the Judge was appointed. A re-appointment cannot be made in a reasonable time before the expiration of the term of the office of the Judge or Justice of Appeal. A re-appointment can only be made once the term of office has expired.
4 The term of office of a Justice of Appeal or a Judge who is not a citizen of Seychelles cannot be extended. There must, by necessity, be a new appointment. This does not mean that the Constitutional Appointments Authority cannot make a recommendation on the re-appointment prior to the expiration of the term, but no re-appointment may occur prior to the expiration of the term.

5 The conditions precedent for an appointment of a Justice for a second term by the President under art 131(4) are:
   a. The Constitutional Appointments Authority's recommendation has been made for the appointment of a second term;
   b. The person to be appointed is not a citizen of Seychelles;
   c. Exceptional circumstances have been shown to exist; and
   d. The person to be appointed has already completed a first term of office.

6 The exceptional circumstances contemplated under art 131(4) should be given a liberal interpretation so as to encompass all circumstances which are reasonable and relevant to the appointment in question.

7 The Constitutional Court has unfettered jurisdiction, pursuant to art 130(4)(c) of the Constitution, to grant any consequential relief or remedy available to the Supreme Court against any person or authority which is the subject of the application or which is a party to any proceedings before the Constitutional Court. It can grant this relief as it considers appropriate. Where there is a right, there is a remedy.

Legislation
Constitution, arts 1, 119, 123, 129, 130, 131(1)(e), 131(3), 131(4), 134, 139

Cases
Electoral Commission v Dhanjee (unreported) SCA 16/2011
Republic v Gervais Pool & Estico (1984) SLR 33

Foreign Cases
Cumming v Danson [1942] 2 All ER 653
Duport Steel v Sirs [1980] 1 All ER 529
Grey v Pearson (1857) 6 HL Case 61, 106; 10 ER 1216
R v Monopolies and Merger Commission [1993] 1 WLR 23
Whitley v Chappell (1868) LR 4 QB 147

A Amesbury and F Ally for the petitioner
R Govinden and V Benjamin for the first, sixth and seventh respondents
F Chang-Sam SC for the second, third and fourth respondents
K Shah SC for the fifth respondent

Judgment delivered on 17 January 2012

Before Karunakaran Ag CJ, Renaud, Dodin JJ

During the reign of the First and the Second Republic, the selection process and appointment of judges to the superior courts of Seychelles were solely made by the Executive; nevertheless, the degree of public concern in such matters was not so significant. However, after the adoption of the modern democratic Constitution of the Third Republic, judicial appointments are now being made through a selection process by an independent and impartial constitutional body – the Constitutional Appointments Authority (CAA); nonetheless, it is paradoxical that the degree of public concern now is more than ever before.

Indeed, the CAA, in terms of article 139(2) of the Constitution, shall not, in the performance of its functions, be subject to the direction or control of any person or external authority. The CAA, particularly in matters of judicial appointments shall and ought to function without interference from any of the branches of the Government, whether it be the Executive, Judiciary or Legislature. After completing the selection process, the CAA shall propose the names of the selected candidates to the President of the Republic, who in turn, in exercise of his constitutional prerogative shall make judicial appointments to the superior courts by issuing instruments under the public seal; in case of a person who is not a citizen of Seychelles, for a specific period not exceeding 7 years. A non-Seychellois thus appointed shall be given a contract of employment for the period of his appointment in Seychelles. This inbuilt constitutional mechanism is evidently designed to prevent or to say the least, minimize the role of the Executive in judicial appointments. Obviously, this is to ensure that an independent and impartial judiciary is maintained at all times. It is also intended to provide a security of tenure for non-Seychellois judges, for a period of 7 years, which is *a sine qua non* for democracy and good governance.

Despite such preventive constitutional mechanisms in place, at times, some of the citizens who have litigation in the superior courts, particularly against the State, still feel insecure and complain with trepidation that their constitutional right to have litigation adjudicated by an impartial and independent Court is jeopardized, especially, when judicial appointments are not made by the CAA in accordance with the provisions and the spirit of the Constitution.

In the instant case, the petitioner, who undisputedly has a number of pending cases against the State in the superior courts, has now come before this Court seeking constitutional redress for his grievance. He alleges that a recent reappointment of one of the sitting Justices of Appeal - Dr Satyabhooshun Gupt Domah - to the Seychelles Court of Appeal (hereinafter called the Court of Appeal) is unconstitutional as it has contravened article 131(4) of the Constitution as well as article 131(3) as read with article 131(4), article 1 and article 119(2) of the Constitution and particularly, that it affects or is likely to affect his interests.

It is pertinent to quote the relevant articles of the Constitution in this respect.

Article 131 of the Constitution inter alia, reads –

> (1) Subject to article 134, a person holding office of Justice of Appeal or Judge shall vacate that office -
> (a) on death;
> (b) if the person is removed from office under article 134;
> (c) subject to clause (2), if the person resigns in writing addressed to the President and to the Constitutional Appointments Authority;
> (d) in the case of a person who is a citizen of Seychelles, on attaining the age of seventy years;
> (e) if the office is abolished with the consent of the person.
> (2) A resignation under clause (1)(c) shall have effect on the date on which it is received by the President.
> (3) Subject to clause (4), a person who is not a citizen of Seychelles may be appointed to the office of Justice of Appeal or Judge for only one term of office of not more than seven years.

> (4) The President may, on the recommendation of the Constitutional Appointments Authority in exceptional circumstances, appoint a person who is not a citizen of Seychelles and who has already completed one term of office as a Justice of Appeal or Judge for a second term of office, whether consecutive or not, for not more than seven years.

Article 1 reads – "Seychelles is a sovereign democratic Republic".

Article 119 inter alia reads –

> (1) The judicial power of Seychelles shall be vested in the Seychelles Judiciary which shall consist of –
>
> (a) the Court of Appeal of Seychelles;
>
> (b) the Supreme Court of Seychelles; and
>
> (c) such other subordinate courts or tribunals established pursuant to Article 137.
>
> (2) The Judiciary shall be independent and be subject only to this Constitution and the other laws of Seychelles.

The material facts of the case are these:

Admittedly, the petitioner, who is a citizen of Seychelles, has been a party to a number of proceedings before the Constitutional Court of Seychelles, the Supreme Court of Seychelles and the Court of Appeal, particularly, in the case of *Electoral Commissioner & ors v Viral Dhanjee* SCA 16/2011, and is a party to pending litigation in the Constitutional Court and as well as in the Supreme Court.

The first respondent is the President of the Republic of Seychelles and by virtue of article 123 of the Constitution of the Republic of Seychelles (hereinafter the Constitution) is empowered to appoint Justices of the Court of Appeal from candidates proposed to him by the CAA, or on the recommendation of the CAA in exceptional circumstances, is empowered under article 131(4) of the Constitution to appoint a person who is not a citizen of Seychelles and who has already completed one term of office as a Justice of Appeal, for a second term of office of not more than seven years.

Incidentally, article 123 runs –

> The President shall, by instrument under the Public Seal, appoint the President of the Court of Appeal and other Justices of Appeal from candidates proposed by the Constitutional Appointments Authority.

The second respondent herein is the Chairman, and the third and fourth respondents are members of the CAA. The CAA is established under article 139(1) of the Constitution. It is empowered under article 123 of the Constitution to propose candidates to the first respondent for appointment as Justices of the Court of Appeal and by virtue of article 131(4) of the Constitution, to recommend to the first respondent the appointment of a person who is not a citizen of Seychelles and who has already completed one term of office as a Justice of Appeal, in exceptional circumstances for a second term of office of not more than seven years.

The fifth respondent is a non-Seychellois citizen - a Mauritian national - a sitting judge of the Supreme Court of Mauritius, who was appointed as Justice of Appeal of the Seychelles Court of Appeal by the first respondent on 4 October 2006, for a term of five years and the term of his appointment came to an end or is deemed to have come to an end or would have come to an end on 3 October 2011 as per the instrument issued by the first respondent to the fifth respondent.

In passing, we would like to mention here that the fifth respondent, in the normal course of events, following his appointment as Justice of Appeal, should have obtained the above instrument from the appointing authority soon after his appointment but before assuming office as Justice of the Court of Appeal. Presumably, he should have then read the contents of the instrument particularly, as to his term of appointment or period of tenure for which he was appointed under that instrument. However, according to him - as he has stated in his letter dated 16 April 2011- in the absence of any written document he was assuming that his term of office was for seven years; but that it was only in April 2011 that he was allegedly informed that it was only for 5 years; and thereafter he wrote a letter to the CAA.

During the term of his office as Justice of Appeal, the fifth respondent on 16 April 2011, nearly 7 months prior to the expiry of his term, applied in writing to the CAA for the renewal of his term of office for a further period and in the same breath for a second term of office. Indeed, there is a world of difference between “renewal” of one’s contract of employment for a further period and “reappointing” a Judge /Justice of Appeal for a second term of office. The difference herein may appear to be formal but it is quite significant in the legal and constitutional context.Be that as it may, this letter reads –

> The Chairperson
> The Constitutional Appointments Authority
> State House
> Victoria
>
> Dear Sir,
>
> Renewal of Term of Office as Judge of Appeal
>
> In the absence of a written document, I assumed that my term of office was for seven years. However, I was recently informed that it is for five years.
>
> The years the Authority has entrusted me with the judicial office, I have made it a personal commitment of mine to contribute to the growth and development of law, justice and jurisprudence of Seychelles to the best of my ability.
>
> Accordingly, if it pleased the Authority to entrust me *with a second term of office*, I pledge that my commitment and contribution will be no less if not more so that we may complete that part of the unfinished business which we, at the Court of Appeal, set out to do as a solid team for the Judiciary and people of Seychelles.

> Permit me, for that reason, to apply for *a renewal of my term of office for a further period* on the like trust that the Authority originally laid upon me. I attach an updated CV for the purpose. [emphasis ours]
>
> I thank you for your consideration,
>
> Faithfully Yours
>
> S.B. Domah
> Judge of Appeal
> Eclsd: An Up-dated CV

Two days after the fifth respondent wrote the above letter to the CAA, addressed to the State House, that is on 19 April 2011, nearly six months prior to the expiry of the fifth respondent's first term of office, the President of the Court of Appeal Justice Francis MacGregor, admittedly, wrote a letter to the CAA, addressed to its office at Mont Fleuri. In that letter, Justice MacGregor enumerated 10 reasons to the CAA, which all according to his belief constituted exceptional circumstances under article 131(4) of the Constitution in order for the fifth respondent to be appointed by the CAA for a second term of office as Justice of Appeal. This letter, written by Justice MacGregor to the CAA dated 19 April 2011 ostensibly recommending the appointment of his sitting brother-judge Justice Domah for a second term of office, reads –

> To:
> The Chairman
> Constitutional Appointments Authority
> La CIOTAT Building
> Mont Fleuri
>
> Dear Sir
>
> I have received an application (sic) from Justice Domah applying for a second term of office as his contract expires next October.
>
> I believe under article 131(4) of the Constitution there are exceptional circumstances in his case for the following reasons:
>
> 1. He has a very impressive CV copy already submitted to you and I believe no other judge or lawyer (sic) in Seychelles has such credentials to that extent. [Within brackets ours]
>
> 2. For the nearly four years he has worked with me and the court, he has proven to be more then a capable team player and with the right team spirit a hard and efficient worker.
>
> 3. Our present esteem of the Court of Appeal in the country and public opinion bears this out.
>
> 4. I have sounded out also the veterans in the legal profession which does hold him in good esteem.

> 5. Although not a citizen he comes from a friendly sister country of Mauritius of which we have strong historical, cultural and judicial ties. He is accordingly fluent in English, French and Creole.
>
> 6. Of our judicial links 8 of the past 21 Justices of Appeal, and many Judges of the Supreme Court were from Mauritius.
>
> 7. He has a strong grounding in the French Civil Law/Code Napoleon/Code Civil which forms a large part of our fundamental laws, that all the present foreign judges in Seychelles do not have, and a sizeable amount of the lawyers locally do not have.(sic) [Within brackets ours]
>
> 8. From his CV he has substantial judicial education/training qualities I want to further make use for potential judge training in Seychelles.
>
> 9. Has credentials in judicial administration that most of our judges do not have, and again would wish to make use of if in Seychelles.
>
> 10. He has a great esteem for Seychelles often seen and experienced by me from him in international judicial forums. He has often proven very supportive for Seychelles.
>
> Yours faithfully
> (sd) Justice F. MacGregor

On 17 June 2011, being nearly three and a half months before the completion of the fifth respondent's first term of office, the CAA prematurely considered the application of the fifth respondent for a "renewal" of his term of office for a further period. The CAA instead decided to grant an extension of his first contract of employment for an additional two year term, substantially relying on the recommendation and the exceptional circumstances formulated by Justice MacGregor in his letter quoted supra. Accordingly, the CAA wrote a letter dated 17 June 2011 (hereinafter called the "impugned letter") to the first respondent, the President of the Republic recommending for his approval the extension of the contract of the fifth respondent for an additional two year term. That recommendation, in the view of the CAA, is permitted by article 131(3) of the Constitution. According to the CAA, they did so, *"*in view of the exceptional circumstances related to Justice Domah*".* This letter of pivotal importance reads –

> The President
> Republic of Seychelles
> State House
>
> Dear Mr. President,
>
> In accordance with the powers conferred upon the Constitutional Appointments Authority by the Constitution of the Republic of Seychelles, the Constitutional Appointments Authority hereby recommends *for approval the extension of the contract of Justice Domah for an additional two year term as permitted by the Constitution (Article 131(3)) in view of the exceptional circumstances related to Justice Domah.*

> Justice Domah's contribution to the good performance of the Seychelles Court of Appeal is very much appreciated by his colleagues and the public in general.
>
> Apart from his extensive qualifications and experience he is among the few to be familiar with the French Civil Law/Code Napoleon which largely serves as the basis of our Civil Code.
>
> Copies of Justice Domah's letter referring to above and that of the President of the Court of Appeal's recommendations are enclosed.
>
> Yours faithfully,
> (Sd) Mr. Jeremie Bonnelamme CHAIRMAN
> Mrs. Marlene Lionet, C.A.A MEMBER
> Mr. Patrick Berlouis C.A.A MEMBER

The petitioner contends that on or around 5 September 2011, and before the fifth respondent had completed his first term in office and before any vacancy for the office of Justice of Appeal had arisen, the first respondent appointed the fifth respondent for a second term of office as Justice of the Court of Appeal under article 131(4) of the Constitution. On 5 September 2011, the fifth respondent was duly sworn in a second time, as Justice of Appeal, even before the completion of his first term of office. However, according to the petitioner, the duration of the term of the appointment of the fifth respondent as Justice of Appeal at the time of the appointment, and until the filing of the petition, had not been made public.

The contention of the petitioner, in essence, is that the recommendation of the CAA to the first respondent, to either appoint the fifth respondent for a second term of office and/or extension of his term for a further period of two years, is contrary to and inconsistent with article 131(4) of the Constitution in that:

(i) There were no exceptional circumstances that existed to recommend the fifth respondent's appointment for a second term or to extend his contract, as there was no evidence to show that the CAA had not been able to find suitably qualified candidates for it to propose to the first respondent for appointment as Justice of Appeal, to replace the fifth respondent, whose term was coming to an end.

(ii) The CAA could not have rationally formed or founded the opinion that there were exceptional circumstances warranting the recommendation to the first respondent, to appoint the fifth respondent for a second term or to extend his contract as a Justice of the Court of Appeal. There was no evidence or any documentation before the CAA to conclude that no other person could be appointed to that office to replace the fifth respondent.The facts on which the CAA relied or found to justify and make the recommendation to the first respondent, do not amount to exceptional circumstances as envisaged by article 131(4) of the Constitution.

(iii) According to Mr Ally, counsel for the petitioner, none of the reasons which the President of the Court of Appeal conveyed to the CAA, favouring Justice Domah's second appointment as Justice of Appeal, either singly or in combination, constitute exceptional circumstances contemplated under article 131(4) of the Constitution. All the reasons given by Justice

MacGregor are commonplace or ordinary reasons that are required in the normal course of events, for the appointment of any candidate for that matter, as a Judge of the superior court. It is evident from article 122 that a person is qualified for appointment as a Justice of Appeal if, in the opinion of the Constitutional Appointments Authority, that person is suitably qualified in law and can effectively, competently and impartially discharge the functions of the office of Justice of Appeal under the Constitution. According to Mr Ally, the factors applicable to the individuals/persons cannot constitute the exceptional circumstances envisaged by article 131(4) of the Constitution. The circumstances contemplated therein are intended to maintain a democratic republic and an independent judiciary. Therefore, exceptional circumstances envisaged therein should relate to the State and the Seychelles judiciary. However, none of the reasons given by either the CAA or Justice MacGregor to the first respondent for reappointment falls within that category of exceptional circumstances as envisaged by article 131(4) to maintain the democratic State and an independent judiciary - vide articles 1 and 119(2) of the Constitution, read with article 49 of the Constitution. Mr Ally also drew an analogy between the "exceptional circumstances" contemplated under the Constitution in this respect and the "special reasons" contemplated in the Dangerous Drugs Act (now repealed) for imposing a lesser sentence than the mandatory minimum for drug offenders. In considering what constitutes "special reasons" the Seychelles courts have repeatedly held that commonplace mitigating factors peculiar to the person/individual (offender) cannot constitute a "special reason", but only the factors peculiar to the offence may constitute "special reasons" vide *Republic v Gervais Pool & Estico* (1984) SLR 33. Likewise, the exceptional circumstances discussed hereinbefore should relate to the State and the Seychelles judiciary, not to the person, Justice Domah.

(iv) In any event, the CAA shall be an independent and impartial Authority in terms of article 139(2) of the Constitution. The determination as to what constitutes "exceptional circumstances" in a particular case should be based on the CAA's own and independent opinion and the formation of which obviously, falls within its exclusive constitutional powers and functions. Therefore, the CAA cannot and should not relinquish or delegate its powers to any other authority, let alone the President of the Court of Appeal. The CAA cannot allow any other person or authority to interfere or influence or usurp its powers and functions and substitute its own opinion to that of the CAA in this respect, as has happened in the present case. This according to Mr Ally is in contravention of article 131(4) of the Constitution and in violation of the CAA's independence guaranteed under article 139(2) of the Constitution.

(v) In any event, in respect of a candidate who has already served one term, the Constitution has authorized the CAA specifically to recommend his/her reappointment for a second term of office only under exceptional circumstances, for a period not exceeding seven years. However the CAA has no constitutional mandate to recommend or seek approval of the first respondent for the "extension" of the contract of that candidate for an additional term to the original existing term. It is not permitted by the Constitution under article 131(3) to extend the term of any judge (from 5

years to 7 years) whether exceptional circumstances exist or not, whether it relates to Justice Domah or any other candidate for that matter. It is ultra vires its constitutional powers for the CAA to act otherwise. It is unconstitutional and ultra vires for the CAA to go beyond its powers to extend and seek approval from the first respondent for such extension of term specified under the original appointment.

(vi) At the time the fifth respondent was recommended for a second term of office as Justice of Appeal, the fifth respondent was already serving a term as Justice of Appeal. As a result no vacancy to the said office had occurred and the fifth respondent had not completed his first term of office. Article 131(4) clearly stipulates that such reappointment in exceptional circumstances can be made only on the completion of the first term, and not before as has been done in this case, which contravenes this provision of the Constitution.

(vii) According to Mr Ally, there were competent persons who could have been proposed for appointment when the vacancy had occurred, but it was not advertised and the CAA did not seek suitably qualified candidates to recommend for appointment to replace the fifth respondent.

(viii) Mr Ally further added that the CAA were not mindful of the following matters at the time they made the recommendation to the first respondent to appoint the fifth respondent for a second term:

- That the fifth respondent was still serving his first term;
- That no vacancy had arisen in the office of Justice of Appeal;
- That the CAA need not seek the approval of the first respondent to recommend or to appoint a Justice of Appeal but the CAA should only recommend the appointment and give reasons for the reappointment for a second term;
- That if the post had been widely advertised in and outside Seychelles, several qualified persons could have applied for the post;
- That there was the possibility of recommending other persons for the post;
- That there was the possibility of appointing Supreme Court Judges to the Seychelles Court of Appeal;
- That there was the possibility of approaching suitably qualified members of the legal profession in or outside Seychelles or inviting members of the judiciary overseas to submit their application or to be recommended to the first respondent, especially since in the past there has been precedents of such appointments and there has not been any shortage of suitably qualified persons as Justices of Appeal from the Commonwealth;
- That there have been applications made by persons who have shown interest in the post by previously applying for it;
- That the bases for the recommendation made by the CAA are flawed, and not cogent, compelling or persuasive or even sufficiently substantiated. In any event, they do not amount to exceptional circumstances warranting such a recommendation and appointment; and

- That the fifth respondent applied for the renewal of his contract and it was only after his application was tendered that the CAA looked for reasons to justify the appointment for a second term, which is contrary to the letter and spirit of articles 131(4) and 119(2) of the Constitution.

In view of all the above, counsel for the petitioner urged this Court to declare the recommendation of the CAA and the appointment of the fifth respondent by the first respondent for a second term to the office of Justice of the Court of Appeal, to be a contravention of the Constitution and null and void, and for the fifth respondent to vacate the office of Justice of the Court of Appeal; and with costs.

Mr Chang-Sam, counsel for the CAA (second, third and fourth respondents) submitted in essence, that the crux of the issue in this matter is whether there were exceptional circumstances for the CAA to recommend the fifth respondent for a second term of office, in terms of article 131(4) of the Constitution. According to counsel, the term "exceptional circumstances" used in this article is not defined in the Constitution. This implies that the framers of the Constitution wanted this expression to be open and inclusive so that there was no static position in defining this term. As the Constitution moves forward, and as the country moves forward, the exceptional circumstances can also change with time and the prevailing circumstances. Having thus submitted, counsel cited the authority *R v Kelly (Edward)* [2000] 1 QB 198 in that, the Court of Appeal (UK) held that exceptional circumstances are out of the ordinary course or unusual, or special, or uncommon**.** They need not be unique, or unprecedented, or very rare, but they cannot be circumstances that are regularly, routinely or normally encountered. Therefore, according to Mr Chang-Sam, it is for the CAA to decide what constitutes exceptional circumstances at a particular point in time and circumstances, provided they are fair and acting in a way that is not arbitrary. Furthermore, Mr Chang-Sam submitted that it is not a constitutional requirement that the CAA should advertise the vacancy to see whether there are other candidates or Seychellois candidates available for the post. In any event, such requirement may apply in the case of the first appointment, and not for the second term given under exceptional circumstances. It is the CAA, which would eventually determine whether there are exceptional circumstances in a particular case to recommend a candidate for the second term. However such determination according to counsel, should only be subject to judicial review. Moreover, counsel submitted that even before the vacancy arises, it is proper for the CAA to recommend the reappointment of a person for the second term, since there is nothing in the Constitution or in law that stops them from doing so or for considering a current member for a second term before the completion of his first term. As regards the alleged letter of recommendation written by the President of the Court of Appeal to the CAA outlining the exceptional circumstances, it is the submission of Mr Chang-Sam that there is nothing wrong on the part of the CAA if they have in their mind, adopted the letter as being correct position on exceptional circumstances. The CAA took nearly two months to consider the reasons given by Justice MacGregor in that letter. In the same breath, Mr Chang-Sam submitted that he was not in a position to tell the Court what were the exceptional circumstances, which the CAA relied and acted upon in this particular case. They might have considered some other factors as well as exceptional circumstances, but these are not disclosed either to the Court or in the impugned letter to the President of the Republic. Further Mr Chang-Sam

submitted that the analogy drawn by Mr Ally between the "special reasons" under the Dangerous Drugs Act and the "exceptional circumstances" discussed herein is inappropriate. According to counsel, since there are insufficient matters relating to "exceptional circumstances" before the Court, it would not be able to rule on the issue.

It is also the submission of Mr Chang-Sam that the petition contains only allegations, and that they are not facts. Hence, according to him, the petitioner has adopted the wrong procedure in this matter.

In any event, Mr Chang-Sam conceded that the CAA in the impugned letter addressed to the President, has employed, to say the least, improper use of words in the expressions such as "recommends for approval", the "extension of contract" etc. Having thus argued, Mr Chang-Sam admitted in his submission that on a plain reading of the impugned letter, it is evident that the CAA has recommended to the President, the extension of Mr Justice Domah's contract of employment for a period of only two years. However, he invited the Court to give a different meaning to those expressions, assuming that the CAA had really intended to recommend him for only a second term for "exceptional circumstances" but has unfortunately, used ill-chosen words. In Mr Chang-Sam's own words, the CAA has used those "infelicitous words" but this Court should infer a meaning, validate and give a purpose to the impugned letter so that it would accord with article 131(4) of the Constitution. In view of all the above, Mr Chang-Sam urged the Court to dismiss this petition.

Mr Shah, counsel for the fifth respondent, having adopted the entire submission of Mr Chang-Sam, added that in any eventuality - even if this petition is allowed- this Court has jurisdiction, simply, to make a declaration that the appointment of the fifth respondent is unconstitutional and nothing more; it has no jurisdiction to order him to vacate the office since he has got a security of tenure under the instrument of appointment. In such an event, he can be removed from office only through the constitutional procedures contemplated under article 134 of the Constitution. Further, Mr Shah contended that whatever interpretation is given to the contents of the impugned letter, the intention of the CAA and the purpose of that letter was simply to seek the fifth respondent's reappointment for a second term due to exceptional circumstances. The intention and purpose can easily be gathered from various terms used by the CAA in the impugned letter. According to Mr Shah substantial parts of the letter in dispute and the true construction of the words used therein have conveyed the correct intention of the CAA to the appointing authority. Hence, this letter can be relied and acted upon. In support of this proposition Mr Shah cited the authority *R v Monopoly and Merger Commission and another* [1993] 1 WLR 23.

On the issue of "exceptional circumstances" Mr Shah submitted that this expression used by the framers of the Constitution is wide enough to encompass the personal attributes of the person amongst others. Mr Shah added that the appropriate test, which this Court should apply to validate "exceptional circumstances" is the test of "reasonableness". This, according to him, is the current approach taken by the courts in many jurisdictions such as England, USA and Canada. Although it appears to be unpalatable to many, Mr Shah submitted that the economic situation of the country may also be considered by the CAA, as a factor amongst others in determining what constitutes "exceptional circumstances". Counsel contended in essence, that if a

non-Seychellois Judge, who has already completed one term of office, is prepared to work or continue to work for a second term of office, accepting relatively, a lower salary, than what is required to recruit eminently qualified judges from other places, then, in the given economic situation of the country, such a factor – an economic austerity measure, if I may call so - should also be taken into account amongst others, by the CAA while considering the "exceptional circumstances" for reappointing him for a second term. Mr Shah's rhetorical question, which reflects his contention in this respect, runs –

> The economic situation of the country also has an impact on recruitment of Judges. One can speculate it is theoretically possible to have eminently qualified judges from other places, but the question is, would that judge be prepared to come and work for the remuneration being offered?

Mr Benjamin, State Counsel, who is appearing for the first, sixth and seventh respondents submitted in essence, that any interpretation given to the expression "exceptional circumstances" contemplated under the relevant article, should be fair, which should meet the changing needs of time and society. In interpreting this expression, the Constitution should be read as a whole and treated as speaking from time to time. According to him, the exceptional circumstances in a particular case ought to be determined only by the CAA, before making their recommendation to the first respondent. He added that as far as the first respondent is concerned, he has no role to play in the determination of the facts as to what constitutes exceptional circumstances and who is qualified for the second term under such exceptional circumstances; once the CAA recommends the candidate/s for second appointment, the first respondent is under no constitutional obligation to review the CAA's recommendation. In the circumstances, Mr Benjamin submitted there is no unconstitutionality in the appointment of the fifth respondent for a second term as Justice of Appeal. Hence State Counsel urged this Court to dismiss the petition.

We meticulously perused the pleadings, affidavits and other documents adduced by the parties in this matter. We carefully examined the relevant provisions of the Constitution. We gave diligent thought to the submissions made by counsel for and against the petition. Although the parties have raised a number of factual issues peripheral to the core, we are of the view that most of them are redundant. All of them do not necessarily call for determination by this Court, save for the core issue, which relates to the constitutional validity of the appointment in question.

Before going into the merits of the case, we observe that the air of mystery surrounding the selection process for constitutional appointments, the small base from which the selections are being made by the CAA may, on occasions, lead to questionable appointments and, worse still, lend itself to perceived arbitrariness. The Seychelles being a small jurisdiction and closed society, an indiscreet comment or a chance rumour is enough to rule out a local candidate's perceived suitability for the post. One should be cautious that friendships, affiliations and obligations may also at times colour recommendations. Consensus in the CAA should therefore be arrived at without any semblance of external influence or extraneous consideration or bias for or against any candidate, as it would render the appointments arbitrary and suspicious in the eye of the general public. Notwithstanding, the CAA is not bound by any specific procedural rules other than what is provided for in the Constitution.

Unless the selection process is made transparent and the resource pool widened and some objective criteria are laid down, “arbitrariness” and “suspicion” will remain.

Objective criteria

In the making of judicial appointments, the CAA ought to take account of public sensitivities, which may manifest themselves in two ways: (i) a desire to see suitably qualified citizens of Seychelles being appointed to superior judicial positions; and (ii) a desire to have transparency in the appointment process. Sometimes, it is difficult to reconcile the desire for the appointment of a local person to a judicial position, with the necessity to appoint someone with impartiality or perceived impartiality when one is drawing from a very limited local resource pool, such as ours. In considering the aspect of impartiality of a potential local candidate, the CAA may draw guidance from what Lord Bingham once stated –

> The key to successful making of appointments must, I would suggest, lie in an assumption shared by appointer, appointee and public at large that those appointed should be capable of discharging their judicial duties, so far as humanly possible, with impartiality. Impartiality and independence may not, even in this context, be synonyms, but there is a very close blood-tie between them: for, a judge, who is truly impartial, deciding each case on its merits as they appear to him, is of necessity, independent.

Particularly in a small jurisdiction such as ours, an individual is known by a large majority of the population. Family connections may be quite extensive in a small community. The judge may have grown up in close proximity to the very people he/she would, as a judge, be called upon to try. By the time the person is ready to take up a judicial appointment, he/she might have formed allegiances, social, professional and even political. These are known throughout the length and breadth of a small community. Lawyers tend to become rather vocal politically and are often seen to be aligned to a particular political grouping. Lawyers are reluctant to join a service which attracts modest remuneration. Able lawyers earn substantially more in private practice than a government with limited means can afford to pay, and indeed practitioners who may often be the most suitable candidates for an appointment to preside in the civil courts are those who have built up a substantial practice at the civil bar. They are thus more likely to meet their former clients if they are to sit as a judge. It is the exceptional individual who emerges as both willing and able to perform the functions of a judge in technical and personal terms. If that exceptional individual does emerge locally then he/she must be the favoured candidate. However, that bias in favour of a local appointee should not lead to the appointment of an unsuitable candidate.

Although the tendency in some jurisdictions nowadays is also to recruit from overseas, there now seems to have grown in those jurisdictions a good practice of openly advertising judicial posts and conducting an open competition along with local candidates. The CAA may also adopt that approach, interview the applicants and inform them of the outcome. This is to be commended whether there are local candidates or not. It is vital however, that only the best candidates are recruited for judicial positions irrespective of the costs involved and the economic situation of the country. The submission of Mr Shah to the effect that one should sacrifice quality for the sake of saving costs in the current economic climate, does not appeal to us in

the least. It is not as though the most economic and appropriate candidate will emerge by making a tender for the post, advertised on page 10 of the *Seychelles Nation*. Furthermore, an open recruitment system gives credibility to an appointment and curtails possible public criticism that an appointment is made other than on merit.

To what extent should the CAA interact with other institutions such as the Judiciary, the local Bar etc on judicial appointments? The CAA is, of course, an independent and impartial constitutional body, which should function without interference from any corridor of power or institution. However, it will be natural for the CAA to acquire information from relevant institutions to ascertain the suitability of the potential appointee, particularly if the potential appointee is known to those institutions. This may be done only to ascertain if there is anything known about that person which ought to be taken into consideration. Seychelles being a small jurisdiction, the members of the Bench and the Bar will all be too familiar with a local candidate. It is not like a large jurisdiction where such matters can be dealt with impersonally; obviously, in a small jurisdiction matters tend to become personalised.

Having said that, we are of the view that it is not improper for the CAA to acquire information from the members of the Bench as well as of the Bar, to assist it in forming an "informed opinion" of its own about a prospective appointee, but it should not go as far as to formally consult them for appointments or to seek others' opinions and then to completely and solely rely and act upon them. The dividing line between the "acquisition of information" and "formal consultation" is indeed very fine. At any rate, it would be unconstitutional for the CAA to relegate its constitutional powers and functions to the Bench or to the Bar or to any other person or authority to select candidates for judicial appointments, in the thin disguise of seeking information or advice from them. At the same time, no other authority Executive, Judicial or Legislative or any other institution, shall be allowed to usurp the constitutional powers and functions of the CAA in the name of giving information or advice to them.

Needless to say, the judicial appointment process can make or break a country's judiciary. The judicial appointment process must always be seen to be as immaculate, as transparent, as fair and as meritocratic as possible. A cloudy appointment process will no doubt bring potentially dubious persons into the judiciary. Only men and women of integrity and competence, legal qualifications and experience, of independent and impartial character should be appointed. Incorruptibility must be the ethos.

Coming back to the merits of the case, it is evident that the fundamental issue that requires determination in this matter is the constitutional validity of the purported second appointment of the fifth respondent as Justice of Appeal. Obviously, the determination of this issue is solely based on the interpretation one gives to the provisions of article 131(3) and (4) of the Constitution and to the contents of the impugned letter. Undoubtedly, the rule under article 131(3) of the Constitution unequivocally stipulates that a person who is not a citizen of Seychelles may be appointed to the office of Justice of Appeal for only one term of office of not more than seven (7) years. The only exception to this fundamental rule is found in article 131(4) of the Constitution, which provides that the first respondent may, on the recommendation of the CAA in exceptional circumstances, appoint a person who is

not a citizen of Seychelles and who has already completed one term of office as a Justice of Appeal for a second term of office. Needless to mention, the fifth respondent or any other Justice of Appeal for that matter, should have or ought to have known that the question as to exceptional circumstances contemplated under article 131(4), ought to be determined only by the CAA, which is a self-directed and independent body, created by the Constitution for the purpose inter alia, of selecting suitable candidates and recommending them to the President for judicial appointments. In interpreting article 131(3) and (4) of the Constitution and construing the meaning conveyed through the contents of the impugned letter of the CAA, it is pertinent to consider what Lord Wensleydale stated in *Grey v Pearson* (1857) 6 HL Case 61, 106; 10 ER 1216, which runs –

> It is 'the universal rule', that in construing statutes, as well as in construing all other written instruments 'the grammatical and ordinary sense of the word' is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity or inconsistency, but no further.

When writing statutory or constitutional provisions, the use of ordinary English words in their ordinary sense has always been the rule, practice and intention. If the meaning is plain, the sole function of the courts is to enforce it according to its terms, and the duty of interpretation does not arise. The judge considers what the provision actually says, rather than what it might mean. In order to achieve this, the judge will give the words in the provision a literal meaning, that is, their plain ordinary everyday meaning, even if the effect of this is to produce what might be considered as an otherwise, unjust or undesirable outcome.

As Lord Diplock stated in the case of *Duport Steel v Sirs* [1980] 1 All ER 529**:**

> Where the meaning of the statutory words is plain and unambiguous it is not then for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they consider the consequences for doing so would be inexpedient, or even unjust or immoral.

A clear illustration is in the ancient case of *Whitley v Chappell* (1868) LR 4 QB 147, where the electoral provision stated *"*It is illegal to impersonate any person entitled to vote*."* The defendant impersonated a dead person. It was held a dead person is not entitled to vote, and the defendant was acquitted.

Similarly the use of the words “shall” and “may” in statutes also mirror common ordinary usage; “shall” is mandatory and “may” is permissive. Unless the outcome of the ordinary use of the word was to result in some absurdity or inconsistency the ordinary literal effect of the words must be maintained.

In considering the question whether a person can be appointed for a second term of office of Justice of Appeal, the provisions of article 131(1)(e) and article 134 must be applied as intended by the Constitution. There is no ambiguity in the meaning and intention of the provision, that a person holding the office of a Justice of Appeal or a Judge shall vacate that office, in the case of a person who is not a citizen of

Seychelles, at the end of the term for which the person was appointed. This provision is only subject to article 134 and definitely not subject to article 131(4).

Article 131(4) is also clear and unambiguous in its wording and application, in that it can only be invoked if the person is not a citizen of Seychelles and has already completed one term of office as Justice of Appeal or Judge. These two provisions do not work in tandem but rather separately and consecutively, in that article 131(4) can only become operational after article 131(1)(e) has become effective.

Hence the contention of State Counsel Mr V Benjamin that there should be a reasonable period prior to the expiration of the term of office of the Justice of Appeal or Judge who is not a Seychellois citizen when a re-appointment can be made, is misconceived.

By the natural expansion and interpretation of the above principles, it also follows that the term of office of a Justice of Appeal or a Judge who is not a citizen of Seychelles cannot be extended. There must by necessity be a new appointment. Hence a recommendation by the CAA for an extension of the term of office of a Justice of Appeal or a Judge who is not a citizen of Seychelles, is, *per se* alien to the Constitution of Seychelles and inconsistent with article 131(3) and (4) of the Constitution; such recommendation being unconstitutional, cannot be relied and acted upon.

On the question of whether the CAA can recommend the re-appointment of a Justice of Appeal or a Judge, prior to the expiration of that person's first term of office, the Constitution makes no provision restricting the CAA from making a recommendation at any time. The control is on appointment, which power is vested solely in the first respondent/President. Hence, the CAA can recommend at any time but the President can only appoint when all the conditions precedent have been met; that is to say, (i) the recommendation has been made for second appointment; (ii) the person is not a citizen of Seychelles; (iii) exceptional circumstances have been shown to exist; and (iv) the person has already completed the first term of office.

In the actual case, the CAA made a "recommendation" for extension of contract on 17 June 2011. Since the Constitution does not allow extension of appointment, that particular recommendation is, in itself unconstitutional. Such recommendation could not have been acted upon by the first respondent. However, even if one were to read the word extension as re-appointment, such re-appointment cannot be made until that person has already completed the existing term of office; that is to say, until after 3 October 2011. An appointment, with reservation, for it to take effect in the future, is against the plain and clear meaning of article 131(4) and therefore unconstitutional.

Intention of the "impugned letter"

We find ourselves unable to subscribe to the line of approach taken by Counsel Messrs Chang Sam and Shah in their respective submissions as to the meaning that this Court should ascribe to the letter of the CAA to the first respondent dated 17 June 2011. The contents of that letter are very clear and unambiguous, and we believe that there is no justification in the circumstances to rewrite it. Members of the CAA are very eminent persons, who in our opinion are well versed in the English

language; moreover, it is not the first time that they have addressed such letters to the appointing authority for appointment of judges. It is our finding and unwavering conclusion that the words and the spirit of that letter were simply to recommend for the approval of the President the extension of the existing 5 year term of office of Justice Domah as a Justice of Appeal, by adding another two years to bring it to a total of 7 years being the maximum term permitted by article 131(3) of the Constitution. This is very evident in that, the CAA itself has stated in that letter that it was so extending the term by virtue of article 131(3) of the Constitution, not for a second term of office under article 131(4).

Were we to accept the submissions of Mr Chang-Sam and Mr Shah, counsel for the respondents, that is to say, to import what is not written in the impugned letter, we would be rewriting a fresh letter of recommendation under article 131(4) to the first respondent recommending a second appointment of the fifth respondent for exceptional circumstances. This, we are not empowered to do, as such importation and rewriting would not only usurp the Constitutional powers and functions of the CAA, but would also defeat the provisions and the very sanctity of the Constitution. With due respect to both counsel, we cannot and should not attempt such ventures, in the guise of interpretation.

Further, Mr Shah's contention is that substantial parts of the impugned letter and the words used - rather randomly found therein - has conveyed the correct intention of the CAA, in recommending a second appointment to the appointing authority. Hence, he contended that this letter can be relied and acted upon by the first respondent.

In fact, a letter is a vehicle of thought; it conveys the intention of the maker of it, to the reader. It should contain apt words; more importantly, to convey the correct intention to the reader, those words used therein ought to have been arranged in a particular order. It is not simply a handful of words randomly scattered across a document that are pecked at by the reader, in order to make some palatable or favourable sense out of it. We are completely astounded by the argument of Mr Shah in this respect. In support of this proposition, Mr Shah also cited the authority *R v Monopoly and Merger Commission and another* [1993] 1 WLR 23. In that case, a bus company sought judicial review on the ground that the Commission was investigating a merger that only affected a small part of the country, the UK. The company argued that the Commission had jurisdiction only if the area affected was a substantial part of the UK, and that the court had to decide whether that was the case and impose it on the Commission in order to keep it within its jurisdiction. The Court held, that even after eliminating inappropriate senses of the word "substantial", one is still left with a meaning broad enough to call for the exercise of judgment rather than an exact quantitative measurement. As we see it, with due respect to counsel, the authority cited herein is of no relevance whatsoever to the issue on hand.

Exceptional circumstances

Having concluded as above, it would now be purely academic to address the issue of exceptional circumstances, although a brief remark on the issue may be made here.

Exceptional circumstances is a phrase or descriptor most often used to denote the conditions required to grant additional powers to a government or institution or person so as to alleviate or mitigate unforeseen or unconventional occurrences. There cannot be any exhaustive means of identifying or defining what constitutes exceptional circumstances.

The exceptional circumstances contemplated under article 131(4) of our Constitution, in our considered view, should be given a liberal interpretation so as to encompass all circumstances, which are reasonable and relevant to the appointment in question. In considering reasonableness, it is in our opinion, perfectly clear, that the duty of the CAA is to take into account all relevant circumstances as they exist at the time when such judicial vacancy arises, including the sensitivity of the public at large. After all, the CAA in selecting potential appointees is only performing its constitutional duty on behalf of the people of Seychelles. In so doing, the CAA must consider all those circumstances, in what we venture to call a broad commonsense way as people of the world, not simply as judges of facts, and come to their conclusion giving such weight as they think right to the various factors in the situation. Some factors may have little or no weight, others may be decisive, but it is quite wrong for them to exclude from their consideration matters which they ought to take into account – vide Lord Green in *Cumming v Danson* [1942] 2 All ER 653 and 656.

Jurisdiction

On the issue of jurisdiction raised by Mr Shah, it is evident from article 130(4)(c) of the Constitution that the Constitutional Court, in addition to its jurisdiction to grant declaratory relief as to any contravention of the Constitution, has also been conferred the jurisdiction to grant any consequential relief or remedy available to the Supreme Court against any person or authority which is the subject of the application or which is a party to any proceedings before the Constitutional Court. In such circumstances, it can grant any consequential relief as the Court considers appropriate. In our view, this Court, in the absence of anything to the contrary in the Constitution, has unfettered jurisdiction to grant any such consequential relief as it deems appropriate, following the declaratory relief in matters relating to the application, contravention, enforcement or interpretation of the Constitution vide article 129(1) thereof. It is truism that a special procedure has been prescribed under article 134 of the Constitution for removal of a Justice of Appeal or a Judge from office for his or her inability to perform the functions of the office, due to infirmity of body or mind or any other cause or misbehaviour. But, this article in our considered view has nothing to do with the unfettered jurisdiction conferred on this Court by article 130(4)(c) of the Constitution to grant any consequential relief or remedy, as it considers appropriate, having regard to all the circumstances of the case. Obviously, "where there is a right there is a remedy": *Ubi jus, ibi remedium*.

In the final analysis, having given careful thought to the submissions made by counsel for and against the petition, taking into account the entire circumstances of the case, and on the strength of the interpretation we give to article 131(3) and (4) of the Constitution, in our unanimous judgment, this Court makes the following declaration, findings and orders in this matter.

(i) This Court hereby declares that the purported recommendation of the second, third and fourth respondents (collectively the CAA), made through its letter dated 17 June 2011, to the first respondent seeking his approval for the extension of the fifth respondent's contract of employment for an additional two year period, is ultra vires and unconstitutional as it has contravened article 131(3) and (4) of the Constitution; consequently, the appointment made by the first respondent on 5 September 2011, based on that recommendation is null and void ab initio;

(ii) Further, this Court finds that, while the CAA may recommend reappointment of a candidate for a second term in exceptional circumstances, under no circumstances does it have any constitutional mandate to extend the contract period of any judicial appointee for any further period exceeding or beyond the period stipulated for the first term of office in the original contract of employment;

(iii) For the avoidance of doubt, this Court also finds that the CAA has constitutional mandate only to recommend a candidate for a second term of office provided that that candidate (a) is not a citizen of Seychelles (b) has already completed one term of office as a Justice of Appeal and (c) "exceptional circumstances" do, in fact, exist in that particular case, as contemplated under article 131(4) of the Constitution;

(iv) In consequence of the above declaration and findings, this Court hereby makes an order setting aside the appointment of the fifth respondent for a second term of office as Justice of the Court of Appeal; and

(v) This Court makes no order as to costs.

REPUBLIC v LADOUCEUR

Dodin J
26 January 2012 Supreme Court Crim 37/2010

Constitution – Sentencing - Mandatory minimum sentence – Special circumstances

The defendant had been convicted of aiding and abetting in the trafficking of a controlled drug, a crime which carries a mandatory minimum sentence of eight years. The defendant was 44 years old and a first offender. She was self-employed and her business contributed to the development of the tourism industry in Seychelles. She was not the principal actor in the crime. She was in poor health and unable to follow her treatment while in prison.

JUDGMENT Following *Poonoo v Attorney-General* SCA 38/2010, the mandatory minimum sentence of eight years would be harsh and excessive. Sentence of six years imprisonment imposed.

HELD

1 The courts do not have to apply the mandatory minimum sentence in every case, but may exercise discretion in determining the appropriate sentence that should be imposed, where the existence of special circumstances would mean that the mandatory minimum sentence would be harsh and excessive.
2 The fact that an offender is a secondary offender cannot alone be construed as special circumstances, however if this is considered together with the personal circumstances of the offender, then this may be enough to be considered special circumstances.

Cases
Poonoo v Attorney-General (2011) SLR 423

D Esparon for the Republic
J Camille for the accused

Sentence delivered on 26 January 2012 by

DODIN J:

The convict, Melitine Ladouceur has been convicted of one count of aiding and abetting the trafficking of a controlled drug, namely 1.523 kg of cannabis resin.

In mitigation counsel for the convict submitted that whilst the law has provisions for a mandatory minimum sentence of 8 years imprisonment, the court is empowered in cases where there are special circumstances to impose a sentence lower than the mandatory minimum sentence.

Counsel submitted that in this case, the accused was acquitted of the principal offence and was only convicted of the lesser secondary offence of being an accessory.

She is 44 years old and has no children and she is a first offender. She was self-employed and her business contributed to the development of the tourism industry. The evidence of the case showed that she was not the principal actor in the crime and that it is doubtful that she was the owner of the parcel in question although the circumstances had led to the parcel being deposited in her kiosk.

On the personal side, the convict is in poor health which has deteriorated during her time on remand. Counsel submitted two medical reports showing that the convict is suffering from degenerative disk disease, bronchial asthma, and chronic gastritis, and whilst she is in prison she is unable to keep her appointments for treatment or to follow the advice of the specialists regarding her treatment.

Counsel submitted that both sets of circumstances, namely the convict's medical problems and the circumstances of the commission of the crime with which she has been convicted, are peculiar to her special situation and warrant consideration by the court in imposing the lowest sentence possible.

Counsel referred the court to the case of *Jean Frederick Poonoo v Attorney-General* (2011) SLR 423 where the Court of Appeal stated that despite the law imposing a mandatory minimum sentence, the court is not bound to apply the provision in every case and the court should consider each case on its merits and apply the necessary discretion it has when determining the appropriate sentence that should be imposed.

I have carefully considered the submission made in mitigation on behalf of the convict. I have also carefully studied the medical reports for Dr Sinuhe Rodriguez and Dr Zia-ul-Hasan Rizvi both dated 23 January 2012 regarding the medical condition of the convict.

Indeed in the case of *Jean Frederick Poonoo v Attorney-General* (2011) SLR 423 the Court of Appeal dismissed the myth that the court cannot impose a sentence lower than the mandatory minimum set out by law.

I am satisfied that counsel has shown that in this case there are special circumstances to be considered in imposing a sentence on the convict; namely, her precarious medical condition which in my view can only be properly and effectively treated if she was not incarcerated or was given special treatment during her incarceration.

Secondly, the circumstances of the commission of the offence as rehearsed in the judgment delivered on 20 January 2012 indeed show that she was a secondary offender. However, that alone cannot be considered to be special circumstances but when considered together with her other personal circumstances I am satisfied that the mandatory minimum sentence of 8 years imprisonment would be harsh and excessive in her particular case.

I therefore impose a sentence of six years imprisonment on the convict. The convict can appeal against this sentence within 42 working days from today.

JULIENNE v GOVERNMENT OF SEYCHELLES

Renaud J
30 January 2012 Supreme Court Civ 380/2005

Delict – Negligent medical treatment – Vicarious liability – Government responsibility

The father of the plaintiffs died in hospital. The plaintiffs averred that he was given inappropriate and inadequate medical treatment for his illness during his stay in hospital, and that the defendant's action or omission in treating the deceased amounted to a faute in law for which the defendant is liable to the plaintiff. They further averred that the defendant, its employees', servants', agents' or preposes' action or omission caused or contributed to the death of the deceased. They claimed damages against the defendant for loss.

JUDGMENT for plaintiffs. Awarded R 275,000 with interest and costs.

HELD

The applicable law for interpreting arts 1382-1384 of the Civil Code is *Attorney-General v Labonte* SCA 24/2007.

Legislation
Civil Code arts 1382, 1383, 1384

Cases
Attorney-General v Labonte SCA 24/2007, LC 309

Frank Elizabeth for the plaintiffs
D Esparon for the defendant

Judgment delivered on 30 January 2012 by

RENAUD J:

This suit was entered on 27 October 2005 whereby the plaintiffs claim the following as loss and damages, against the defendant for reasons pleaded:

(a) Moral damages for pain, suffering, bereavement and loss of father		
at R 25,000 per child		R 175,000
R 50,000 for the wife		R 50,000
		R 225,000
(b) Pain and suffering of deceased before death		R 50,000
	Total	R 275,000

Plaintiffs' case

The plaintiffs are the children of the late Philibert Julienne (hereinafter referred to as "the deceased"), who passed away on 28 April 2005. They brought this action in their own capacity as well as in their capacity as heirs to the estate of their late father.

The plaintiffs averred that at the time of the admittance of the late Philibert Julienne to the Victoria Hospital for medical treatment on Friday 6 April 2005, the deceased was married and had the following 7 children:

(1) Margaret Daphne Theoda Julienne, born on 28 January 1968;
(2) Marinette Francoise Julienne, born on 25 June 1971;
(3) Jude Andrew France Julienne, born on 15 July 1974;
(4) Marie-Antoinette Julienne, born on 15 May 1975;
(5) Josette Merna Julienne, born on 6 January 1977;
(6) Sindy Anette Julienne, born on 2 August 1978; and
(7) Tony Riley Julienne, born on 16 December 1979.

The deceased was diabetic at the time of his admittance to the hospital.

The plaintiffs averred that the deceased was given inappropriate and inadequate medical treatment for his illness during his stay in the hospital.

The plaintiffs also averred that the defendant's action or omission in treating the deceased amount to a 'faute' in law for which the defendant is liable to the plaintiffs in law.

The plaintiff further averred that the defendant, their employees, servants, agents or préposés action or omission caused or contributed to the death of the deceased in that:

(a) The defendant gave the wrong information to the plaintiffs in respect of the defendant's ability to treat and care for the deceased.
(b) Advised the plaintiffs that amputation of the deceased's leg would not be necessary when the defendant knew or ought to have known that amputation was necessary to save the deceased's life.
(c) The defendant administered the wrong, inappropriate or inadequate medical treatment to the deceased thereby causing or contributing to his death.
(d) The defendant assured the plaintiffs that the deceased had no fever when the deceased did suffer from fever and the same had reached over forty degrees Celsius and the deceased was shivering and sweating profusely from the effect of the fever.
(e) The defendant failed to provide reasonably good and adequate medical treatment to the deceased as would generally be expected from a good, competent, skilled and qualified medical practitioner.
(f) The defendant was incompetent, reckless and negligent in all the circumstances of the case.

For reasons stated above, the plaintiffs claimed to have suffered loss and damages as stated above.

Defendant's case

In its statement of defence, the defendant denied the averment of the plaintiffs that the deceased was given inappropriate and inadequate medical treatment for his illness during his stay in the hospital.

The defendant also denied that its action or omission in treating the deceased amounted to a 'faute' in law for which it is liable to the plaintiffs in law.

The defendant further denied that it, its employees, servants, agents or préposés action or omission caused or contributed to the death of the deceased, as pleaded at paragraphs (a) to (f) of the plaint.

By way of further answer the defendant stated that:

> (i) The defendant's employees, servants or préposé attended to the deceased in April, 2005, in a professional, diligent and efficient manner and gave the deceased the necessary and appropriate treatment;
> (ii) The defendant's employees, servants or medical officers made the appropriate and correct diagnosis;
> (iii) That correct information was imparted to the plaintiffs and the deceased at all material times relating to his treatment by the medical officers.
> (iv) That the plaintiffs and deceased were properly advised by the medical officers in their professional capacity as good, skilled, competent and qualified medical practitioners.

The defendant averred that the alleged loss or damages are not directly or indirectly derived from the defendant's or its employee, préposé, or servants act or omission.

Facts not in dispute

The plaintiffs are the children of the late Philibert Julienne (the "deceased"), who passed away on Saturday 28 April 2005.

The deceased was married to Marie-France Lafortune on 19 June 1973. The marriage certificate is marked as Exhibit P4.

Out of the marriage seven children were born. They are Daphne Margaret Theoda Julienne. Her birth certificate is admitted as Exhibit P5. Marinette Francoise Julienne, her birth certificate is Exhibit P6. Jude Andrew France Julienne, his birth certificate is Exhibit P7. Marie Antoinette Julienne, her birth certificate is Exhibit P8. Josette Merna Julienne, her birth certificate is Exhibit P9. Cindy Anette Julienne, her birth certificate is Exhibit P10. Tony Riley Julienne, his birth certificate is Exhibit P11. They are all alive and have brought this action in their own capacity as heirs to the estate of their late father.

The deceased was diabetic at the time of his admittance to the hospital.

The issues

The issues that this Court is required to determine are:

Firstly, was the deceased given inappropriate and inadequate medical treatment for his illness during his stay in the hospital?

Secondly, whether the defendant's actions or omissions in treating the deceased amount to a 'faute' in law for which the defendant is liable to the plaintiff in law.

Thirdly, whether the defendant's, its employees', servants', agents' or préposés' actions or omissions caused or contributed to the death of the deceased.

To establish or otherwise the third issue, this Court has to consider whether the particulars in support of that averment as pleaded have been established by evidence. These are:

> (a) Whether the defendant gave the wrong information to the plaintiffs in respect of the defendant's ability to treat and care for the deceased.
> (b) Whether the plaintiffs were advised that the amputation of the deceased's leg would not be necessary and whether the defendant knew or ought to have known that amputation was necessary to save the deceased's life.
> (c) Whether the defendant administered the wrong, inappropriate or inadequate medical treatment to the deceased thereby causing or contributing to his death.
> (d) Whether the defendant assured the plaintiffs that the deceased has no fever when the deceased did suffer from fever and the same had reached over forty degrees Celsius and the deceased was shivering and sweating profusely from the effect of the fever.
> (e) Whether the defendant failed to provide reasonably good and adequate medical treatment to the deceased as would generally be expected from a good, competent, skilled and qualified medical practitioner.
> (f) Whether the defendant was incompetent, reckless and negligent in all the circumstances of the case.

The law

The pertinent applicable legislative provisions are articles 1382 -1384 of the Seychelles Civil Code. Article 1382 states that:

> 1. Every act whatever of man that causes damage to another obliges him by whose fault it occurs to repair it.
> 2. Fault is an error of conduct which would not have been committed by a prudent person in the special circumstances in which the damage was caused. It may be the result of a positive act or an omission.
> 3. Fault may also consist of an act or an omission the dominant purpose of which is to cause harm to another, even if it appears to have been done in the exercise of a legitimate interest.
> 4. A person shall only be responsible for fault to the extent that he is capable of discernment; provided that he did not knowingly deprive himself of his power of discernment.

> 5. Liability for intentional or negligent harm concerns public policy and may never be excluded by agreement. However, a voluntary assumption of risk shall be implied from participation in a lawful game.

Article 1383 provides that:

> 1. Every person is liable for the damage he has caused not merely by his act, but also by his negligence or imprudence.
> …..

Article 1384 provides that:

> 1. A person is liable not only for the damage that he has caused by his own act but also for the damage caused by the act of persons for whom he is responsible or by things in his custody.
> 2. The father and mother …
> 3. Masters and employers shall be liable on their part for damages caused by their servants and employees acting within the scope of their employment. A deliberate act of a servant or employee contrary to the express instructions of the master or employer and which is not incidental to the service or employment of the servant or employee shall not render the master or employer liable.
> 4. Teachers and craftsmen …

To shed some light as to how the Seychelles Court of Appeal has interpreted and applied the above-quoted legal provisions, I will refer to and cite the case of *Attorney-General v Roch Labonte & Ors* SCA 24/2007, where that Court held that:

> 1. A professional is required to exercise a higher standard of care than the prudent man (bon pere de famille; l'homme moyen; the man on the Clapham bus).
> 2. To be a professional, one needs to belong to a self-regulating organization. The mere fact that someone specialize in a particular area does not make them a professional.
> 3. For those who are not professionals, the standard of care that is applicable is that of the prudent man.
> 4. Fault under articles 1382-1384 of the Civil Code depends on what precautions were taken to foresee the occurrence of an event and adopt measures to prevent the consequences.
> 5. There can be no fault where there is diligence in dealing with predictable or unpredictable events.
> 6. For the Government to be vicariously liable for the actions of its employees fault must be attributable to the State.
> 7. For the Government to be vicariously liable for the actions of its employees, it must be shown that the employees in exercising their official functions were acting in bad faith, abused their power, or were grossly negligent.
> 8. For there to be gross negligence the act must be one that no person of ordinary intelligence would commit.
> 9. Once fault is found, the act of the victim will generally not exonerate the author of the fault. However, the fault of the victim may be such that it completely negates the responsibility of the other party.
> 10. "Actes de puissance publique" are not justiciable.

11. Government “actes de gestion en vue des services publiques” are justiciable.

Evidence of plaintiffs’ witnesses

Evidence in support of the plaintiffs’ case was adduced by two witnesses, Ms Marinette Julienne and Mrs Cindy Pothin nee Julienne who are both the daughters of the deceased.

Marinette Julienne was a medical social worker at the material time and at the time of testifying she was a student at the National Institute of Health and Social Studies doing a Diploma in Social Work.

Cindy Pothin born Julienne was and is a nurse by profession and now specializes in mental health nursing. She was trained at the National Institute of Social Studies from 1997 to 1999. She now holds a Diploma in Mental Health. She has been working for the Ministry of Health as a nurse for almost twelve years now.

The evidence on behalf of the plaintiffs no doubt reveals matters of serious concern to them as they observed during the time that the deceased was being treated by the defendant. The two witnesses related to the Court all the material events that went on during that period of his hospitalisation. All of what they have testified may be truthful and cogent but what is of most concern to this Court are only what are considered to be relevant to the matter in issue. On that basis this Court has summarized its findings of facts which follow.

The facts

In 1995 the blood sugar level of the deceased was out of control as a diabetic and there was complication that led to the amputation of the lower part of his right leg. He had been on tablets since after his amputation in 1995 to 1999 and he was doing well and still in employment. His blood sugar level was stabilized and every Saturday he was going for his physiotherapy treatment. The deceased continued to be diabetic and was also hypertensive.

In April 2005 it appeared to the relatives that he was developing the same complication that occurred in 1995.

On Friday 6 April 2005, the deceased was at home and was complaining of pains in his left leg on which there were blisters. The next day, Saturday 7 April 2005 the wound was turning bluish and his relatives took him to Dr Kumaran, a doctor in private practice at English River. Dr Kumaran immediately caused him to be admitted to the D’Offay Ward at the Seychelles Hospital where he was seen by doctors including Dr S Sanyal and Dr Ronaldo.

Amongst the other treatment to be administered the doctors also ordered that his leg be soaked every day before it is dressed.

When the deceased was admitted the doctors also scheduled him for a wound debridement the next day, Saturday 7 April 2005. He was accordingly starved from

midnight and the next day he was taken to the operating theatre at 12 noon. However the debridement was not carried out and he was brought back and was told that he would be attended to later.

The deceased went to theatre more than once on that day and each time he was told that he would be attended to later, but without any further explanation or reason given to him or his relatives. The deceased waited up to 4 pm on that day and still he was not admitted to theatre for the debridement. By then the deceased who was feeling faint, and thirsty, drank three packets of juice. He accordingly informed the nurses of that. The doctor eventually agreed to do the wound debridement the next day, Sunday 8 April 2005.

On Monday 9 April 2005 the health condition of the deceased deteriorated, and he had fever on and off. He was administered panadol, amoxicillin and treatment for high blood pressure and diabetes. The treatment was either oral or by intra-venous method.

One of his daughters discussed the health condition of the deceased with the nurse who was only a student nurse working without supervision, administering panadol syrup to the deceased. Upon enquiry by the witness as to why panadol syrup was being administered to an adult, the student nurse told her that she would discuss this with the doctor and let her know afterwards.

During the day, the deceased continued having fever and when that was taken up by the relative with Dr Ronaldo, he said that he could not prescribe other medication without discussing with Dr Telemaque who was in charge of the ward.

As from Monday 9 April 2005 a relative stayed with the deceased during the day. On Tuesday 10 April 2005 the condition of the deceased was worsening and he was beginning to be delirious and he was weak and he could not lift his arm to scratch himself.

Dr Telemaque came the next day Tuesday 10 April 2005 to see the deceased in the presence of the relatives.

On that day Tuesday 10 April 2005 when Dr Telemaque examined the leg of the deceased he enquired from the nurse whether the leg of the deceased had been soaked as ordered. The nurse replied in the negative and stated that it had been soaked only on Saturday 7 April 2005. Dr Telemaque expressed his surprise and asked why the deceased's leg had not been soaked as it was his instruction that it was to be soaked every day. Dr Telemaque then remarked that dressing was being applied on a dirty wound. In the presence of the relatives Dr Telemaque again told the nurse that the wound must be soaked every day before it is dressed.

In the night of Tuesday 10 April 2005 the health condition of the deceased worsened and he was becoming delirious. The nurse told the relatives that that morning when her assistant groomed the deceased, the deceased informed them of his being delirious. By 8 pm that day (Tuesday) the deceased was behaving strangely and was throwing things from his bed. The nurse asked one of his relatives to come and stay the night with him and his wife went.

The next morning Wednesday 11 April 2005 the deceased's leg had flesh coming out and a nurse was putting a "square white pack" on it. The nurse could not confirm to the relatives whether applying that pack was correct as she said that the Hospital had just received it and it was only then that she was testing it.

By 4 pm on Wednesday 11 April 2005 when the "pack" was removed from the deceased's leg, the leg appeared as if the flesh had been cooked and his veins could be seen. The veins were dry, looking as if when one fries something dry. The condition of the deceased's leg appeared to have worsened when the pack was removed.

The nurses referred to by the witnesses up to that point in time, never introduced themselves to the relatives and carried no name badge and they are therefore only known by face. One of them was however known and that was the nurse in charge, Ms Morel.

The deceased's condition worsened, his high blood pressure rose and fell on and off as his hypertension was volatile and at that point the doctor informed the relatives that the deceased was developing a heart condition and that he would have to be put on treatment to remove the excess water from his body and also his heart had to be tested.

At that time it was one Nurse Ah-Tion who was doing the heart test on the deceased and according to the witness Nurse Ah-Tion was complaining nonstop that she was tired of working with patients with diabetes, patients that had dirty wounds. Nurse Ah-Tion continued complaining until she finished the procedure. The procedure was a sort of machine that they use to test the heart. The deceased did not get better after that.

The system of treatment that was used to remove excess water required the monitoring of the deceased's intake and outtake of liquid, his urine, things that he was eating or drinking. The relative staying with the deceased was not properly educated on how to measure and collect that information. The nurse would just come, say at 12 noon, give him lunch and then entered it on the record as if the deceased had eaten that lunch without her asking if he had really eaten or not. The records were not being kept properly.

Dr Telemaque informed the deceased that definitely he would have to amputate his left leg. The deceased signed his consent paper himself for the amputation. Dr Telemaque explained to the deceased that his leg had to be amputated because of the burns on his leg that were shown to the relatives. The temperature level of the deceased continued to rise and fall on and off with fever, the blood sugar level was also rising and falling on and off with diabetes and so also high blood pressure level. The doctor tried to stabilize him because they were going to proceed with the amputation the following Thursday 12 April 2005.

On Thursday 12 April 2005 the relatives came very early in the morning. At that time the deceased was doing blood transfusion and a student nurse was using the "canula", unsupervised, and she was having difficulty removing it. At the same time

that student nurse was testing the blood pressure when she received a phone call. She just left and went away, leaving the BP apparatus there for a long time.

The deceased went to the operating theatre early afternoon of Thursday 12 April 2005 and three of his children waited for him in the lobby outside the theatre. They noticed that he took a long time inside, so they asked the nurse why. The nurse told them that she did not know why. By 4 pm the relatives saw all the doctors leaving the theatre and everyone was taking their bags to go home. The relatives asked again and no one knew.

The relatives saw the doctors who were supposed to be treating the deceased, Dr Ronaldo and Dr Sergio coming out of the operating theatre. The relatives ran after them to ask them what was happening because they had not seen the patient coming out. The doctors told the relatives that they should enquire with Dr Telemaque. The relatives asked to see Dr Telemaque and no one knew where he was. The relatives insisted that they see him and they were told that he had left. The relatives then saw the deceased coming out of the theatre lying on a stretcher heading for the ICU. The relatives "ran" around the hospital like mad people asking what was happening. The relatives were told that they could see the deceased later as he had to be admitted to ICU because of his condition.

The next day, Friday 13 April 2005 early in the morning the relatives came and asked to see the deceased and were allowed to see him in the ICU. All the beds in the ICU were full. One of the relatives saw the deceased struggling to remove the mask from his face and the mouth of the deceased appeared as if it had been pulled or fallen on the left side of his face. The relative informed the nurse and asked her why his mouth was like that. The nurse said that they had not noticed it but that they would inform the doctor. By 10 am the relative was informed that the deceased was being discharged from the ICU. That was not even 24 hours after he was admitted. The relative was told that if she wanted to know why she had to enquire with Dr Telemaque whom the relative had not seen up to then. The deceased was placed again on D'Offay Ward and he was just there like a vegetable.

On Monday 16 April 2005 when Dr Telemaque observed the deceased's medication chart, Dr Telemaque surprisingly asked the nurse in the presence of the relatives why the deceased was not on a specific kind of drug; he said that the deceased was supposed to be on that medication since the day he was admitted. The nurse just shrugged her shoulders to indicate that she did not know why.

On Saturday 21 April 2005 at around 2 pm a relative went to the hospital to see the deceased, when she came she saw that the deceased was not responding at all. He was sleeping and his breathing was strange, he was breathing as if the respiration was coming from his stomach. According to the nurses that state was called comatose. The relative informed the nurse that it seemed that the condition of the deceased was not alright and the nurse told her that he was in a deep sleep.

At around 6 pm of that Saturday 21 April 2005 the relative insisted again that the nurse come and see the deceased because since she got there the deceased had not woken up and had not responded and the breathing sound was very strange. At around 5 to 6 pm, the relative had called all her sisters and her mother to come. The

nurse came and told her that the deceased was in a deep coma and that she will inform the doctor but no doctor came to see him. The nurse decided to put the deceased in a side room where they usually keep patients who are critically ill. The deceased was there but again the doctor never came and the relatives were told to wait. They waited for a long time and then the doctor came at around 7 to 8 pm. It was Dr Sergio who came but he could barely speak English. The relatives had difficulty understanding him and he also had difficulty understanding them. Dr Sergio is a Cuban. One of the relatives asked him about the deceased's condition and he simply replied - 'no good', 'no good', 'the condition no good', that was all that he could speak. The relatives wanted to know more than 'no good' but Dr Sergio just kept saying 'no good'. When asked again he said - 'the scan no good, no good', so, the relatives asked the nurse who was on duty for a second opinion on the deceased's situation. The nurse told them that the doctor had already talked to them and there was no other doctor and no other opinion that could be given to them. The relatives told the nurse that they did not have enough details because the doctor had only told them - 'no good, no good'. The nurse again told the relatives that the doctor had already talked to them.

At that time one of daughters of the deceased, Mrs Cindy Pothin (born Julienne), who is a nurse was there. She told the relatives that it was only a matter of accepting it. However, Cindy insisted with the nurse to call the doctor because the relatives wanted the doctor to examine the deceased. The nurse, Ms Ah-Tion, ignored them. One of the relatives informed Ms Ah-Tion that she is a medical social worker and that Cindy is a nurse and that if she does not call the doctor, one of them would call. One of the relatives told Nurse Ah-Tion that she would go round the hospital to look for the doctor. Out of desperation the relatives preferred to get a Seychellois doctor who could better understand their situation. The relative saw Dr Mickey Noel who was working at the ICU and she asked him for his help only to come and see the deceased and to tell the relatives what was happening. Dr Mickey Noel told them that he would not be able to come and assess the deceased because he was not the doctor in charge of the ward and that he had to have the permission from the doctor who was in charge of the ward for him to do that. Dr Mickey Noel said that the only thing that he could come and do was to look at the deceased's medical case notes.

Dr Mickey Noel came and looked at the deceased's file and he informed the relatives that the condition of the deceased was such that it was advisable that they insist with the nurse that the doctor in charge of the ward comes and see the deceased.

It was Dr Telemaque who was the doctor in charge and Dr Sanyal was the doctor who was on call. Nurse Ah-Tion insisted that the doctor had already talked to the relatives and that it was a matter that they should accept and the second nurse who was there, Nurse Onezime, also took the opportunity to speak to the wife of the deceased and told her to tell the relatives to stop because the doctor had already talked to them and there was nothing that could be done.

The relatives insisted and eventually after a lot of persuasion, Ms Ah-Tion called Dr Sanyal, Dr Ronaldo, Dr Sergio and Dr Noel. That was almost midnight of Saturday 21 April 2005.

When the doctors came the first thing that Dr Sanyal very loudly said was that his patient's condition was not like that when he left him. He said to the nurses, Ms Ah-Tion and Ms Onezime that – 'I told you that if the patient's condition changes you have to call me'. Dr Sanyal then told the relatives that nobody had informed him that the deceased's condition had changed drastically for the worst. At that time the deceased's skin was moist, he was sweating and he was breathing from his stomach and Dr Sanyal told the relatives that the deceased would have to go back to ICU because his condition was very critical. Around 2.30 am on Saturday 22 April 2005 the deceased was transferred back to the ICU.

A few days after that the relatives met with the Health Minister Mr Vincent Meriton and they put their concerns forward because they by then had perceived that there was negligence, lack of supervision, they were concerned regarding the treatments being given to the deceased, among other matters. Dr Valentin was also present at that meeting. They had the chance to negotiate the issue of the deceased receiving 10ml of panadol syrup. The deceased was not supposed to be on syrup, but on pills. Dr Valentin, surprisingly said - 'what !! panadol syrup?'. Dr Valentin added that if the deceased was on panadol syrup it would have to be more than 10ml, maybe it should have been about two bottles. When the relatives voiced their concern regarding the syrup they were told that no panadol syrup had been prescribed. Minister Meriton told the relatives that he would investigate and then inform them of the outcome. All along the relatives were in contact with Minister Meriton and he told the relatives that he was working on it until he left the position of Minister for Health and the relatives never received any feedback from him.

The deceased was kept in ICU. On Monday 23 April 2005 in the morning Dr Punda, who was a doctor in the ICU introduced herself as one of the doctors who assisted during the deceased's operation. Dr Punda said to the relatives that all the doctors inside the theatre had asked Dr Telemaque if he had informed Mr Julienne's family of his condition because Dr Punda said that she had noticed that on the bench outside the theatre there were many of the relatives and she said that she recognized from their faces that they were the relatives. Dr Punda said that Dr Telemaque confirmed that he had already spoken to them. In fact Dr Telemaque had not spoken to any of them. Dr Punda said if Dr Telemaque had not talked to the family it could be because according to Dr Punda the deceased was critically ill at the time and his condition was 50- 50.

When the deceased was in the ICU the following Saturday 21 April 2005 the relatives got a phone call to come to the hospital on emergency. When a daughter and the wife came Dr Telemaque told them that he was going to do another wound debridement because the wound was septic. The relatives consented.

When his daughter came back the next Monday 23 April 2005 again Dr Punda asked her if Dr Telemaque had explained to her what he went to do with her father in the theatre. She told Dr Punda that Dr Telemaque made them sign a paper for wound debridement. Dr Punda told the daughter that it was not a wound debridement that they signed for, but for another amputation. Dr Telemaque amputated her father's leg further up.

The relatives believe that they had the right to be informed that the doctors did not do a debridement but an amputation further up.

Unluckily the deceased died on Saturday 28 April 2005 whilst he was still in the ICU where he was taken after the second supposed debridement.

The death certificate of the deceased was admitted and marked as Exhibit P1.

The relatives had been to the Ministry of Health several times to get copies of the medical report of the deceased, and were informed that the file had mysteriously disappeared and could not be found. The relatives then instructed a lawyer on 8 August 2005 to write to Minister Meriton asking for the medical file of the deceased.

The letter dated 8 August 2005 from counsel to Ministry of Health is marked as Exhibit P2.

The relatives received a letter on 22 August 2005 from Mr Maurice Lousteau Lalanne, the Principal Secretary in the Ministry of Health refusing to give copies of the deceased's medical report.

The letter dated 22 August 2005 from the Ministry of Health in reply to the previous letter is admitted and marked as Exhibit P3.

During the time that the relatives visited the deceased in the hospital, they formed the opinion that the deceased's doctors and medical practitioners were not totally providing him care, with professionalism, diligence, in an efficient manner and also were not giving him the necessary and appropriate treatment for his disease which was diabetes.

The averment of the defendant, the Government of Seychelles is denied by the relatives, when it stated that there was a correct diagnosis made of the deceased and that at all times the relatives were being given correct information about his treatment by the medical officers. The relatives had to be after them all the time to seek for information about the deceased and most of the time the information was not detailed. The family was obviously not satisfied with the information they were being provided and that was why they kept insisting all along. Until today, the relatives have been asking the Ministry of Health to provide information regarding the deceased and they have been informed that his file has disappeared, and that there was no information.

The relatives denied the averment of the defendant that the deceased and the family were being advised properly by the medical officers in a professional capacity as good, skilled, competent and qualified medical practitioners, and/or that they were imparting information to them about the deceased throughout his stay at the hospital. The relatives had to deal with doctors who could not speak English clearly, and most of the time when the relatives asked the nurses to assist and explain to them, they said that the relatives had to ask the doctor.

The relatives believe that there was medical negligence in the way that the care and treatment was applied to the deceased.

The wife of the deceased was unemployed and totally depended on the deceased financially. Before the deceased passed away he worked with the Customs Division and he retired on medical grounds in October 2004 when he was about 59 to 60 years old and was admitted in hospital on 6 April 2005 where he died on 28 April 2005. The deceased was receiving an invalidity benefit at that time.

The relatives instructed the lawyer to again write another letter to the Ministry of Health in answer the latter's letter of 22 August 2005 to insist that the medical file be given to her as these are the records of the deceased's medical condition. The letter dated 31 August 2005 from counsel to the Ministry of Health is Exhibit P12. Still the Ministry of Health refused to give copies of the medical records of the deceased to his relatives.

The relatives claimed that they are not only aggrieved about the death of the deceased but also because they were not given enough and not given proper information about the state of the deceased all along.

Evidence of defendant's witness

Dr Bhubendi Sherma was the only witness who testified on behalf of the defendant.
Dr Bhupendi Sherma is a surgeon who graduated from the SMS Medical College, Nepal, India more than 20 years ago. He obtained a Master Degree of Surgery. He was a surgeon in Seychelles from 2006 – 2009. He has had prior medical experience as a surgeon when he was working in the Medical College in India.

Prior to his testifying, Dr Bhubendi Sherma made it clear to the Court that he was not in Seychelles and that he was not at all involved with the management and treatment of the deceased at the material time. He had only been asked by his immediate employer, the Ministry of Health, to come to Court to present a "medical report" dated 11 July 2005, drawn up by one of the doctors who attended the deceased at the material time, Dr S Sanyal who has since left Seychelles for good.

Dr Sherma testified that despite all his efforts to obtain the medical case file of the deceased from his employer, the Ministry of Health, he was unsuccessful. He was before Court armed only with the medical report written by Dr Sanyal but with no supporting documents attached. Documents such as results of tests carried out, remarks or observations made by the doctors or nurses who were ministering to the deceased, sequence of events during the period the deceased was under treatment, surgeries carried out etc.

Dr Sherma did not know Dr Sanyal personally but had seen medical reports in many files signed by Dr Sanyal. He therefore knew Dr Sanyal's signature, having come across it many times.

He showed the Court where Dr Sanyal had signed on the medical report pertaining to Phillibert Julienne dated 11 July 2005 (Exhibit D1).

The medical report was drawn up by Dr S Sanyal, Consultant Surgeon, Department of Surgery, Victoria Hospital, Ministry of Health, dated 11 July 2005 on Mr Philibert Julienne of Pointe Larue, born 11 January 1946, which is now Exhibit D1.

Dr Sherma could only assist the Court with general information based on his personal opinion but such information was not evidence relating to the specific situation of the deceased or evidence in the matter in issue, in support of the defendant's case.

Findings and conclusions

This Court will first consider the evidence of Dr Bhubendi Sherma.

The evidence of Dr Sherma amounts to hearsay evidence when it relates to the actual situation of the deceased. As he stated himself, he was not present at the material times and moreover he had not had the benefit of seeing the medical case file of the patient to verify the facts contained in the medical report drawn up by Dr Sanyal, Exhibit D1. As a matter of evidence Exhibit D1 carries no weight as the author who actually drew up that exhibit was not subjected to any cross-examination. The medical report is furthermore not supported by results of any tests or actual case notes as these were not made available to the witness who testified.

This Court also takes note of Exhibit P3 which is a curt reply from the Principal Secretary of the Ministry of Health in response to a request by the lawyer of the plaintiffs to obtain the medical records of Mr Philibert Julienne. If the Ministry of Health was not minded to provide to the heirs any medical record pertaining to the deceased, this Court believes that that should not have been the case with regards to the witness who was testifying in favour of the defendant.

When testifying in Court, Dr Sherma who was the only witness of the defendant stated that despite his endeavours to obtain the medical case file of Mr Philibert Julienne for his verification prior to his coming to Court to testify, the case file was not made available to him. In the circumstances Dr Sherma could not assist the Court to establish the veracity of the contents of Exhibit D1.

This Court also takes note that it may be that Dr Sanyal had left the country for good, but this excuse is not available to the other doctors or nurses who had personal knowledge of the matter and who are still in the country. They could have been of assistance to the Court and the defendant in this matter, especially when the witnesses of the plaintiffs have cited names when they were testifying on material aspects.

The evidence now available for this Court to base its findings upon in order to reach its conclusion is, in the main, only the evidence of the witnesses of the plaintiffs which stand "uncontroverted".

Upon an analysis of the evidence adduced by the witnesses for the plaintiffs, this Court makes the following findings upon which this Court has accordingly based its conclusions.

There are two main issues which this Court has to first determine before considering the other particulars pleaded.

Firstly, it has to establish whether the deceased was given inappropriate and inadequate medical treatment for his illness during his stay in the Seychelles Hospital.

Secondly it also has to determine whether the action or omission of the defendant's employees, servants, agents or préposés in the manner that they treated the deceased amounted to a 'faute' in law to render the defendant liable to the plaintiffs in law.

The deceased was referred to the defendant for treatment because of his situation that required immediate, specific and particular treatment. There was no doubt an element of urgency. The deceased was diabetic and had hypertension at the time of his admittance to the Seychelles Hospital. About 15 years prior to that he had had one leg amputated.

Failure by the defendant's employees, servants, agents or préposés to properly soak the leg of the deceased every day before dressing, administration of panadol syrup to a diabetic patient, failing to call the doctors when the health condition of the deceased showed a declination, among other omissions in my judgment sufficiently put into question the defendant's ability to have properly, professionally, adequately and sufficiently treated and cared for the deceased in the circumstances.

The defendant's employees, servants, agents or préposés at all material times knew or ought to have known that amputation was necessary to save the deceased's life yet they advised the plaintiffs that amputation of the deceased's leg would not be necessary.

It is the findings and conclusions of this Court that the defendant's employees, servants, agents or préposés:

> (a) Administered wrong, inappropriate or inadequate medical treatment to the deceased thereby causing or contributing to his death.
>
> (b) Assured the plaintiffs that the deceased has no fever when the deceased did suffer from fever which had reached over forty degrees Celsius and the deceased was shivering and sweating profusely from the effect of the fever.
>
> (c) Failed to provide reasonably good and adequate medical treatment to the deceased as would generally be expected from good, competent, skilled and qualified medical practitioners.
>
> (d) In the particular circumstances of this case, showed incompetence, recklessness and negligence.

It is also the findings of this Court that the defendant's employees, servants, agents or préposés, at all material times when the deceased was under their medical care did not give sufficient or did not give correct information to the plaintiffs. The

evidence of the witnesses of the plaintiffs abounds with such instances. This caused mental anguish to the plaintiffs.

In light of its finding of facts enumerated above, and applying the law to the facts as found, it is the considered judgment of this Court that the plaintiffs have satisfied this Court and proven their claim on a balance of probabilities that the defendant vicariously committed a “faute” in law by the actions and/or omissions of its employees, servants, agents or préposés and that the plaintiffs are therefore entitled to judgment in their favour.

The plaintiffs claimed to have suffered loss and damages for which the defendant is liable to make good to the plaintiffs. In the circumstances it is the judgment of this Court that the defendant ought to make good the loss and damages suffered by the plaintiffs.

This Court takes note that the incident giving rise to this claim arose in April 2005 and that the plaintiffs entered this suit in October 2005. The purchasing power of the Seychelles Rupee had considerably eroded during the intervening period in that R 5.00 could purchase a US Dollar in 2005 and R 13.75 is now required to purchase that same US Dollar. This Court finds that the plaintiffs’ claim for loss and damages are not speculative and excessive and assesses the damage as follows:

(a) Moral damages for pain, suffering, bereavement and loss of father	
at R 25,000 per child	R 175,000
R 50,000 for the wife	R 50,000
	R 225,000
(b) Pain and suffering of deceased before death	R 50,000
Total	R 275,000

Judgment is accordingly entered in favour of the plaintiffs as against the defendant in the total sum of R 275,000 with interest and costs.

ESPARON v ESPARON

Renaud J
2 February 2012 Supreme Court Divorce 59/2008

Matrimonial property – Joint property – Non-Seychellois applicant

The applicant is a German national, who obtained a divorce from the Seychellois respondent in 2009. She claims she is entitled to the sole interest in the matrimonial home. The home is registered solely in the name of the respondent, because it could not be registered in her name or jointly. The purchase of the property and building of the house was funded largely by the applicant's parents who live in Germany. Since the divorce she has been in Germany with the two children of the marriage, and the respondent has had possession of the house, though he has not been living there.

JUDGMENT Matrimonial assets divided with 60% going to the applicant and 40% going to the respondent.

HELD

1 There is no mathematical formula by which matrimonial property should be divided, and each case is considered on its merits. The cardinal principle is that there must be a level of equity in that each party is not deprived of their fair share of contributions in the matrimonial asset despite such asset's being registered solely in the name of one party.
2 Where the legal ownership of a matrimonial asset is vested solely in one party but there is overwhelming and convincing evidence that the other party made significant contributions towards the matrimonial asset in issue, the matrimonial property should be vested in both parties.
3 Where the court concludes that the matrimonial assets belong to both parties, it must then determine what proportion of ownership each party holds in the assets.
4 In determining the equitable balance of ownership the court normally starts by looking at the legal ownership and then adjusts the shares of each party based on the level of contributions made by each party.

B Georges for the applicant
F Ally for the respondent

Judgment delivered on 2 February 2012 by

RENAUD J:

The parties in this matter are divorced and are now in the process of settling matrimonial assets. The substance of the matrimonial assets in issue is the house occupied by the parties. It is situated at Anse Aux Pins, Mahe, Seychelles on land parcel S2776 which is registered in the sole name of the respondent. The applicant is praying this Court to order that the said property be transferred into her sole name for reasons set out in an affidavit. The parties also adduced further vice voce testimonies.

The applicant is a German National who married the respondent, a Seychellois National on 30 May 1992 and divorced on 24 July 2009. There are two children born of this marriage and they are now in the care and custody of the applicant in Germany.

The applicant claims that she wholly financed the purchase of the property in issue and as she was a non-Seychellois she caused the property to be registered in the sole name of the respondent. She also claimed to have financed the construction of the matrimonial home on that property from her personal funds and moneys received from her family in Germany in the total sum of R 970,000. She produced documentary evidence showing that she indeed transferred the total amount of Deutschmark 325,497.91 from Germany to Seychelles. She claims that she also furnished the house with her own funds in addition to her own furniture which she brought from Germany.

The applicant averred that at the material time the respondent had no money or ability to purchase the land and build and furnish the matrimonial home and that he made no financial contribution whatsoever to the purchase of the land and the building of the matrimonial home.

The applicant also claimed that during the subsistence of the marriage she contributed towards the household expenses and the maintenance and upkeep of the family including the payment of the school fees of the children. That happened, according to her, because the respondent earned a very meagre salary or at times no salary as he was unemployed for a few months, and that the respondent was greatly dependent on her in respect of the family charges.

The parties separated on 26 March 2001 and the applicant went back to Germany with the two children, taking only clothes and the children, and leaving all the movables in the home. Since then she had been the one who maintained the children without any contribution from the respondent. Since the applicant left in March 2001 the respondent has had the sole use, occupation and enjoyment of the matrimonial home.

The applicant averred that the respondent has no will, interest, ability and financial means to maintain the matrimonial home in that he had abandoned the matrimonial home, which is currently unoccupied and is in a state of disrepair and its value rapidly diminishing.

The applicant on the other hand claims that she has the will, interest, ability and financial means to maintain and preserve the matrimonial home and that unless it is settled on her its value will rapidly and substantially diminish.

It is for the reasons averred by the applicant that she claims to be entitled to land title S2776 with the matrimonial home thereon which should, therefore, be settled in her sole name. She added that should this Court find that the respondent has any share in the property she is prepared to pay him for his share.

In his affidavit in reply the respondent asserted that he had been married to the applicant for 16 years prior to her deserting him and the matrimonial home, leaving Seychelles with their two children in March 2001. Since then he has had sole occupation of the home and now claims that he should be allowed to retain it.

He denied abandoning the house however; because he is working on Praslin he had to live there. He stated that he made arrangements for a caretaker to look after the house in his absence and visits the property whenever he comes to Mahe. He averred that he has the will, interest, ability and financial means to retain the property.

The respondent, although admitted that the land title S2776 was indeed purchased from funds received from the applicant, denied that the matrimonial property should be settled in her sole name. He averred that as per an agreement between the applicant and him, he was to contribute towards the maintenance of the house during the course of the marriage in Seychelles. The respondent admitted that the construction of the matrimonial home and furnishings thereof were greatly done from funds received from applicant's parents from Germany and from gifts received from her parents.

The respondent also averred that during the marriage, he was gainfully employed as an entertainment manager in Seychelles earning between R 5,000 to R 6,000 monthly. He claimed to have contributed substantially towards household expenses and for the upkeep of the children. He added that at the material time there was question of payment of school fees as both of them contributed towards payment of day care for the child Jessica as the other child Janick had just been born and both of them contributed towards the payment of the babysitter for him. He denied that it was only the petitioner who maintained the children during their marriage.

The respondent averred that he could not pay for the children's maintenance after they had left for Germany as no system existed then for the transfer of funds to Germany as remittance in view of the restrictions existing then in Seychelles. He averred that he did make arrangement with the German Welfare Agency for Children, whereupon the children have been maintained in Germany ever since, by the said system.

The respondent contended that the applicant having deserted the matrimonial home and the matrimonial property having been registered in his sole name, this Court ought to order that he retains the matrimonial property solely. The respondent added that the applicant is already in possession of a flat in Freudenstadt, Germany and will accordingly not be prejudiced in him solely retaining the matrimonial property in Seychelles.

I had the benefit of hearing the parties viva voce. The parties actually lived and co-habited in the matrimonial home for 6 years or so. They were married in 1992 and lived in Germany before coming to Seychelles in 1996. They later moved into the matrimonial home after its completion.

As is the case in all such matters before the Court, each party goes at great length in trying to convince the Court through the production of all possible documentary evidence as well as adducing oral evidence that he/she should be vested with the matrimonial property, solely or in a greater share.

In our jurisdiction there are many such cases which have been decided by this Court as well as in the Seychelles Court of Appeal and therefore guidance abounds. However, there is no set mathematical formula by which such cases are decided and each case is considered on its own merits. The cardinal principle is that there must be a level of equity in that the respective party is not deprived of their fair share of contributions in the matrimonial asset despite such asset being registered in the sole name of one party, as is the case here. In determining that equitable balance the Court normally starts by looking at the legal ownership and then adjusts the shares of each party based on the level of contributions made by each party, be such contributions in cash, in kind or otherwise.

The legal ownership of the matrimonial asset, Title S2776 and the house thereon as well as its contents, belongs to the respondent as the property is registered in his sole name. It follows that the house thereon belongs to him in the absence of any legal document to the contrary, and obviously likewise the contents of that house.

Is there evidence that the petitioner made significant contributions, both in cash or in kind towards the acquisition of such matrimonial assets?

I have carefully listened to the testimonies of the parties and have verified the documentary evidence before the Court and I find and conclude that there is overwhelming and convincing evidence that the petitioner did indeed make significant contributions towards the matrimonial assets in issue.

Having made the above finding of facts I believe that I should proceed to equitably adjust the assets in order to reflect the situation of the parties. To start with I will declare that although the matrimonial property is registered in the sole name of the respondent it in fact belongs to both parties to the marriage. At the time the property was purchased the petitioner was not a Seychellois and the property could not be registered in her name personally or jointly with respondent. They were married and as a unit the property was registered in the sole name of the respondent although belonging to both of them. It follows that the house built on that property as well as its contents likewise belong to both parties jointly, hence for avoidance of doubt I find that all the matrimonial assets in issue belong to both the petitioner and the respondent jointly.

Having concluded that the matrimonial assets belong to the parties jointly I must now determine in what proportion does each party hold in these assets.

On the basis of the evidence I find that the petitioner made a greater cash contribution than the respondent. This fact is admitted by the respondent. The parties lived in the matrimonial home for 6 years and the petitioner left with the two children for Germany leaving the property in the sole care and custody of the respondent for a considerable period of time. Property needs to be administered and maintained and that was done by the respondent solely. Whether he maintained it to

the level that it would have been had the parties continued to live together does not carry much weight against the respondent. On the other hand the petitioner maintained the two children of the marriage during that period. Despite the property not bring kept in an utmost standard of repair I take judicial notice that the value of property in Seychelles has been on the considerable increase over the years. Bearing in mind the foregoing findings, I assess the shares of the parties in the matrimonial assets at 60% for the petitioner and 40% for the respondent.

The pleadings show that both parties do not wish to hold their shares in indivision but would prefer a clean break. I believe that this is fair and reasonable in the circumstances. As the respondent is the one who had been occupying the matrimonial home since the petitioner left Seychelles up to now, I will give the respondent the first option to purchase the shares of the petitioner and this he must do within 6 (six) months from the date of this judgment, failing which the option shall revert back to the petitioner to purchase the shares of the respondent within six months thereafter or 12 months (twelve) from the date of this judgment. Failing the parties purchasing the shares of the other party as stated, the property shall be sold on the market and each party will receive their share in the proceeds.

If and when either of the respective party purchased the shares of the other party the sole ownership of the property title S2776 and the house thereon as well as its contents shall be registered in the sole name of the party who had purchased the shares of the other party. This judgment and proof of payment shall be sufficient for the Land Registrar to give effect to the transfer as afore-stated.

I order accordingly.

FAYE v LEFEVRE

Renaud J
3 February 2012 Supreme Court Civ 225/2007

Civil procedure - Stay of execution

The applicants applied for a stay of execution pending appeal of a Supreme Court judgment.

RULING Stay of execution granted.

HELD

1 Whether to grant a stay is within the court's discretion in the exercise of its equitable jurisdiction under s 6 of the Courts Act.
2 In considering whether to grant a stay, the court must balance the interests of the parties by minimising the risk of possible abuse by an appellant to delay the respondent from realising the fruits of the judgment.
3 Where an unsuccessful defendant seeks a stay, it is a legitimate ground for granting the application that the defendant is able to satisfy the court that the appeal has some prospect of success and that without a stay the defendant will be seriously affected.

Legislation
Code of Civil Procedure, art 230
Court of Appeal Rules, r 20
Courts Act, s 6

Cases
International Investment Trading SRL v Piazolla (2005) SLR 57

Frank Ally for the applicant
France Bonte for the first respondent
William Herminie for the second respondent

Ruling delivered on 3 February 2012 by

RENAUD J:

The application entered on 29 July 2011 by Nathalie Lefevre, hereinafter called the first applicant and another application entered on 5 August 2011 by Beau Vallon Properties Ltd hereinafter called the second applicant, sought a stay of execution of a judgment delivered on 4 July 2011 in favour of the plaintiff who is the respondent herein.

In the affidavit in support of the application, Mr F Bonte counsel for the first applicant inter alia deponed that he has been instructed to appeal against the said decision and an appeal has already been filed. He also deponed that the first applicant would be unjustly prejudiced in that irreparable damage would be done if execution is not

stayed pending the appeal. Counsel for the first applicant prayed this Court to stay its decision in that case until the determination of the appeal.

A copy of the notice of appeal incorporating 11 grounds of appeal of the first applicant is attached to the application. The relief sought by the first application is (1) to quash the orders and declaration; (2) reverse the findings, more specifically that the first applicant was a conspirator in an alleged fraud; and (3) allow the appeal with costs of the appeal and in the Court below.

In the affidavit in support of the application, Mr W Herminie counsel for the second applicant inter alia deponed that he has been mandated to represent the second applicant and that the appeal has a good chance of success. He claimed that the second applicant would be unjustly prejudiced in that irreparable damage would be done if execution is not stayed pending the appeal. He also prayed this Court to stay its decision in that case until the determination of the appeal.

Counsel for the second applicant attached a copy of the notice of appeal incorporating three grounds of appeal.

Counsel for the respondent opposed the granting of a stay of execution and submitted that the first applicant has neither adduced sufficient cause to justify a stay nor shown what prejudice will be caused to her if a stay is granted and neither has the first applicant submitted that the appeal has any chance of success.

With regards to the application of the second applicant, counsel for the respondent submitted that counsel for the second applicant only stated that he has a good chance of success.

Counsel for the respondent submitted that neither application is sufficiently supported by facts to justify the Court in granting this application.

Article 230 of the Seychelles Code of Civil Procedure relates to stay of execution. It states:

> An appeal shall not operate as a stay of execution or of a proceedings under the decision appealed from unless the court or the appellate court so orders and subject to such terms as it may impose. No intermediate act or proceeding shall be invalidated except so far as the appellate court may direct.

Rule 20 of the Seychelles Court of Appeal Rules 2005 also states that – “an appeal shall not operate as a stay of execution or of proceedings under the decision appealed from”.

It goes on to state that:

> provided that the Supreme Court of the Court may on application supported by affidavits, and served on the respondent, stray execution on any judgment, order, conviction, or sentence pending appeal on such terms, including such security for the payment of any money or the due performance or non-performance of any act of the suffering of any punishment ordered by or in

> such judgment, order, conviction, or sentence, as the Supreme Court of the Court may deem reasonable.

The judgment appealed against was delivered on 4 July 2011 and it is not yet known as to when the appeals will be heard by the Seychelles Court of Appeal.

In the case of *International Investment Trading SRL (IIT) v Piazolla & Ors* (2005) SLR 57, it was held that:

> (i) Whether to grant or deny a stay is entirely within the Court's discretion in the exercise of its equitable jurisdiction under section 6 of the Courts Act;
> (ii) In considering whether to grant or refuse a stay, the Court must balance the interests of the parties by minimising the risk of possible abuse by an appellant to delay the respondent from realising the fruits of their judgment; and
> (iii) Where an unsuccessful defendant seeks a stay execution pending an appeal, it is legitimate ground for granting the application that the defendant is able to satisfy the Court that without a stay they will be ruined and that they have an appeal which has some prospect of success.

The relief sought by the first applicant is that the Court quash the orders and declaration of the Judge; reverse the findings of the Judge, more specifically when he finds that the alleged appellant was a conspirator in an alleged fraud; and allow the appeal with costs of the appeal and in the Court below. In the case of the second appellant, the relief sought is to reverse the finding and make the following orders:

- The second defendant/applicant did not act wrongfully when it registered Nathalie Lefevre as a shareholder in its register of shareholders.
- That the point *in limine litis* raised by the second defendant/appellant was valid.
- That it is not compelled to pay costs to the plaintiff/respondent.

The relief sought by the applicants, as appellants before the Seychelles Court of Appeal is for the reversal of the decision of the trial Court and for a judgment to be instead granted in their favour on the basis of their grounds of appeal as pleaded.

Obviously it is not for this Court to determine whether the appeal of the appellants will succeed before the Seychelles Court of Appeal. However, for the purpose of considering this application, this Court has to obviously peruse the grounds of appeal to consider whether it is not frivolous and vexatious and whether it has not been filed by the applicants only to delay the respondent from enjoying the fruits of his judgment. Upon careful perusal of this matter I find that these applications are not necessarily frivolous and vexatious although lacking in supporting details.

At the end of the day, in the event that the applicants' appeal finds favour with the Seychelles Court of Appeal the end result will be that the respondent will not become a shareholder of Beau Vallon Properties Limited and the position now held by the first applicant in the company shareholder register of the second applicant will remain unchanged.

Although I agree with the respondent that the first applicant will not be prejudiced in the event that a stay of execution is granted, I am of the view that it would be more of an embarrassment to the respondent if he was to become a shareholder on the basis of the judgment of the trial Court and to thereafter relinquish that position should the Seychelles Court of Appeal accede to the prayers of the applicants in their respective appeals. The right of the respondent as already determined by this Court, however, must be preserved so that he will suffer no loss in the event that the appeal is not successful.

In the exercise of its equitable jurisdiction and in exercising its discretion after balancing the interests of the parties in minimising the risk of possible abuse by the appellants to delay the respondent from realising the fruits of their judgment, this Court will grant a stay of execution in this matter on the condition that the status quo at the date the judgment was given by this Court, is maintained by the first and second applicants until the appeals are concluded.

I accordingly order a stay of execution in this matter on the condition that the status quo subsisting at the date the judgment was given by this Court is maintained by the applicants until the appeals are concluded.

Costs shall be costs in the case.

AMELIE v MANGROO

Egonda-Ntende CJ
29 February 2012 Supreme Court Civ 1/2008

Civil procedure – Diverting from pleadings

The plaintiff and the defendant had an agreement whereby the plaintiff would construct a house for the defendant for a fixed sum, which was to be paid in instalments. The plaintiff was paid the first instalment but never completed the first part of the work, because he discovered it would cost much more than anticipated. He asked for more money, and gave the defendant fourteen days notice to pay that money. She did not pay more, and so he ceased work. The plead was that the defendant never paid him any money, and that he was claiming for the first instalment plus loss of income. The defendant counterclaimed for the losses she incurred as a result of the work not being completed.

JUDGMENT Both claim and counterclaim dismissed.

HELD

1 A matter which has not been pleaded cannot be held to have been proved and no evidence should be adduced or admitted in respect of it.
2 Pleadings provide the adverse party with the case it has to meet, and diverting from pleadings would allow parties to ambush one another.

Cases
Nanon v Thyroomooldy (2011) SLR 92

Elvis Chetty for the plaintiff
France Bonte for the defendant

Judgment delivered on 29 February 2012 by

EGONDA-NTENDE CJ:

The plaintiff is seeking from this court an order to rescind the contract between the plaintiff and defendant made on 23 December 2004 and the payment by the defendant of the sum of R 445,500 to the plaintiff together with interest and costs.

The case for the plaintiff is that both parties hereto agreed that the plaintiff would build for the defendant a 4 bedroom house at Glacis, Mahe for the price of R 445,500. This sum was to be paid in installments. The first installment was to be R 125,000 for ground preparation, foundation and retaining wall. The plaintiff completed this work but was never paid the first installment of R 125,000 by the defendant. By reason of this breach the plaintiff ceased any further work in respect of the contract. He now claims the R 125,000 as well as R 310,000 being loss of profits the plaintiff would have made had he completed the contract.

The defendant opposed the plaintiff's claim as well setting up a counterclaim. She agreed that there was a contract between the parties for construction of a house for her. She contended that she paid the plaintiff the sum of R 125,000 by cheque no 475429 dated 26 November 2004 as agreed for the first installment. However the plaintiff failed to complete the first stage of the works and abandoned the works. By reason of the plaintiff's failure to complete the contract the plaintiff counterclaimed a sum of R 190,000 as loss suffered by the defendant on account of (a) expenses for additional rent payment, (b) expenses for unpaid water bills/reconnection fee, (c) uncompleted works as of date of termination, and (d) loss of enjoyment of the property; together with interest.

The plaintiff denied the counterclaim.

At the hearing of the case each party testified on his or her own behalf and no other witnesses were called. The plaintiff in his testimony stated that he received the initial payment from the defendant of R 125,000 for the initial works but that when he started construction he met some unusual conditions that necessitated further works beyond those agreed. When he brought the attention of the defendant to these extra works the defendant refused to pay him and he gave 14 days' notice to her that he would abandon the works unless she accepted to pay him. As she did not accept to pay him and the notice passed, he abandoned the works in question.

The defendant testified that she paid the plaintiff in accordance with their agreement the initial sum of R 125,000 for the plaintiff to carry out the first stage of the works. The plaintiff commenced the works but failed to complete them. In spite of repeated calls from the defendant that the plaintiff complete the work as agreed, the plaintiff failed to do so and abandoned the work. She admitted that the plaintiff had subsequently paid for the water bills to the site.

The plaintiff's case as set out in the plaint is different from that presented on evidence. In the plaint the plaintiff had claimed that the initial sum or first installment of R 125,000 had never been paid by the defendant. The claim in the plaint was for that amount plus lost profits on the contract of R 310,000. On the evidence the plaintiff admitted that he had been paid the initial first installment of R 125,000. He was only claiming an additional R 125,000 for the extra works that arose at the first stage of the works. This is a different case from the one on the pleadings and must for that reason fail.

As was observed by the Court of Appeal in *Michel Nanon v Janine Thyroomooldy* (2011) SLR 92 –

> We also remind ourselves that the following points are pertinent: (i) a matter which has not been pleaded, may not be found to have been proved and no evidence should be adduced or admitted in respect thereof; (ii) a party is bound by his / her pleadings; (iii) he / she who avers must prove.

The reason for this requirement is simple. Pleadings provide the adverse party with the case it has to meet. Once the other party has prepared to meet the case at hand it is not permissible to ambush it with another case altogether of which it has no notice. Secondly, a party's pleadings ought to act as a beacon to that party

delineating for that party the case it has to prove in order to succeed. It is therefore simply not permissible for a party to depart from the case set forth in its pleadings and prove another that the other party has had no notice of and or the chance to respond to. It is not permitted so to speak to move the ‘goal posts’ of the litigation as the plaintiff has attempted to do in this case.

On the other hand the claim for loss of profits of R 310,000 was not supported by an iota or scintilla of evidence. It remains unproven. It must fail on that account.

The counterclaim put forth by the defendant is similarly unsupported by any evidence on record. No evidence was adduced relating to how the sum of R 190,000 was arrived at. No evidence was led as to the loss suffered by the defendant on account of expenses for additional rent payment, uncompleted works as of date of termination, and loss of enjoyment of the property.

In the result I have no alternative but to dismiss both the suit and counterclaim for the reasons set out above with costs to either party.

It is apparent that counsel for both parties in handling this matter could have done much more in presenting their clients’ cases than they did. I regret that not enough effort was put into preparation and presentation of their clients’ cases.

GAMBLE v RHODES TRUSTEES LTD

Egonda-Ntende CJ
23 March 2012 Supreme Court Civ 61/2011

International Trusts Act – Breach of trust

The plaintiffs are beneficiaries of the LGA Gamble Succession Trust, registered under the International Trusts Act 1994. The plaintiffs claim the defendant, as a trustee, has breached the trust by: resigning as co-trustee, failing to inform the Registrar of International Trusts of the resignation, failing to distribute the trust fund to the plaintiffs, failing to render accounts, failing to deliver a report on the administration of the trust fund, and failing to communicate further the plaintiffs.

JUDGMENT Defendant liable to the plaintiffs for £402,869.62 or the equivalent in rupees, with interest and costs.

HELD

1 A trustee of an international trust cannot delegate authority to the only other co-trustee to look after the trustee property (International Trust Act, ss 32(1), 37(1) and 38(5)). This would be a breach of the trustee's duties under ss 26 and 27 of the International Trusts Act.
2 Where a trustee has entered into an agreement in breach of the trust to cede control of the trust property to the co-trustee, the trustee cannot take advantage of s 44(1)(a) of the International Trusts Act to claim that breaches were committed prior to his appointment. The trustee will be liable under s 44(2) of the International Trusts Act for failing to take any reasonable steps to remedy the breach.

Legislation
International Trusts Act, ss 26, 27, 32(1), 37(1), 38(5), 43, 44, 44(1)(a),(2), 49

Lucy Pool for the plaintiff
Divino Sabino for the defendant

Judgment delivered on 23 March 2012 by

EGONDA-NTENDE CJ:

Plaintiffs no 1 to no 4 bring this action in their capacities as beneficiaries to a trust registered under the International Trust Act 1994. The name of the trust is the LGA Gamble Succession Trust, hereinafter referred to as the Trust, and the plaintiffs are named as beneficiaries therein. The Trust Deed is dated 15 November 2008. The plaintiffs contend that two co-trustees were appointed, Valinger Trustees Ltd, presently of an unknown address and not registered within the jurisdiction of Seychelles, and Rhodes Trustees Ltd, the defendant in this matter.

The plaintiffs further contend that the initial property in reference to the said Trust was paid, transferred and delivered and placed under the control of the said trustees,

including the defendant, upon the signing of the LGA Gamble Succession Trust instrument on 15 November 2008.

The Trust Fund, as at 31 August 2009, totaled British Sterling 812,869.92. The plaintiff contends that the defendant was obliged under law to preserve the said trust property, control the trust property, enhance its value and keep accurate accounts and records of the trusteeship. Further the defendant was obliged to provide full and accurate information upon request by the beneficiaries, execute the trust, jointly with any co-trustee, and with all due diligence, care and prudence and to the best of its ability and skill.

The plaintiffs have repeatedly requested the defendant to do the following: To provide an updated and accurate account of the trust funds; to preserve and protect the trust funds; and to wind-up the trust fund and pay and distribute the proceeds to the plaintiffs and other beneficiaries.

In breach of the Trust, the defendant on 23 August 2010 stated to the plaintiffs' attorney that it had resigned as co-trustee of the Trust on 28 January 2010. As at 17 November 2010, the defendant failed to inform the Registrar of International Trusts as to its purported resignation.

Further it is contended for the plaintiffs that the defendant in breach of trust unlawfully, failed to distribute the Trust Fund to the plaintiffs, failed to render any accounts, failed to deliver a report on the administration of the Trust Fund and has failed to communicate further with the plaintiffs for which the defendant is liable in law.

In the alternative the plaintiffs aver that the defendant has fraudulently misappropriated the Trust Fund and property and by reason of the foregoing, the plaintiffs have been put to loss and damages. The loss is established to be the loss of the Trust Fund and property of British Pounds Sterling 812,869.92 as well as moral damages of R 1 million.

The plaintiffs therefore pray to this Court for judgment against the defendant ordering the defendant to pay to the plaintiff the total sum of R 16,607,102.46 plus interest and costs.

The defendant opposed this action. Firstly it set up a plea *in limine litis* to the effect that no trust existed as the purported trust was not completely constituted. The purported trust property was never deposited with the co-trustees. The defendant cannot therefore be in breach of trust as there is no trust. The plaint is therefore bad in law and must be dismissed against the defendant.

On the merits of the claim the defendant contends that the names of the beneficiaries as per the Third Schedule of the LGA Gamble Succession Trust are not the names of the plaintiffs. The defendant further contends that as the defendant is no longer co-trustee the purported trustee ceased to exist as an international trust for lack of a resident trustee.

The defendant denies what is set out in paragraph 3 of the plaint and states that the original trust instrument appointed only Valinger Trustees Limited as trustee. Valinger Trustee Limited later appointed the defendant as a co-trustee. It was agreed that the defendant would act as statutory trustee and that Valinger Trustees Ltd would handle the management of the purported trust property.

The defendant further contends that no property intended to form part of the purported international trust or otherwise, was ever delivered or placed under the control of the defendant before, upon or after the signing of the Trust Deed. Any monies were placed in the control of an entity associated with co-trustee VTL, namely Valinger Trade Services, into an Isle of Man bank account, of which the defendant has no control or access.

The defendant further contends that although funds were transferred to Valinger Trade Services, those funds were never deposited into the pre-arranged trust accounts, and so no monies were actually deposited into the "Trust Fund" per se. The defendant denies that it was ever in control of the so-called trust property. The defendant resigned as a co-trustee on 6 November 2009 and ratified the resignation by way of formal notification on 28 January 2010. The Registrar of International Trusts was formally informed on 13 August 2010. The defendant's resignation as a co-trustee is not a breach of trust. Furthermore, the defendant has never received any consideration for its role as co-trustee.

The defendant states that it was never in a position to distribute any funds to the plaintiffs and the defendant is not liable in law to the plaintiffs, as the defendant could not have breached any of its duties to the plaintiffs as a trustee. The defendant denied that it ever controlled any funds or property of the Trust and could not therefore have misappropriated any funds or property as alleged.

In conclusion the defendant states that any loss or damage suffered by the plaintiffs was not caused by the defendant and prays that this suit should be dismissed with costs.

At the hearing of the case the plaintiffs called one witness from SIBA Ms Karen Auguste and Mrs Dena Kay Gamble, plaintiff no 1. The defendant called the Managing Director Mr Pagano as its witness and then each side closed its case. From the evidence on record I can gather the following facts. Prior to the registration of LGA Gamble Succession Trust there had been a first trust established by plaintiff no 1's father. At some point plaintiff no 1 and in discussion or advice with her accountant and advisers and with Valinger Trustees Ltd agreed on the creation of a new trust. Plaintiff no 1 mobilized funds from the first trust and forwarded them to an account in the Isle of Man in the names of Valinger Trade Services. This was prior to the formation of the LGA Gamble Succession Trust. Transfer of such funds started in August 2008. On 15 November 2008 a deed named the LGA Gamble Succession Trust dated 15 November 2008 was executed by Valinger Trustees Limited whose address is stated to be the Wharf Hotel and Marina, Providence, Mahe, P O Box 882, Victoria, Seychelles. This declaration of trust was admitted in evidence as exhibit P8 and D9. This Trust Deed indicates that the trust property is the initial property, set out in the Second Schedule to the Deed, and the Second Schedule has no information whatsoever or no description whatsoever describing

the initial property; whether it was a sum of money, immovable property, shares or whatever.

The initial trustee was Valinger Trustees Limited of Seychelles as at 15 November 2008. On 10 December 2008 Valinger Trustees Limited of Seychelles retired as trustees and appointed Valinger Trustees Limited of Nevis as the new trustee and 8 days later on 18 December 2008 Valinger Trustees Limited of Nevis appointed the defendant as co-trustees. After being appointed as a co-trustee, Rhodes Trustees Limited Managing Director Pagano applied for registration of an international trust on 18 December and it was received on 29 December 2008 at the Seychelles International Business Authority. The names of the co-trustees are stated to be Rhodes Trustees Limited and Valinger Trustees Limited.

It would appear that after some time the beneficiaries decided to wind-up this trust. They wrote on 24 September 2009 to Valinger Trustees Limited a letter to that effect to which was annexed an account. They requested that this money be immediately distributed to the beneficiaries. That was not done. They engaged lawyers in Switzerland who eventually contacted the defendant and were informed by the defendant that they had resigned as co-trustees on 6 November 2009 and that the person to contact was the remaining trustee Valinger Trustees Limited. On the advice of her lawyers she decided to bring this action against the defendant.

After filing this action she received some 410,000 pounds remitted to her by Valinger Trade Services. Mr Pagano testifying for the defendant reiterated the facts that no funds whatsoever were ever received into the joint hands of the trustees and no trust accounts were established for that purpose. Basically there are two causes of action, one in the alternative, that have been brought against the defendant in this case. The issue is whether on the evidence before me either action stands proved.

The first action is for breach of trust. It was contended for the plaintiffs that the initial property in reference of the said international trust was paid, transferred, delivered and placed under the control of the said trustees including the defendant upon the signing of the LGA Gamble Succession Trust instrument on 15 November 2008. It appears to me that much as the defendant has denied that any trust property was handed over to the trustees, there is sufficient evidence to conclude that in spite of the failure to describe the trust property [as the initial property] in Schedule 2 of the Deed, Valinger Trustees Ltd the initial sole trustee had in fact received possession and control of the trust property. Mr Veitch, the Managing Director of Valinger Trustees Ltd had directed how this money was to be transmitted to the trustees and this was complied with by plaintiff no 1.

I have formed the impression from the amended defence and the testimony of the DW1 coupled together that the defendant must have become aware of the transfer of funds much earlier than is admitted in the testimony of Mr Pagano. I refer to the last line of paragraph of 4 of the amended statement of defence which states, 'It was agreed that the defendant would act as statutory trustee and that VTL would handle the management of the purported trust property.'

The aforementioned agreement with regard to the management of trust property and the role of each trustee was an agreement between the trustees, that is the defendant and Valinger Trustees Ltd. The defendant was therefore aware at the stage it commenced its statutory duties in December 2008 that Valinger Trustees Ltd was in possession of the trust property, and consented to the management of the said property by Valinger Trustees Ltd. It is only when Rhodes Trustees Ltd became aware that the beneficiaries were claiming termination of the Trust and distribution of trust property that it was galvanised into action and decided to resign as a trustee as the day of reckoning had arrived.

Mr Pagano described in great detail how they would manage trustee property by setting up trust accounts in the control of third parties. He did indicate that there were several other trusts that the defendant and Valinger Trustees Ltd were trustees of and that this was the protocol followed to protect the trust funds. Clearly this was not done in this case. For Rhodes Trustees not to have insisted that this was done as it was done in all the other cases was a dereliction of duty. The defendant was aware of the breach and chose to do nothing about it, contrary to section 44(2) of the International Trusts Act. On account of this failure the beneficiaries are seeking that the trust property be made available by the trustees.

Since the beneficiaries demanded the winding-up of the LGA Gamble Succession Trust in September 2009 the trustees have failed to put them into all the funds that they are entitled to, and to date have only paid or caused to be paid, £410,000 out £812,869.62. I am satisfied that the defendant's breach of its duties as a trustee, together with the breach by Valinger Trustees Ltd is the cause of this loss to the beneficiaries. Had the defendant not abdicated its responsibility and left it to only Valinger Trustees Ltd to manage the trust property instead of insisting on the usual protocols acceptable in the industry, this loss would not have been suffered by the beneficiaries.

Sections 32(1), 37(1) and 38(5) of the International Trust Act [herein after referred to as the Act] are relevant in these circumstances. Section 32(1) of the Act states – “All trustees of an international trust shall, subject to the terms of the trust, join in the execution of the trust”.

All trustees must be involved in the execution of the trust without exception.

Section 37(1) of the Act provides – “A trustee shall not delegate any functions of the office of trust unless permitted to do by this Act or by the terms of the international trust”.

Section 38(5) of the Act states – “A trustee may delegate the trust or function to any person qualified to act as trustee of an international trust other than to the only other co-trustee of the delegator”.

The agreement between the defendant and its only other co-trustee that the defendant would act only as statutory trustee and the other co-trustee would look after the trust property runs foul of the foregoing provisions if read together. That agreement amounted to the defendant delegating to the only other co-trustee the

function of looking after the trust property which is in violation of section 38(5) of the Act.

The plaintiffs contend that the defendant flouted his duties under sections 26 and 27 of the Act. Section 26 provides –

> (1) A person shall in the exercise of the functions of a trustee observe the utmost good faith and act -
> (a) with due diligence
> (b) with care and prudence; and
> (c) to the best of the ability and skill of the person.
> (2) Subject to this Act, a trustee shall execute the functions of the office of trustee –
> (a) in accordance with the terms of the trust;
> (b) only in the interest of the beneficiaries or in the fulfillment of the purpose of the trust.

Section 27 provides –

> Subject to this Act and to the terms of the international trust, a trustee shall –
> (a) ensure that the trust property is held or vested in the trustee, or held by a nominee on the trustees' behalf, or is otherwise under the control of the trustee; and
> (b) preserve and enhance so far as is reasonable, the value of the trust property.

It is the case for the plaintiff that the defendant failed in the above duties. From the beginning of this trusteeship the defendant wrongfully delegated authority to look after the trustee property to the only co-trustee of the international trust. It did not exercise any care, prudence or diligence to the trust property. It failed to ensure that the trustee property was properly vested in the trustees including itself. The result of these failings is that approximately half of the trust property is not available to the beneficiaries and or the trust.

Liability of trustees is governed by Part 7 of the Act. Section 43 states in part,

> (1) Subject to this Act and to the terms of the International trust, a trustee who commits or concurs in a breach of a trust shall be liable for –
> (a) any loss or depreciation in value of the trust property resulting from the breach; and
> (b) any profit which would have accrued to the international trust had there been no breach.
> (2) .....
> (3) Where the trustees are liable for a breach of trust, they are liable jointly and severally.

Section 44 is relevant too. It states –

1. A trustee of an international trust is not liable for a breach of trust committed by-
    (a) another person prior to the trustee's appointment;
    (b) a co-trustee unless
        (i) the trustee becomes or ought to have become aware of the breach, or of the intention of the co-trustee to commit the breach; and
        (ii) the trustee actively conceals the breach or intention or fails within a reasonable time to take proper steps to protect or restore the trust property or to prevent a breach.
2. A trustee who becomes aware of a breach of trust to which subsection (1)(a) applies shall take all reasonable steps to have the breach remedied.

The defendant on being appointed trustee participated in the first breach when they entered an agreement whereby he was to cede control of the trust property to the co-trustee and retain only the role of statutory trustee. Because of this agreement the defendant cannot take advantage of section 44(1)(a) of the Act to claim that the breaches were committed prior to his appointment. So apart from the breaches committed by Valinger Trustees Ltd the defendant committed his own breaches too in terms of section 44(2) of the Act in that he failed to take any step, let alone reasonable steps as required by the Act, to protect trust property or to restore trust property to the trust or beneficiaries.

Lastly, given the nature of breaches that have been established in this case, the defendant cannot benefit from section 49 of the Act that provides some protection to trustees that resign or are removed from office.

I therefore find the defendant liable to make good British Sterling £402,869.62 or the equivalent in rupees at the going rate at the time of payment, to the plaintiffs together with interest at the court rate from the date of filing of this suit till payment in full. I award to the plaintiffs costs of this suit.

I am aware that the defendant claimed to have a deed of indemnity from Valinger Trustees Ltd. The defendant did not choose to add Valinger Trustees Ltd in third party proceedings in relation to this claim. That was their choice but I suppose it is not too late in the day for them to enforce their indemnity against Valinger Trustees Ltd by separate proceedings.

The second action was in the alternative. It is unnecessary to consider this in light of my findings above. Nevertheless I should point out that there is no iota of evidence to show that the defendant misappropriated the trust property.

In the result this suit is allowed to the extent set out here above with costs.

MAGNAN v DESAUBIN

Egonda-Ntende CJ
29 March 2012 Supreme Court Civ 1/2011

Civil Code article 555 - Concubinage

The parties lived together in concubinage for 35 years. The parties lived together in a house (and outbuildings) built by the defendant, on land owned solely by the plaintiff. The plaintiff made a small financial contribution to the construction of the house and outbuildings. When the parties separated the plaintiff moved out of the house. The plaintiff sought orders to evict the defendant from the house, restrain the defendant from entering the property, and that the defendant had no claim in the house on the property.

JUDGMENT Application allowed. Defendant to vacate the property after the plaintiff pays R 784,488 less 10% (the contribution the plaintiff originally made to the house) to the defendant.

HELD

1 Concubinage creates no legal rights or relationship. Relief can be obtained only on the basis of unjust enrichment under art 1381 of the Civil Code.
2 The Court of Appeal judgments *Vel v Knowles* SCA 41/1998 and *Arrissol v Dodin* SCA 6/2003 are in agreement. Parties that were in concubinage are entitled to relief under art 555 of the Civil Code if the conditions set out in the article are fulfilled, where a party has developed property of another, as in *Vel v Knowles.*
3 A person, be it concubine or otherwise, who has contributed only cash to the person who has made the development on land is not entitled to claim under art 555.
4 Even if art 555 of the Civil Code is inapplicable, the decision can be grounded in equity, as it would be inequitable to evict the occupying party without compensating them for the improvements they made.

Legislation
Civil Code, arts 555, 1381

Cases
Arrissol v Dodin SCA 6/2003, LC 246
Vel v Knowles SCA 41/1998, LC 136

Karen Domingue for the plaintiff
Frances Bonte for the defendant

Judgment delivered on 29 March 2012 by

EGONDA-NTENDE CJ:

The plaintiff, Rosy Magnan, brings this action against the defendant, Charles Desaubin, seeking an order to evict the defendant from the plaintiff's house on property parcel S3273. The plaintiff seeks a further order to restrain the defendant from entering the said plaintiff's property. The plaintiff seeks a further order that the defendant has no claim whatsoever in the house on property S3273, and costs of this suit.

It is contended for the plaintiff that the parties lived together in a state of concubinage for a period of 35 years. During this period the plaintiff and defendant built a house at Brilliant on a parcel of land registered as S3273 belonging to the plaintiff. The plaintiff is sole owner of the said piece of land. The plaintiff further contends that following the defendant's unbearable and unreasonable behavior towards the plaintiff she was forced to vacate the said house and move elsewhere.

The plaintiff further contends that the defendant constructed on the said piece of land a workshop in which for the last 22 years the defendant has conducted all his work. It is the contention of the plaintiff that the defendant has lived rent-free on the said property and that he has operated his businesses rent-free on the said property for the last 22 years and that as a result the defendant has received in full his contribution to the house on plot S3273. The plaintiff wishes to return and occupy her house and is therefore seeking the eviction of the defendant from the house.

The defendant opposes this action vigorously. The defendant admits that they lived together in concubinage but denies that the plaintiff ever contributed to the building of the house on the land in question. The defendant contends that the defendant built the house in question with the plaintiff's full authorization from his sole funds and savings and a loan that he took from SHDC. He contends that the plaintiff could not have contributed to the building of the said house as she was unemployed at the time. The defendant further contends that the plaintiff left the house on her own accord to go and live with somebody else. The defendant further contends that the value of the house is R 560,000, the value of the carport is R 26,460 and the value of the retaining wall is R 198,028. The defendant prays that the plaint should be dismissed with costs and that the plaintiff be ordered to pay the defendant the sum of R 784,488 as per the valuation of the property in question.

At the hearing of the case, the plaintiff testified in person and called no other witnesses. The defendant testified in person too and called one other witness, a quantity surveyor. From the evidence adduced in this case, it is clear that the facts are not largely in dispute. What I can gather is that it is not in dispute that parcel S3273 is owned by the plaintiff solely and was so owned at the time both the plaintiff and defendant chose to go and live on the said land. The defendant largely constructed the two bedroom house and outbuildings that now exist on the property in question. The plaintiff did make some contributions as she paid a sum of R 2,500 that was the balance of a loan of R 25,000 that the defendant had taken out to build this house.

All in all, the plaintiff's contribution could not have exceeded 10% of the cost of construction of the house and outbuildings on the plot in question. She paid only R 2,500 which was the balance on the loan of R 25,000 taken out by the defendant to support construction of the house. This is only 10% of the loan amount. But the house must have cost much more. The defendant testified that he used the money he got from the house he sold at Takamaka to finance the construction of this house plus the loan.

At the time of building the said property it is clear that the intention of the parties had been that they would occupy it and live on the said property. Unfortunately, that objective has now fallen apart as it appears, at least according to the plaintiff, that she is no longer willing to share the property with the defendant.

What are the rights of the parties in such a situation? It has been contended for the plaintiff that this action is based on article 1381 of the Civil Code of Seychelles and it is for unjust enrichment. It is contended that her patrimony has been impoverished where at the same time the patrimony of the defendant has been unjustly enriched. The defendant disagrees. The defendant contends that the doctrine of unjust enrichment does not apply to the plaintiff. She has not been impoverished in any way.

Case law in this jurisdiction is clear that concubinage creates no legal rights or relationship. The partners' contributions either in terms of consortium or household chores or looking after children in a concubinage relationship is not taken into account and confers no value or benefit to one or the other party. Regardless of whether or not the reasoning that gives rise to this widely held view in the jurisprudence of this jurisdiction is sound or not, this, it must be accepted, is the law of the land.

Living together in a non-marital relationship and raising a family is so widespread and common place in Seychellois society today that it is questionable if it can be judged by the morality of 19th century Europe which adjudged it be immoral and continues to hold so today. This is so regardless of whether this standard of morality has been abandoned in Europe. I suppose the position is so firmly established in our law that it now requires legislative action to bring the law in line with the lives, morality, and culture of the nation.

The only limited relief parties to such a relationship have been allowed by the law is the use of the doctrine of unjust enrichment. Where one party has made a contribution, for instance to the development of property, and that property is owned by the other party, the extent of the contribution can be reimbursed to the other party on the basis of an action in '*de rem verso'* or unjust enrichment pursuant to article 1381 of the Civil Code of Seychelles hereinafter referred to as the CCS.

There are two cases of the Court of Appeal which are apparently in conflict over whether article 555 of the CCS could apply in cases involving parties that have been in a concubinage relationship. These are *Elfrida Vel v Selywyn Knowles* SCA No 41 of 1998, and *Octave Arrissol v Stephenie Dodin* SCA No 6 of 2003.

The relevant facts of *Elfrida Vel v Selwyn Knowles* are that the parties cohabited together for 17 years. In the course of this time the plaintiff purchased a house and registered in it her name. She did so with funds from the defendant. The defendant made substantial financial contributions toward the house and participated in the construction of the house. The plaintiff had taken a loan that was partially paid. The plaintiff subsequently moved out of the house. She later brought an action seeking to be declared the rightful owner of the house and land, an order for eviction of the defendant, and an injunction restraining the defendant from occupying the plaintiff's house.

The trial court ordered the defendant to refund to the plaintiff the amount of money she had paid on the loan, and ordered the plaintiff to re-convey to the defendant the plot of land. The plaintiff appealed. The Court of Appeal held that the trial court could not re-formulate the case for the parties after listening to the evidence. The court could not adjudicate on issues not raised by the parties and in particular the re-conveyance of property. The court held that the plaintiff was the registered owner of the land and the defendant would be entitled to compensation under article 555 of the CCS.

The facts of *Octave Arrissol v Stephenie Dodin* are that the parties had cohabited for 14 years. They had acquired property in their own names. The plaintiff claimed that the property registered in the defendant's name was acquired as joint property in the course of their cohabitation. She brought an action for unjust enrichment. The trial court found that the plaintiff had suffered impoverishment while the defendant had been unjustly enriched. The court awarded damages. The Court of Appeal on appeal by the defendant reaffirmed the decision of the trial court, grounded in unjust enrichment. It stated in part -

> The learned trial judge rightly held that the plaintiff could not have brought a real action for a right of co-ownership as she had no legal right to the land, which was registered in the sole name of the the defendant. On the question of the alleged remedy available under Article 555 of the Civil Code of Seychelles, with due respect to the views of Mr Hodoul this Article is not all relevant to the case on hand as there is a world of difference between the rights and obligations of a third party, who has erected buildings or structures on another's land and that of a concubine, who has contributed in cash or kind to her cohabiter. The trial judge rightly, therefore, rejected the contention of the defendant in this respect.

On the face of it *Arrissol Octave v Stephenie Dodin* suggests that a concubine or common law partner cannot found a claim under article 555 of the Civil Code of Seychelles. However on a closer examination of the foregoing passage in the judgment of the Court of Appeal, it appears to me that all the Court of the Appeal is saying is that a person, be it concubine or otherwise, who has only contributed cash to the person that has made the development on land, is not entitled to claim under article 555. It is only a person who has erected a building or made the developments in question that would be entitled to claim under article 555 and this could well include a cohabiter. Read this way *Arrissol Octave v Stephenie Dodin* is not in conflict at all with *Elfrida Vel v Selywn Knowles*. Both decisions in effect are in agreement.

Secondly, if a concubinage creates no legal relationship, it is rather perplexing how concubinage in itself can disqualify a party from claiming relief under article 555 of the CCS in event that such party was entitled to such relief. In my view regardless of whether one has been in a concubinage or not, a party may be entitled to relief if the conditions set out in article 555 of the CCS are fulfilled, where such party has developed property of another which is consistent with *Elfrida Vel v Selwyn Knowles*.

It is clear that the plaintiff is the sole owner of S3273 and the defendant has no claim to the said land. The defendant developed the house in question with the express permission of the plaintiff. The defendant occupied the said house with the express permission of the plaintiff. The plaintiff has now changed her mind. She desires to evict the defendant.

The defendant's defence, effectively in the form of a set-off, is basically that he should not be evicted unless the plaintiff pays him the value of the house that was erected by the defendant on the plaintiff's land with her permission. This value has been assessed at the sum of R 784,488 only by Ms Bastille a quantity surveyor that testified in this court.

I am satisfied that in the circumstances of this case, it is untenable for the plaintiff to claim that since the defendant has been living in this house for 22 years that should be transformed into rent and debited against the defendant so as to wipe out the value of improvements or the value of the development of the property. There was never a landlord tenant relationship at any one time between the parties. The question of rent due from defendant to plaintiff cannot arise. If the plaintiff wants to evict the defendant it is only equitable that the plaintiff pays to the defendant the value of improvements to the land in question which has been valued at R 784,488, less 10% which I find to have been her contribution to the development of the property.

I have decided to anchor this decision in article 555 of the CCS, following the Court of Appeal decision in *Elfrid Vel v Selywn Knowles*, rather than article 1381 of the CCS as pressed upon me by the plaintiff's attorney. Article 1381 does not apply in my view in light of the fact that the patrimony of the plaintiff has actually not been impoverished but in real terms has been improved by the defendant's construction of a house on parcel S3273. As the plaintiff wants to take advantage of the development of S3273 made by the defendant, the plaintiff must pay to the defendant the value of improvement of the said property prior to excluding the defendant from possession.

I hasten to add that even if article 555 of the CCS may not be applicable, it would be sufficient to ground this decision in the doctrine of equity as it would be inequitable for the plaintiff to evict the defendant without compensation for the improved value that that the defendant has brought to this property with the permission and consent of the plaintiff.

In the result I will allow the action for the plaintiff only on condition that she pays the sum of R 784,488 less 10% to the defendant. The defendant shall vacate the said property one month after receipt of the said sum of money.

Each party shall bear its own costs of these proceedings given the fact that it is estrangement from a rather intimate relationship that has given rise to the proceedings.

JEAN v SINON

Egonda-Ntende CJ
30 March 2012 Supreme Court Civ 21/2011

Family – Protection order

The appellant and respondent were in a de facto relationship. The Family Tribunal issued a protection order against the appellant. The appellant breached the protection order by threatening the respondent and he was sentenced to one month's imprisonment. After he was released, he entered the respondent's house twice on one day and assaulted her. The Family Tribunal sentenced him to one and a half years imprisonment for breaching the protection order. The appellant appealed this order.

JUDGMENT Appeal dismissed.

HELD

1 It is unnecessary to have recorded evidence on oath where the accused has admitted facts sufficient to found a conviction under s 6 of the Family Violence (Protection of Victims) Act.
2 A sentence of 18 months imprisonment is not excessive where the accused has violated previous protection orders.

Legislation
Family Violence (Protection of Victims) Act, s 6

Karen Domingue for the appellant
Respondent in person

Judgment delivered on 30 March 2012 by

EGONDA-NTENDE CJ:

Micheline Sinon complained to the Family Tribunal against the conduct of the appellant who is in the position of a spouse [de facto husband] to her. The Family Tribunal on 1 April 2011 issued a protection order against the appellant. It restrained the appellant from physical and psychological violence against the respondent and any other member of the respondent's household. It restrained the appellant from approaching the respondent within a distance of 25 metres. It restrained the appellant from being on the premises including the house of the respondent at Takamaka. The appellant was ordered to remove all his personal belongings with the assistance of the police by 5 pm of 1 April 2011. Contrary to this order on 17 April 2011 the appellant was in the household of the applicant. He used keys to let himself in.

A complaint was raised to the Family Tribunal and it sentenced him to one month imprisonment suspended for 6 months and it was to review the matter on 18 May 2011. This order was subsequently vacated on 20 April 2011 with no

reasons assigned for the vacation. On 18 April 2011 the parties were before the Family Tribunal. The applicant notified the Tribunal that the respondent had threatened her in the presence of a police officer. The appellant admitted that he was less than 25 metres from the respondent when he spoke to her. The Family Tribunal ordered a sentence of one month to be served by the appellant for breach of the 1 April 2011 order. On 18 May 2011 the appellant was released from prison from serving that sentence.

On 22 May 2011 at 5.30 pm the appellant again entered the respondent's home armed with a wooden machete, grabbed her hand and dragged her outside her house into the bushes. Relatives of the respondent called the police who arrived on the scene and the appellant fled. At around 7.30 pm the same evening the appellant returned to the home and removed the roof of the house and physically assaulted the respondent. She managed to flee the house to seek police assistance.

The respondent admitted to being at the applicant's house, claiming that he was there to remove his personal belongings which he states the applicant had destroyed. The Family Tribunal decided to sentence him to one and a half years imprisonment for breach of the Family Tribunal order of 1 April 2011. Right of appeal was explained and he was committed to prison. The appellant appeals against that order and set forth four grounds of appeal. At the hearing of the appeal Ms Domingue, counsel for the appellant, argued only two grounds abandoning the last two grounds.

Firstly, she argued that the Family Tribunal erred in convicting the appellant without having heard any evidence in the matter. She submitted that when the records are perused there is no record that indicates that any evidence was taken on oath and as a result there is no evidence to sustain a conviction in this matter.

Secondly, she submitted that the sentence of the Family Tribunal was manifestly harsh and excessive and unwarranted in all the circumstances of this case. She submitted that ordinarily a court of law would not impose the maximum sentence but in this instance the sentence was close to the maximum sentence of 24 months.

I have perused the record of the Family Tribunal. It is to say the least very brief but what is clear is that when the parties appeared before the Family Tribunal on 27 May 2011 the Family Tribunal listened to both the applicant and respondent and notes were made of the statements of each person. The statement of the respondent is not on oath. Neither does the statement of the appellant indicate that any oath was taken. However, it is clear that the appellant admitted that he was at the respondent's premises on the day in question which was clearly in violation of the 1 April 2011 protection order. He had been restrained from being on the premises of the house of the respondent at Takamaka. He had been restrained from approaching the respondent within a distance of 25 metres.

In my view it was open to the Tribunal to find that the appellant had admitted sufficient facts to disclose that he had contravened the protection order and as a result to have committed an offence under section 6 of the Family Violence (Protection of Victims) Act, Act 4 of 2000. In the result it was unnecessary to have recorded evidence on oath given the fact that the appellant had admitted facts

sufficient to found a conviction under this provision. I would dismiss ground no 1 of the appeal.

The second ground was that the sentence in question was manifestly harsh and excessive. The appellant was sentenced to 18 months imprisonment. The maximum imprisonment is three years or a fine and such imprisonment. The appellant had a history of violating this order repeatedly. I am satisfied that in the circumstances of this case this sentence could not have been excessive. I must emphasise that the purpose of this legislation is to protect victims from violence from members of their family. It is clear that short sharp sentences had failed to work with the appellant. I am satisfied that the Tribunal did not err in any way in setting the sentence of imprisonment at 18 months. I would reject ground no 2 of appeal.

In the result this appeal fails and the conviction and sentence of the Family Tribunal is affirmed.

OTKRITIE SECURITIES LTD v BARCLAYS BANK (SEYCHELLES) LTD

Egonda-Ntende CJ
30 March 2012 Supreme Court Civ 15/2012

Discovery – Norwich Pharmacal *order*

The applicant sought an order for discovery against the respondent. The applicant alleged no wrongdoing against the respondent, but contended that the respondent had become a conduit for the fraudulent holding and transfer of money which had been fraudulently obtained from the applicant.

RULING Application allowed in part.

HELD

1 The Supreme Court has jurisdiction to issue a discovery order against a respondent who is not party to any substantive claim and who is not involved in any alleged wrongdoing against the applicant, but who has information that is relevant to establish the identity of the wrongdoers against the applicant (ss 5 and 17 of the Courts Act).
2 A nexus must be established between the information sought to be discovered and the alleged wrongdoing that has inflicted loss or damage on the applicant.

Legislation
Courts Act, ss 5, 6, 17

Cases
Danone Asia Pte Ltd v Offshore Incorporations (Seychelles) Ltd (unreported) SSC Civ 310/2008

Foreign Cases
Norwich Pharmacal v Commissioner of Customs and Excise [1974] AC 133

J Renaud for the applicant
P Pardiwalla SC for the respondent

Ruling delivered on 30 March 2012 by

EGONDA-NTENDE CJ:

This is an application for an order of discovery or more technically a *Norwich Pharmacal* order compelling the respondent to disclose certain information. It must be set out at the outset that the applicant alleges no wrongdoing on the part of the respondent but contends that the respondent has become a conduit for the fraudulent holding and transfers of money that was fraudulently obtained from the applicants by a group of individuals. The application is brought by notice of motion and is supported by an affidavit sworn by Mr Neil Patrick Dooley, a solicitor acting for the applicant. At the hearing of this application which on the orders of court proceeded inter partes, Mr Pesi Pardiwalla informed court at the outset that the

respondent was willing to abide by the decision of this court and would not oppose or support the application. Mr John Renaud acting for the applicant referred this Court to the case of *Norwich Pharmacal v Commissioner of Customs and Excise* [1974] AC 133 which he stated contains the principle which supports the grant of the orders he is seeking. He referred to sections 5, 6 and 17 as the law upon which this application is made. Basically that where the law of Seychelles is silent the law applicable by the Supreme Court of England or the practice and pProcedure of the Supreme Court of England shall apply.

The facts that give rise to this application have been set out in the affidavit of Mr Neil Patrick Dooley. The applicant is a financial services company incorporated in England and Wales providing execution services to hedge funds, asset managers, and broker dealers. The applicant at the relevant time employed Mr Georgy Urumov, Mr Ruslan Pinaev, Mr Sergey Kondratyuk, Mr Yefgeni Jemai, and Mr Alessandro Gherzi. It is contended that the said persons who were employees of the applicant in breach of their fiduciary duties caused the applicant to acquire Argentinean Warrants for the price of $213 million when they are only worth $53 million, causing a loss of $160 million. This fraud involved the manipulation of the applicant's trading systems by changing the exchange rates of the Argentinean Peso to the United States Dollar exchange rate. Instead of the applicable rate of Peso 4 to US$1 the rate was changed to Peso 1 to US$1, causing the first applicant to pay four times the market value of the Argentinean Warrants. In an effort to conceal this fraud, senior management of the applicants were told that the Argentinean Warrants were to be resold to Threadneedle Asset Management at a significant profit.

An employee of Threadneedle by the name of Mr Gherzi facilitated this fraud. Mr Gherzi was close to Mr Vladimir Gersamia, an employee of Threadneedle who was subsequently sacked in connection with this fraud. It is stated that Mr Gherzi disclosed to the applicant that he had received $2.4 million from Mr Gersamia in relation to the Argentinean Warrants fraud but declined to state the whereabouts of the money. Mr Gersamia was dismissed by Threadneedle. It is believed by the applicant that part of the proceeds following from the fraudulent activities of the aforesaid persons found its way in the different accounts of the respondent. In particular, information disclosed by one Mr Dolidze indicated that a sum of $2.3 million out of these proceeds had been paid to an account at the respondent in the name of Mr Gersamia Senior.

In tracing the various entities that received part of this money and were partly used as conduit there is Airdale International Limited. An Airdale account has been discovered to show a receipt of $2.5 million from a company called Bexerton Limited from an account at the Barclays Bank of Seychelles Ltd. The address of Bexerton which is given as Paliashvilli Street 32, Flat 27, Tbilisi, Georgia is the same address Mr Gersamia had given for himself. This account of Airdale in the Republic of Bahamas has been frozen by an order of Mr Justice Milton Evans.

Mr Patrick Dooley concludes his affidavit and I quote paragraphs 36, 37 and 38 -

> 36. It is clear that the accounts of members of the Gersamia family have been used to launder the proceeds of fraud as described above. At the very least the account of Mr Teimuraz Gersamia has received US$2.75 million and he has paid a kickback to Mr Gherzi of US$2.5 million. All of these transactions involved accounts held with the respondent.
> 37. Although at present the applicant is unable to show that any monies misappropriated by each of Mr Urumov, Mr Pinaev and Mr Kondratyuk passed through the accounts of the respondent, it is possible that they have used the respondent as a conduit to launder proceeds in much the same way, and as a result the applicant also requests disclosure of any accounts in the name of, or operated by, each of Mr Umurov, Mr Pinaev, Mr Kondratyuk and Mr Jemai.
> 38. In the circumstance the applicant now seeks an order that the respondent disclose to the applicant the documents specify in the draft order attached.

Unfortunately I have not been able to see the draft order referred to.

There has been one case prior to the one before me in which the Supreme Court has had occasion to consider whether an application such as this one before me can be granted by a court in Seychelles. This is *Ex parte: Danone Asia Pte Limited & Ors v Offshore Incorporations (Seychelles) Ltd* Civil Side No 310 of 2008 before Perera CJ. The Supreme Court came to the conclusion that it had the jurisdiction to issue an order to respondents who may not be parties to an action and who are not involved in the alleged wrongdoing but who have information that is relevant to establish the identity of the wrongdoers against the applicant, relying on sections 5 and 17 of the Courts Act.

I am satisfied that this Court has jurisdiction under sections 5 and 6 of the Courts Act, which provide for jurisdiction in civil matters of the Supreme Court and the equitable jurisdiction of the Court to make orders as the kind sought in the action before me. What is important is that certain minimum conditions are fulfilled. It is clear that a remedy of this nature is an exceptional remedy and for instance it will not be available in respect of an innocent bystander or a person who would qualify only as a witness in a matter. There must be a nexus established between the information sought to be discovered and the alleged wrongdoing that has inflicted loss or damage to the applicant.

The application must not be a mere fishing expedition. There is no question as was observed by Mr Dooley in his affidavit in paragraph 36 that the proceeds of the fraud in question have been partly laundered through the accounts of members of the Gersamia family and those transactions involved accounts held with the respondent. I would have no hesitation in issuing the orders in relation to the accounts held by the Gersamia family and payments made from the same.

More particularly I order the respondent to produce any and all documents relating to –

(a) establishing the identity of the beneficial owners of Bexerton Limited;
(b) establish details in relation to the transfer made on 17 May 2011 in the amount of US$2.5 million; and
(c) establish details of the accounts held in the name of Mr Teimuraz Gersamia and transfers on –
    i. 6 April 2011 in the amount of US$2.3 million from Belux (Hong Kong) Company Limited;
    ii. 26 April 2011 in the amount of US$250,000 from the account of Templewood Capital Limited; and
    iii. 1 June 2011 in the amount of US$200,000 from the account of Templewood Capital Limited.
(d) details of sums and balances held by the respondent in the names of Bexerton Ltd, Vladimir Gersamia, Teimuraz Gersamia including any accounts where the aforementioned are beneficial owners of any accounts or are signatories.

The respondent shall not inform the foregoing entities or any persons associated with them of this application or this order.

As noted by Mr Dooley, no connection has been shown that any monies misappropriated by Mr Urumov, Mr Pinaev, and Mr Kondratyuk or any other person mentioned in the application passed through the accounts of the respondent but he alleges that there is a possibility that this may have happened and therefore requested disclosures in respect of any accounts that may be held in those names. I see no basis for extending any orders to those persons who have not been shown to have any links with the respondent.

This application is allowed in part and costs shall be borne by the applicant.

BEEHARRY v REPUBLIC

MacGregor P, Twomey, Karunakaran JJ
13 April 2012 Court of Appeal 28/2009

Constitution – Right to a fair hearing - Criminal procedure – Amendment of charge – Appeals – Burden of proof

This is an appeal against the appellant's conviction and sentence for trafficking in a controlled drug.

JUDGMENT Appeal allowed by majority.

HELD

1 Once a court has pronounced final judgment it has no authority to correct, alter or supplement either the judgment or the proceedings on either a procedural or a substantive issue.
2 If there is an error in the charge and final judgment has been delivered, the court can amend the charge pursuant to s 344 of the Criminal Procedure Code if the defence has not been prejudiced and the error has not occasioned a failure of justice.
3 An appellate court does not rehear the case. It accepts findings of facts that are supported by the evidence believed by the trial court unless the trial judge's findings of credibility are perverse.
4 An appellate court should interfere with the findings of facts of a trial court when satisfied that the trial judge has reached a wrong decision about a witness. The court can evaluate the inferences drawn from the facts by the trial judge.
5 Police officers have no immunity for unreliability or lying.
6 In interpreting art 19(1) of the Constitution (the right to a fair hearing), the court has a duty to safeguard the constitutional rights of accused persons. The court is concerned not with innocence but with the safety of the conviction.
7 When the accused raises a defence (eg planting of evidence) the accused must adduce some evidence to establish this, but the evidential burden is on the prosecution to prove beyond reasonable doubt the defence is ill-founded. This is consistent with the presumption of innocence in art 19 of the Constitution.

Legislation
Constitution, arts 19(1),(2), (5)
Court of Appeal Rules 2005, rules 31(3),(5)
Criminal Procedure Code, ss 187, 344
Misuse of Drugs Act, ss 5, 14(c),(d), 26(1)(a), sch 2 (s 29)

Cases
Akbar v R SCA 5/1998, LC 146
Bacco v R SCA 5/2005, LC 275
Hoareau v Republic (unreported) SCA 13/2010
Kate v R (1973) SLR 228
R v Quatre (unreported) SSC 2006

Foreign Cases
Benmax v Austin Motor Company Ltd [1955] 1 All ER 326
Hobbs v Tinling and Co [1929] 2 KB 1
Michel v R [2009] All ER (D) 142
Miller v Minister of Pensions [1947] 2 All ER 372
R v Bircham [1972] Crim LR 430
R v Cole [2008] All ER (D) 181
R v Cordingley [2007] All ER(D) 131
R v Grafton [1992] 4 All ER 609
R v Johnstone [2003] 1 WLR 1736
R v King [2000] 2 Cr App R 391 (CA)
R v Lambert [2002] 2 AC 545
R v Malcolm [2011] All ER (D) 4
*Sheldrake v DPP [*2005] 1 AC 264
Woolmington v DPP [1935] AC 462

Foreign Legislation
Human Rights Convention, art 6

P Pardiwalla SC for the appellant
J Chinasammy, principal State Counsel for the respondent

Judgment delivered 13 April 2012

Before MacGregor P, Twomey, Karunakaran JJ

TWOMEY J:

The appellant was charged in the Supreme Court with the offence of trafficking in a controlled drug contrary to section 5 as read with sections 14(c) and 26(1)(a) of the Misuse of Drugs Act (Cap 133). The particulars of the offence were stated as follows:

> Roy Beeharry on 25 March 2008 at La Louise, Mahé was found in possession of a controlled drug namely 201.6 grams of cannabis resin which gives rise to a rebuttable presumption of having possessed the said controlled drug for the purpose of trafficking.

Background and facts

As some of the facts of this case are in some respects seriously contested we find it important to set out the background and those facts that are uncontested. It is accepted that the appellant, Roy Beeharry has been the subject of previous police operations which culminated initially in 2002 in criminal charges being brought against him for the trafficking of controlled drugs. That case was dropped after allegations of “drug planting” by the police force were made by Mr Beeharry. On 24 March 2008 a search was conducted at the appellant’s home at La Louise. Nothing illegal was found during that search. However, less than 24 hours later on 25 March 2008, a second search was carried out at his home which this time yielded a drug find. As a consequence of this search and seizure the appellant was charged on 28 March 2008 with trafficking in a controlled drug. On 5 May 2008 that charge was

withdrawn. On 20 May 2008 an affidavit was sworn by Police Officer Samuel Camille supporting the bringing of fresh charges against the accused for the same offence on the basis that "new evidence comes into the possession of the Police after the release of the accused person" (sic, Attachment C1 of Court Record).

At trial the following facts were adduced in evidence: On 25 March 2008 a group of 10 police officers from the ADAMS Unit, SSU and the CID proceeded to the appellant's home at La Louise to execute a search. Some of these officers were the same ones who had taken part in the previous day's search. As the appellant's home was a split level building, a group of officers entered the top floor through a door whilst another group entered the ground floor through another door. The appellant was eating lunch at the time and the search downstairs proceeded in his presence. The search upstairs was conducted with the assistance of his son, who was the only other occupant of the house at the time. The search upstairs began in the son's bedroom and then proceeded to the bedroom of the appellant and his wife. A large block of cannabis resin was discovered wrapped in cling film and newspaper in a wardrobe in the room. The appellant and his son were transported to the police station and charged.

The appellant pleaded not guilty to the charge but was convicted after trial and was sentenced to eight and a half years imprisonment. He appealed against this conviction and sentence and lodged 15 grounds of appeal.

Grounds of appeal

A formidable list of 15 grounds was put up as follows:

1. The Judge erred in law and fact, when he completely ignored the grave inconsistencies and contradictions of the prosecution witnesses, thereby arriving at a wrong conclusion.
2. The Judge erred in law and fact, when he indulged his mind in speculation and conjecture, in respect of several findings and inferences which he arrived at by the process of defective reasoning.
3. The fair hearing of the appellant's case was compromised when the learned judge did not compel the prosecution witnesses to answer questions and produce evidence that had a natural bearing on the case.
4. The Judge erred in law and fact when he failed to evaluate the evidence of the defence properly and fairly, rather than indulging in speculation.
5. The Judge's handling of the case is biased and unfair and the whole exercise carried out by him, in the analysis of the evidence, is an exercise of plugging holes in the prosecution case and providing unjustified excuses, rather than giving cogent reasons for rejecting the evidence of the defence when it contradicted that of the prosecution.
6. The Judge's reliance on an alleged "confession" of the appellant to convict him, and blaming defence counsel for not cross-examining on a "material point" is clearly flawed, selective and biased, as the learned judge completely ignores the whole of the cross-examination by the defence on that point.

7. The Judge's explanation as to why Deeroy's name was on the exhibit rather than the appellant's name is clearly flawed and biased and is not supported by the other evidence in the case.
8. The Judge erred in law when he drew an adverse inference on the failure of the defence to call a certain witness.
9. The Judge erred in law and fact, in concluding that the appellant was in possession of the drugs as there was no evidence to show guilt beyond a reasonable doubt linking him to the drugs.
10. The Judge erred in law in amending the charge at the stage of address by the appellant and arbitrarily concluding that no harm was done to either side.
11. The Judge further erred in law is not inviting the appellant to consider whether he wished to call further witnesses or recall witness in view of his arbitrary amendment.
12. The Judge's finding that "the amendment was therefore neither fatal to the proceedings nor prejudicial to the appellant but rather in the interest of justice" is flawed in law and is speculative.
13. There was insufficient evidence to convict the appellant of the charge and having regard to both the evidence and the reasoning of the trial court; the verdict was one which no reasonable court could have returned.
14. In evaluating the case, the Judge erred in law in that he completely ignored the case for the prosecution as borne out in its cross-examination of the appellant, and had he properly done so, he would have had no option but to acquit the appellant.
15. The conviction should be set aside as under all the circumstances of the case, it is unsafe and unsatisfactory.

Grounds 10, 11 and 12

When the appeal was heard in November 2010 the Court of Appeal held that the points raised in grounds 10, 11 and 12 should be resolved "as a threshold exercise" in the Supreme Court before they could proceed to hear the appeal on the other grounds.

Those grounds as borne out above related to the fact that the charge under which the appellant had been convicted was not that under which he had been arraigned and along which the hearing had been conducted up to the stage of final addresses by counsel. The charge read section 14(c) which refers to heroin and not section 14(d) which refers to cannabis resin. Although this matter was argued before the trial court no ruling had been given by the judge yet in his judgment he stated that leave to amend had been granted to the prosecution. The Court of Appeal rightly found that this was both procedurally incorrect and an error on the face of the record. However, they then remitted the matter back to the Supreme Court for a "ruling on the motion for amendment."

Hence the matter came back before the Supreme Court on 8 July 2011, much to the surprise of the trial judge and indeed to counsel. In due course, despite the fact that all concerned were of the view that the Court was functus officio, in deference to the

Court of Appeal ruling, the motion for amendment was argued and the trial judge granted leave to amend.

The remaining grounds of appeal are now before this Court, but as grounds 10, 11 and 12 have been recanvassed in view of the consequences of the Court's ruling we need to address them afresh. Mr Pardiwalla contends that the procedure followed by the Supreme Court in respect of the ruling was incorrect. He argues that the ruling of the Court of Appeal directing the Supreme Court trial judge to "hear the parties in law and on the facts and give a ruling on the motion for amendment in the light of the objection raised," was not followed since the trial judge after giving his ruling did not have the amended charge put to the appellant again as is provided for in section 187 of the Criminal Procedure Code. In his submission once the charge had been amended the appellant should have been asked to plead afresh and the trial started anew. Mr Chinnasamy, for his part, contended that this would amount to ordering a new trial and was not at all the intention of the ruling.

We are conscious of this Court's anxiety to see justice done in this case but are of the view that when this appeal first came before it, it could have been dealt with in its entirety. Remitting the matter to the Supreme Court for the resolution of these grounds "as a threshold exercise" was unfortunate. The Supreme Court was functus officio as it had heard and disposed of the case. It is a well-established general principle that once a court has pronounced final judgment it has no authority itself to correct, alter or supplement either the judgment or indeed the proceedings on either a procedural or a substantive issue or for that matter at all.

Rule 31(5) of the Court of Appeal Rules 2005 stipulates:

> In its judgment, the Court may confirm, reverse or vary the decision of the trial court with or without an order as to costs, or may order a retrial or may remit the matter with the opinion of the court thereon to the trial court or may make such other order in the matter as to it may seem just, *and may by such order exercise any power which the trial court might have exercised*… [our emphasis]

In our view since the Supreme Court had no power to alter proceedings or its judgment, similarly the order of the Court of Appeal could not have been made. It could have ordered a retrial of the case based on grounds 9, 10 and 11 of the appeal but this it did not do.

Alternatively the Court of Appeal could have applied the provisions of section 344 of the Criminal Procedure Code in relation to irregular proceedings as was the case in the majority decision of this Court in the case of *Jerry Hoareau v Republic* (SCA 13/2010, unreported). In that case Fernando J stated that "… the Court cannot, on its own motion, after both the case for the prosecution and the defence have closed amend the charge when writing the judgment." He proposed instead that since the defence had not been prejudiced in any way and the error in the charge had not in effect occasioned a failure of justice it was curable, vide section 344 Criminal Procedure Code:

> …no finding, sentence or order passed by a court of competent jurisdiction, shall be reversed or altered on appeal… on account (a) of any error, omission

> or irregularity in the …charge …before or during the trial…. Unless such error, omission, irregularity or misdirection has in fact occasioned a failure of justice.

We are of the view that indeed this should have been the approach taken by the Court of Appeal when it heard the appeal on grounds 10, 11 and 12. The defence is not prejudiced in any way as the whole defence was conducted on the basis that the charge was in fact under section 14(d) and the error in the charge has not occasioned a failure of justice. Hence, although there is merit in those grounds of appeal, the correct approach is to amend the charge pursuant to section 344 of the Criminal Procedure Code. As this matter is now revisited before a reconstituted Court of Appeal we proceed to so order. We do have to add that this is the second time in less than six months that such an error in a misuse of drugs charge has been raised on appeal. It behoves the prosecution to exercise extreme care and diligence in drafting charges.

The remaining grounds of appeal are so intertwined that with the agreement of counsel they are consolidated so that the following issues remain to be considered:

1. Whether the inconsistencies in the prosecution witnesses' evidence amount to a reasonable doubt in the prosecution case.
2. Whether the appellant was denied a fair hearing.
3. Whether as a whole the evidence led by the prosecution against the appellant amounted to proof beyond reasonable doubt.

Inconsistencies in evidence and their consequences

Counsel for the appellant contends that there are many inconsistencies in the evidence led by the prosecution. The most important issues under scrutiny relate to the following contradictions:

1. The police officers who were witnesses in the case differed in their evidence as to who amongst them were present when the drugs were found in the wardrobe.
2. They differed in their version of where the wardrobe was situated in the bedroom and also in relation to their field of vision when the wardrobe door was open with respect to where the drugs were located.
3. They also differed in their version of when and where the drugs found were shown to the appellant.
4. They further differed in their version of where the accused was when the drugs were found.
5. They differed in their version of what the accused said when the drugs were discovered.

The question arises as to the effect of such inconsistencies in evidence. In all criminal cases discrepancies in the evidence of witnesses are bound to occur. The lapse of memory over time coloured by experiences of witnesses may lead to inconsistencies, contradictions or embellishments. The Court however on many occasions is called upon to assess whether such discrepancies affect the very core of the prosecution case; whether they create a doubt as to the truthfulness of the witnesses and amount to a failure by the prosecution to discharge its legal burden.

This Court is disadvantaged in that that it has to weigh these matters with only the record of proceedings before it and cannot observe the witnesses first hand to gauge their truthfulness. Can it substitute its finding of fact from the record of proceedings for that of the trial court who had the benefit of seeing and hearing the witnesses first hand? Or can it only substitute its own inferences from the facts as found by the trial court? In *Akbar v R* (SCA 5/1998) this court stated –

> An appellate court does not rehear the case on record. It accepts findings of facts that are supported by the evidence believed by the trial court unless the trial's judge's findings of credibility are perverse.

This is certainly not the case as we do not for one moment view the judge's findings as perverse.

But that is not the only duty of the appellate court in relation to findings of fact. It also a well-established principle that the appellate court will and should interfere with the findings of fact of a trial court when satisfied that the trial judge has reached a wrong decision about a witness - vide Lord Reid in *Benmax v Austin Motor Company Ltd* [1955] 1 All ER 326 at 327:

> Where there is no question of credibility or reliability of any witness, and in cases where the point in dispute is the proper inference to be drawn from proved facts, an appeal court is generally in as good a position to evaluate the evidence as the trial judge …. Though it ought, of course, to give weight to his opinion.

What I understand from Lord Reid's statement and what seems to have been the approach consistently adopted by appellate courts, is that whilst they do not generally interfere in the perceptive function of the judge, the appellate court is as well off as the trial judge in the exercise of its evaluative function.

Rule 31(3) of the Seychelles Court of Appeal Rules enunciates this common law principle clearly in providing that: "The court may draw inferences of fact…" This court is therefore at liberty to evaluate the inferences drawn from the facts by the trial judge. Hence whilst the judge finds the inconsistencies in the testimony of the prosecution witnesses as outlined above "minor," his inference that the inconsistency in the appellant's testimony when he states first that the drug was shown to him by PC Jean and subsequently by PC Dubel, as "serious contradictions" is arguably not an inference based in fact. There is nothing in fact or in law to persuade us that the inconsistencies in the testimonies of police officers are less serious than those of ordinary witnesses. Police officers are not conferred with some kind of immunity to unreliability or to lying. In our view neither side's testimonial inconsistencies are serious enough to warrant the inferences drawn by the trial judge.

The constitutional right to a fair hearing

The right to a fair trial is enshrined in our Constitution in article 19(1):

> (1) Every person charged with an offence has the right, unless the charge is withdrawn, to a fair hearing within reasonable time by an independent and impartial court established by law.
> (2) Every person who is charged with an offence -
> (a) is innocent until the person is proved or has pleaded guilty.

Counsel for the appellant contends that this right has been breached in two aspects, firstly with respect to the fact that the court was not impartial and secondly in relation with the court's assessment of the burden of proof in this case.

In interpreting article 19(1) of the Constitution, the Court of Appeal in *Bacco v R* (SCA 5/2005) stated that the Court had a duty to protect the rule of law and constitutional freedoms and that such a duty falls more heavily on this Court than any other court. It went on to quote Lord Birmingham in *Ashley King* (2002) 2 Cr App R 391 (CA) at 406: [that this Court] "is concerned not with innocence but with the safety of the conviction." We share that view and we reiterate that whether a constitutional case alleging breaches of these rights is brought or not, it is incumbent on the Court to safeguard at all times the constitutional rights of accused persons charged with criminal offences.

In the present case the appellant contends that the Court was not impartial. In support of this contention he relies on certain passages from the judgment where the judge substitutes his beliefs for evidence adduced:

> Why would the accused deny being taken to his bedroom? Was he already aware of what was being kept in the wardrobe? The short answer is yes...
>
> What I believe happened is that the accused was caught off-guard not expecting the police officers to return to his residence so soon...
>
> The set up version of the story, though adopted a bit early in the transaction was riddled with inconsistencies and falsehoods as pointed out earlier on and it is entirely rejected as fabrication.

While these are certainly speculative statements by the judge we do not find that they amount to bias on his part. In our view these speculations are rather suggestive of what he appreciated to be reasonable inferences to be drawn from the evidence that had been adduced. However, whether they can objectively be taken as reasonable, inferences is a different matter. We do not find that they were the only irresistible and logical inferences that could be drawn from the facts for the following reasons:

> 1. The police witnesses accepted that they had been inside the appellant's home on more than two previous occasions and that in fact some of the same officers took part in searches conducted at the appellant's home on two consecutive days.

> 2. The police witnesses accepted that on two previous occasions the appellant had been charged with trafficking and both times the charges were withdrawn, on one occasion demonstrably because of allegations of "planting."

In our view it was even more incumbent on the trial judge, on this third attempt to try the accused to take every precaution to see that his fair trial rights were protected. We do not think that such protection was adequately afforded to the appellant.

The appellant also contends that the reliance on an alleged admission by the appellant is also in breach of his fair trial rights, is flawed and selective. This admission concerns an alleged statement by the accused to the effect that everything in the room belonged to him. The judge finds that since PC Dubel was not cross-examined on this matter this implies an admission of fact. He relies on *Cross on Evidence* and quotes the 7th edition at 303:

> Any matter upon which it is proposed to contradict the evidence-in-chief given by the witness must normally be put to him so that he may have an opportunity of explaining the contradiction, and failure to do this may be held to imply acceptance of the evidence-in chief.

This passage continues as follows in the 11th edition at 337 – "...but it is not an inflexible rule..."

A similar passage from Adrian Keane, *The Modern Law of Evidence* (7th ed) at 206 is even more instructive:

> In other cases as acknowledged in *Browne v Dunn*, the story by a witness may be so incredible that the matter upon which he is to be impeached is manifest, and in such circumstances it is unnecessary to waste time in putting questions to him upon it...

In our opinion it is crucial to analyse the provenance of this alleged statement by the accused. In scrutinising all the court records we note the following:

> 1. The affidavit of PC Samuel Camille sworn on 26 March states among other things that –
>
> > ...Sergeant Octobre showed both Roy and Deeroy Beeharry the dark substance he had found in the wardrobe. They were both cautioned, informed of their constitutional rights and informed of the offence committed. Roy Beeharry elected to remain silent whereas Deeroy Beeharry pointed out the bedroom did not belong to him but belonged to his father, Roy Beeharry...
>
> 2. An undated statement given by Sergeant Octobre states –
>
> > ...I found a folded Nation paper and I opened it and found a piece of black substance wrapped in cling film, which I suspected to be controlled drugs, namely hashish. I asked Deeroy "Whose is it" and he stated "Sa ki zot in war mon pa konen pou ki, akoz sa i lasanm mon manman ek mon papa (what you have seen I don't know to whom it

> belongs as this is my mother's and father's room). At a certain moment Roy came to the said bed room and I informed him that something suspected to be drugs was seized in that room. I showed it to him and he stated "Sa i mon lasanm. Deeroy napa nanyen pou dir avek gard, mon a dir tou keksoz mon avoka."(This is my room. Deeroy has nothing to say to the police, I will tell my lawyer everything).

3. The case against the accused was withdrawn on 12 May 2008.

4. On 20 May 2008 Police Officer Samuel Camille swore another affidavit in which he stated that "...This fresh charge is brought by the Republic upon new evidence comes into the possession of the Police after the release of the accused person" (sic).

5. This new evidence was never adduced although counsel for the appellant stated that it consisted of an undated statement by PC Dubel.

6. At the trial however during the examination-in-chief of Sgt Octobre the following exchange took place:

> Q. So who is this Roy?
> A. Roy Beeharry.
> Q. The accused?
> A. Yes. I then showed him what I had found in his house...
> Q. Continue officer.
> A. I showed him what I had found in his house. He said to Deeroy you have nothing to say to the police whatever we have to say I will say to my lawyer...
> Q. What else happened?
> A. I informed him that we were going to arrest him and I informed him of his constitutional rights and he told me that this was a set-up.
> Q. At that time was he speaking?
> A. It was when I was talking to him that he said that this was a set-up.
> Q. No what I am saying is, was this the only thing he said?
> Mr Pardiwalla: The officer has said it already is he pushing the officer to say something more.
> Mr Govinden: No my Lord.
> Mr Pardiwalla: Well it looks like it.
> Mr Govinden continues.
> Q. Who were the other police officers present?
> A. Lance Corporal Dubel and Constable Jean.
> Q. And did he speak to you or was he speaking in general.
> A. When he spoke all the police officers heard him. I also heard him say "everything that you see in this house belongs to me."
> Mr Pardiwalla: I want the Court to take special note that what this officer said just now is after prompting from the prosecution as to did he say anything else. I just want the court to highlight that, bear it in mind for the future.
> Mr Govinden: My Lord I would not call this as prompting I would call this as another question during the course of examination in chief.

7. In cross-examination by Mr Pardiwalla the following exchange took place:

> Q. ...When did you actually give this statement?
> A. Just after the incident.
> Q. Only a few days after I think.
> A. But I do not recall when it was but just after.
> Q. And of course at that time when you gave the statement things were very fresh in your memory, is that not so.
> A. Yes.
> ...
> Q. Tell me show me where in this statement that you say Roy said all that is in this house is mine, show where it is.
> A. I did not write it in my statement but I recall the words which Roy said on that day.
> ...
> Q. Why did you not put it in there?
> A. I forgot, but I recall what he said.

8. In the examination-in-chief of Police Officer Dubel a similar exchange took place between Mr Govinden and the witness:

> Q. What happened after that?
> A. Sergeant Octobre asked Deroy about the contents of the newspaper. Deroy told them that he did not know because this is his parent's room. At the same time I heard people coming up the stairs. While Sergeant Octobre was talking to Deroy, Mr. Roy Beeharry arrived along with some other officers who had been downstairs. When he came in he saw Deroy and Sergeant Octobre and he said to "Deroy that he has nothing to say and that whatever he has to say he say it (sic) in the presence of his lawyer. Sergeant Octobre then showed M. Beeharry the substance that was found and told him that the substance was found in his wardrobe and it was then that that the arrestation began. It was then that that Sergeant took both Roy and Deroy down.
> Q. Now tell us again Officer Dubel what the accused told Deroy.
> Mr Pardiwalla: Objection, the officer has already said what was told I can see where my friend is leading and this is the most important point in this case, my learned friend with respect, is trying to coax the witness into saying something which fact is a contention of the defence was never said..
> Mr Govinden continues.
> Q. Yes Mr Dubel.
> A. When he came in he told Deroy that he has nothing to say. What is in this room falls under my responsibility, whatever you have to say you will say it in the presence of my lawyer.

It is patently obvious that the appellant impugns not only the credibility of both PC Dubel and PC Octobre in their assertions that the admission was made by him but also raises the possibility that this statement was fabricated in order to recharge the accused. We cannot close our eyes to the previous inconsistent statement by Police Officer Octobre nor to the possibility that this account of what the accused said could have been fabricated after the charge against him was withdrawn. We cannot therefore come to the same conclusion as the judge to find that this is an acceptance

by the appellant of the fact that he made the admission to the police. Further, the trial judge does not direct his attention to the fact that the alleged admission was by both accounts of the police officers made without the appellant being cautioned. As this was the case he should have warned himself of the risk of relying on such evidence. This he did not do.

The presumption of innocence

The second limb of article 19 of the Constitution is in respect of the presumption of innocence: “Every person who is charged with an offence is innocent until the person is proved or has pleaded guilty.”

The appellant argues that the prosecution did not discharge this burden of proof and that it was shifted onto him.

It is not disputed that the prosecution had the legal burden of proving all the elements of the offence in relation to the offence of drug trafficking. What however is at issue is the evidential burden placed on the accused when he raises a defence, in this case, that he had no knowledge of the drugs as these were planted and the legal burden if any that ensues for the prosecution. Mr Pardiwalla contends that once he has raised the defence he does not have to do anything else.

Mr Chinnasamy while agreeing that at all times the prosecution has the legal burden to prove all the ingredients of the offence argues that it is up to the defence who alleges the planting to prove it. He also contends that the Misuse of Drugs Act imposes a reverse burden on the accused. In respect of this case it is our view that the reversal of the burden of proof is limited to the presumption of trafficking arising from the fact that the drugs found in the accused’s house exceeded 25g of cannabis resin. In any case if such a legal burden had been imposed on the accused by statute it would be a breach of his constitutional rights. The recent cases of *Lambert* [2002] 2 AC 545, *Johnstone* [2003] 1 WLR 1736 and *Sheldrake* [2005] 1 AC 264 decided in relation to English legislation incompatible with article 6 of the Human Rights Convention (which contains a near identical provision to our article 19), point to the now accepted view that although legislation may impose a burden of proof on the accused where there is incompatibility with article 6 of the Convention (in our case, article 19 of the Constitution), the proper balance would be achieved by reading down the provisions as imposing an evidential burden only. Hence, to succeed in a defence of “planting” the accused must adduce some evidence that the drugs were planted but he does not have the duty of proving it. We find that he did. The prosecution must prove that the accused’s assertion of the “planting” is ill-founded, and prove it beyond reasonable doubt. A court cannot magnify the weakness of an accused’s defence and overlook the failure of the prosecution to discharge its onus of proof. We are not of the view that the prosecution discharged its legal and persuasive burden in this case.

We are well aware of the catastrophic and calamitous situation in relation to drugs and drug trafficking in Seychelles. Contrary to an often held view we also live in the real world. In this tiny community we are all related or connected to victims and perpetrators of this crime in some way. We know too well the pressures on the police, the prosecution, and the courts to secure convictions and put away drug

traffickers. It is certainly tempting to bow to public opinion but we must do our work according to our judicial and constitutional oaths and consider only the evidence before us. As Lord Sankey said nearly one hundred years ago:

> It is not admissible to do a great right by doing a little wrong. The inequalities of life are so dangerous in a state whose subjects know that in a court of law at any rate they are sure to get justice by obtaining a proper result by irregular or improper means. (*Hobbs v Tinling and Co* [1929] 2 KB 1 at 53).

For these reasons we resist the temptation and allow this appeal.

KARUNAKARAN J DISSENTING:

I will humbly begin by saying, that being apex in the judicial hierarchy, we, the Court of Appeal, are final. We are final, not because we are infallible. We are infallible, because we are final. The privilege of finality accorded to our decisions is a barometer of the trust and confidence which the people of Seychelles have placed on us as Justices of Appeal, hoping that we would meet their expectations in the administration of justice. Needless to say, they have conferred that privilege on us with an implied condition that we would secure the freedoms, rights, and liberties of all the people of Seychelles; not only of those who appear before us as appellants or respondents seeking remedies for their individual grievances. Justice is an indivisible word and rooted in public confidence. If we want to enjoy it and fight for it, we must be prepared to extend it equally to everyone, whether he or she be a prisoner or a law abiding citizen going about his daily business. In deciding cases, obviously, judges should look at the bigger picture and face reality. We cannot isolate ourselves from the fabric of contemporary society and live in a legal utopia, cut off from the rest of the world. We cannot and should not lock ourselves in our ivory tower and turn a blind eye to the emergence of certain crimes that threaten social morality and the very existence of our society. After all, a judge is but an agent of society who enforces the social will that manifests itself in the law. Yet, he remains very much a part of the society he serves as he sits on the judgment-seat and passes judgment on his fellow citizens. However, the sensitivities of the community are largely invisible, voiceless, and unrepresented in our courtrooms, while vociferous lawyers argue their cases to protect the interests of their clients only. In striking a fine balance between the interests of the individual on the one hand, and the larger interest of the community on the other, one should never miss the forest for the trees. The interest of the majority, the law abiding citizens in this country, is in no way inferior to that of an individual. The rights and freedoms found on the glossy pages of the Constitution and the statute books are guaranteed not only to the small minority, who have the opportunity to appear before us as litigants, but is guaranteed to every citizen, whether he be seen outside or inside the clutches of the law. A court of law, be it appellate or trial, should steer the law towards the administration of justice, rather than the administration of the letter of the law. In that process, its primary function amongst others is to adjudicate and give finality to the litigation. However, in my view, such finality cannot and should not be given mechanically by the Court for the sake of a technical conclusion to the case, disregarding the sensitivities of the community, to which we, as judges are accountable. In each adjudication, the Court ought to ensure that all disputes including the latent ones pertaining to the cause or matter under adjudication, are as far as possible

completely and effectively brought to a logical conclusion once and for all. The good sense of the Court, I believe, should always foresee the long term ramifications of its determination, and adjudicate the cause so as to prevent or control the contingent delays that could possibly proliferate in future, due to the multiplicity of litigations on the same cause or matter. It is trite to say, prevention of potential delays, through judicial foresight, is always better than the cure. Therefore, our Courts in Seychelles – as would any other court of such foresight and sense - should adjudicate the disputes accordingly and prevent the chronic delays that have cancerously afflicted our justice delivery system. After all, the law is simply a means to an end; that is, justice. If the means in a particular case fails to yield the desired result due to procrastination – as has happened in the instant case because of repeated appeals, remittals, and retrials over a period of four years – we have to rethink, reinvent, reinterpret, and sharpen those means of procedural and substantive laws, the tools of our trade, in order to eradicate judicial delay, or as Lord Lane once called it, the Enemy of Justice. Hence, the Courts should never hesitate, where circumstances so dictate, to adopt measures that are just and expedient to prevent the procrastination and the resultant frustration in the due administration of justice. Now then, I would simply ask: Which is to be preferred? The “means” or the “end”? Please, forgive my obiter herein. When a Court, short-sighted by the letter of the law, at times, prefers the “means” over the “ends”, I too, at times, deem it necessary to ventilate what I feel. Having said that, I will now turn to the facts of the case on hand.

The appellant, Roy Beeharry, has appealed to this Court against the decision of Judge D Gaswaga dated 3 November 2009 whereby the appellant was convicted on one count of trafficking in a controlled drug, contrary to section 5 as read with sections 14(c) and 26(1)(a) of the Misuse of Drugs Act (Cap 133) and punishable under section 29 of the Second Schedule of the said Act, and sentenced to imprisonment for 8 and a half years. The appellant urges this Court to allow the appeal, quash the conviction and set aside the said sentence on the following grounds of appeal:

1. The Judge erred in law and fact, when he completely ignored the grave inconsistencies and contradictions of the prosecution witnesses, thereby arriving at a wrong conclusion.
2. The Judge erred in law and fact, when he indulged his mind in speculation and conjecture, in respect of several findings and inferences which he arrived at by the process of defective reasoning.
3. The fair hearing of the appellant’s case was compromised when the learned judge did not compel the prosecution witnesses to answer questions and produce evidence that had a natural bearing on the case.
4. The Judge erred in law and fact when he failed to evaluate the evidence of the defence properly and fairly, rather than indulging in speculation.
5. The Judge’s handling of the case is biased and unfair and the whole exercise carried out by him, in the analysis of the evidence, is an exercise of plugging holes in the prosecution case and providing unjustified excuses, rather than giving cogent reasons for rejecting the evidence of the defence when it contradicted that of the prosecution.
6. The Judge’s reliance on an alleged “confession” of the appellant to convict him, and blaming defence counsel for not cross-examining on a

"material point" is clearly flawed, selective and biased, as the learned judge completely ignores the whole of the cross-examination by the defence on that point.

7. The Judge's explanation as to why Deeroy's name was on the exhibit rather than the appellant's name is clearly flawed and biased and is not supported by the other evidence in the case.
8. The Judge erred in law when he drew an adverse inference on the failure of the defence to call a certain witness.
9. The Judge erred in law and fact, in concluding that the appellant was in possession of the drugs as there was no evidence to show guilt beyond a reasonable doubt linking him to the drugs.
10. The Judge erred in law in amending the charge at the stage of address by the appellant and arbitrarily concluding that no harm was done to either side.
11. The Judge further erred in law is not inviting the appellant to consider whether he wished to call further witnesses or recall witness in view of his arbitrary amendment.
12. The Judge's finding that "the amendment was therefore neither fatal to the proceedings nor prejudicial to the appellant but rather in the interest of justice" is flawed in law and is speculative.
13. There was insufficient evidence to convict the appellant of the charge and having regard to both the evidence and the reasoning of the trial court; the verdict was one which no reasonable court could have returned.
14. In evaluating the case, the Judge erred in law in that he completely ignored the case for the prosecution as borne out in its cross-examination of the appellant, and had he properly done so, he would have had no option but to acquit the appellant.
15. The conviction should be set aside as under all the circumstances of the case, it is unsafe and unsatisfactory.

Be that as it may. I have had the advantage of perusing the majority-judgment (in draft) of the Honourable Justice MacGregor (Presiding) and Honourable Justice Twomey delivered in this appeal. For the sake of brevity, I adopt herein the background facts of the case, the written submissions and the authorities cited by counsel as found in their judgment and the relevant excerpts as found on record, which may be read mutatis mutandis, as part of this judgment hereof.

To my mind, although the appellant has torrentially rained 15 grounds of appeal challenging the decision of the trial Court, many of them are in pith and substance, repetitive, overlapping, and abundantly redundant. Some share a common ground and give rise to almost the same, or to say the least, identical issues. In passing, with due respect to counsel, the grounds of appeal could have been fewer, and better phrased with more clarity and identity. Having carefully analysed the nature and substance of all 15 grounds individually and in combination, in my considered view, they can all broadly be categorised into 6 grounds. They are –

(i) The Judge wrongly evaluated and analysesd the prosecution evidence. He relied and acted upon evidence which was inconsistent,

contradictory, weak, and unreliable to convict the appellant, on which no other reasonable tribunal would rely and act. Vide grounds 1, 4, 6, 7, 9, 13 and 14.

(ii) The Judge drew adverse inferences on the failure of the defence to cross-examine the prosecution witnesses, and to call certain witnesses for the defence. Vide grounds 2 and 8.

(iii) The Judge acted on speculations, conjectures and surmises to convict the appellant, and not on evidence. Vide grounds 2, 4, 8 and 12.

(iv) The Judge erred in the procedural law, in that he failed to invite the defence to adduce further evidence after granting an amendment to the charge. Vide grounds 11 and 12.

(v) The Judge was biased and prejudiced against the appellant and favoured the prosecution throughout the trial by plugging the holes in the prosecution case. No fair trial was granted to the appellant. Vide grounds 3, 5, 6, 7 and 14.

(vi) The prosecution failed to discharge its evidential burden to prove the case beyond a reasonable doubt, as the charge against the appellant for the same offence was withdrawn in a previous case on 5 May 2008 for lack of evidence, but was subsequently re-charged based on fresh evidence vide the statement of PC Dubel. This creates a doubt that the drugs could have been planted to foist the charge against the appellant in the present case.

Ground (i) Inconsistencies, contradictions, etc in the prosecution evidence

This ground relates to the quality of evidence adduced by the prosecution. I carefully perused the evidence of the prosecution witnesses. To my mind, there are no grave or material inconsistencies or contradictions in the testimony of the prosecution witnesses, as alleged by the appellant. It is truism that there are inconsistencies on trivial details in the testimony of the witnesses for the prosecution. But they are immaterial, irrelevant and not fatal to the case of the prosecution. In fact, they do not relate to the material facts that were necessary to constitute the offence or relevant to any of the elements of the charge. I would like to repeat what the Supreme Court had to state in this respect, in the case of *Republic v Marie-Celine Quatre* (2006) (unreported) which runs –

> …. [I]t is pertinent to note that human memory is not infallible. All tend to forget things sometimes; some, all the time; others, from time to time. It is normal. Witnesses are not exceptions or superhuman. The ability of individuals differs in the degree of observation, retention and recollection of events. Who is the more credible - the witness who recalls in tremendous detail every bit of what went on when he was involved in or observed some incident, or the one who says honestly that he cannot exactly remember every minute detail? I am not here referring to dishonest witnesses who so often seem to suffer from selective amnesia for reasons best known to them. Of course, a liar ought to have a good memory to keep his lie alive! Obviously, it is a task set before the Court to try and distinguish a genuinely

> forgetful witness from the one who chooses not to remember.

Hence, though forgetful witnesses at times give seemingly different or discrepant or inconsistent or even contradictory descriptions on minute details based on their observations of the same incident, they need not necessarily be dishonest all the time, in all cases. Having said that, in the case on hand, I do not find any grave discrepancy or contradiction or inconsistency in the evidence of PC Jean, PC Octobre, PC Dubel and S Camille on any material fact or particular that constitutes the offence alleged against the appellant. The discrepancies on trivial details are not uncommon; they are bound to occur as the ability of individuals differs in the degree of observation, retention, and recollection of events. In these circumstances and in my view, the judge did not err in law or fact when evaluating, analysing, relying, and acting upon the evidence on record. I therefore reject this ground of appeal.

Ground (ii) Adverse inferences from non-cross-examination, etc

Upon a careful perusal of the record it is evident that PC Raymond Dubel testified in the examination-in-chief that when the appellant arrived in the bedroom and was asked about the drug recovered, he stated that he was responsible for all that was in his bedroom and told his son not to say anything unless in the presence of a lawyer. It is true that PC Dubel was not cross-examined by the defence on this very crucial matter. The Judge has rightly identified and referred to the defence's failure in this respect, as any reasonable tribunal would in the given circumstances of the case. In his judgment, at page 471 of the record, he has quoted the relevant excerpts from *Cross on Evidence* (7th ed) at 303 –

> ... any matter upon which it is proposed to contradict the evidence-in-chief given by the witness must normally be put to him so that he may have an opportunity of explaining the contradiction, and failure to do this may be held to imply acceptance of the evidence-in-chief.

It is therefore wrong to conclude from the above that the Judge drew adverse inferences against the appellant in this respect. It is true that the appellant has a constitutional right to remain silent. The Court shall not draw any adverse inference from the exercise of his right to silence, either during the course of the investigation or at the trial - vide article 19(2)(h) of the Constitution. At the same time, it is pertinent to note that the appellant has also a constitutional right to examine in person, or by a legal practitioner, the witness called by the prosecution - vide article 19(2)(e). The appellant, who failed to exercise his right at the appropriate time to cross-examine properly and effectively a witness, cannot subsequently avoid the consequences that follow such failure.

Indeed, cross-examination of prosecution witnesses in criminal matters, apart from being a search-engine for the truth, serves three purposes: (i) to challenge the evidence-in-chief insofar as it conflicts with the intended line of defence; (ii) to elicit facts favourable to the defence case which have not emerged, or which were insufficiently emphasised in chief; and (iii) to bring into question the credibility of the witness.

The main evidential reason for cross-examining any witness is that a failure to cross-

examine may be taken by the court - as the judge did in this particular case - as an acceptance of any part of the examination-in-chief which is not challenged: *R v Bircham* [1972] Crim LR 430. This means that the cross-examiner should cross-examine the witness about any matters on which his instructions differ from the evidence-in-chief, and about any parts of his case with which the witness can reasonably be expected to answer. Although facts about that which the witness has not given evidence-in-chief are excluded from this rule, the court may draw an adverse inference from failure to cross-examine about a relevant matter with which the witness could have dealt. This is the common law principle. In passing, it is pertinent to mention that what the appellant stated in excitement, at the time the police entered his bedroom is not at all a confession in the eye of law. In fact, he never confessed his guilt. He was not charged with any offence at the stage of the raid. What he uttered as he was moving away from his bedroom is simply res gestae, as such although it is admissible in evidence, this can in no way be treated or termed as a confession of his guilt. In the circumstances, Judges Rules and Caution are not relevant and shall not apply to the case, as the police were not recording any statement from the accused since the appellant was not even informed of any charge. Obviously, there is a world of difference between res gestae utterances and confessional statements. Both are governed by different sets of rules for their admissibility in evidence.

It is unfair to deny the witness (PC Dubel) the opportunity to answer challenges to his evidence, where the defence intends to invite the court to disbelieve or disregard the evidence of the witness. Therefore, it is the duty of a cross-examiner to 'put his case' to the witness, or in other words, to question the witness directly on the points on which his evidence diverges from the cross-examiner's instructions. This means that one must fairly put the substance of his case, not that one must harp on every minute detail. As an attorney, one is trusted to distinguish the essential from the inconsequential.

All advocates are human, and from time to time, you will forget to put something which should be put in cross-examination. When this happens, ask the court to have the witness recalled, if necessary, at the first possible opportunity. Although this can cause delay and inconvenience, it is better than omitting an important aspect of your case. Recall of a witness is within the court's discretion, and although the court may express some disapproval, it will realise that occasional inadvertence is a fact of life and normally allow recall of the witness. Vide *Kate v R* (1973) SLR 228. Having failed to exercise these options, the appellant cannot now find fault with the judge for having drawn inferences on the failure of the defence to cross-examine the prosecution witnesses and in not calling certain witnesses for the defence. Hence, ground (ii) also fails.

Ground (iii) Acting on speculations, conjectures, and surmises etc

I revisited the record, especially pages 472-473 of the judgment. These pages, according to Mr Pardiwalla, contain certain expressions of the Judge which are based on speculations and inferences. To my mind, all those alleged expressions are simply "vituperative epithets" and they are not speculations, conjectures, and surmises as portrayed by Mr Pardiwalla. For instance, the phrase used by the Judge "deliberate move by the accused" is being criticized and categorized as a

"speculation" of the Judge. In fact, the Judge by using this expression conveys to the reader that the appellant had the knowledge as to why he distanced himself from the bedroom at the material time. The Judge cannot be faulted for using that expression, which is his style, in order to reveal the defendant's knowledge of the drug's existence and his ulterior intention of propounding his set-up theory. Reasonable and logical inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if it had been actually observed. In other cases, the inference does not go beyond reasonable probability. In the case on hand, all the expressions Mr Pardiwalla identified as conjecture or speculation are in my view, again, simply "vituperative epithets" used by the Judge, or to say the least, they are plain logical inferences that any reasonable tribunal would draw from the evidence on record. The submission made by Mr Pardiwalla to the contrary does not appeal to me in the least. Hence, ground (iii) too is devoid of merit and thus fails.

Ground (iv) – Alleged failure to invite further evidence following amendment to the charge, etc

Indeed, by its judgment dated 10 December 2010, the Court of Appeal remitted the matter to the Judge with a specific direction; that he should "hear the parties in law and on facts and give his ruling on the motion for amendment in the light of the objection raised", vide page 5 of the said judgment. In fact, the Court of Appeal decided to remit the case to the Judge only for that limited purpose as it took the view that the points raised under grounds 10, 11 and 12 should be resolved as a threshold exercise before they could proceed, if at all, to determine the rest of the grounds, should that become necessary in light of the determination under grounds 10, 11 and 12 vide page 1 of the judgment.

In pursuance of the said direction, the Judge heard the parties in law and on facts, and accordingly gave his ruling on the motion for amendment on 6 October 2011, whereby the Judge allowed the amendment to the charge-sheet to reflect the correct section of the law to read as section 14(d) instead of 14(c) of the Misuse of Drugs Act.

In fact, this amendment for an alphabetic correction did not bring in any new charge against the accused. The particulars of the offence in the charge-sheet remained the same. From day one the accused had known what the charge was and what material facts that allegedly constituted the charge were levelled against him. In an identical situation involving a similar amendment, the Court of Appeal (A F T Fernando J), in the case of *Jerry Hoareau v Republic* SCA 13/2010, held –

> We are of the view that defence has not been prejudiced in any way in his defence and had also proceeded on the basis that the charge was in fact under section 14(c) and therefore, error in the charge had not in fact, occasioned a failure of justice and therefore curable under section 344 of the Criminal Procedure Code.

According to Mr Pardiwalla, after having allowed the amendment to the charge, the Judge should have invited the defence to adduce further evidence, if any, in view of

the said amendment. However, he failed to do that in the instant case; therefore, the conviction is unsafe and defective due to this procedural irregularity.

First of all, I note the case was remitted by the Court of Appeal to the Judge with a specific direction to hear the parties and rule only on a particular issue pertaining to the amendment to the charge. It was not remitted for any fresh trial or for taking fresh evidence. Had the Judge invited any party to adduce evidence after giving his ruling on the amendment as canvassed by Mr Pardiwalla, then obviously the Judge would be faulted for acting beyond the mandate given to him by the Court of Appeal on remittal and reopening a case for fresh hearing, in which he had already convicted and sentenced the accused person. Evidently, the Judge is functus officio in this respect, a fortiori he had no jurisdiction to take further evidence in the case that was pending before the Court of Appeal for the final determination. In any event, the accused was, on the date of ruling, an autrefois convict and it would be unconstitutional for the Judge in terms of article 19(5) to invite any party to adduce further evidence and entertain a trial again for the same offence against the appellant. *Nemo debet bis puniri pro uni delicto*: No one should be twice put in jeopardy of being convicted and punished for the same offence.

In the circumstances, the approach taken by the Judge cannot be faulted for any reason whatsoever. Mr Pardiwalla's submission criticizing the judge for not inviting the defence to adduce further evidence after amendment to the charge in this respect does not appeal to me in the least. Hence, ground (iv) is also devoid of merit and so rejected.

Ground (v) - Judicial bias and lack of fair trial

According to the appellant, the Judge was biased and prejudiced against the appellant and favoured the prosecution throughout the trial by plugging the holes in the prosecution case. It is argued that the conviction is unsafe because of the way in which the Judge had conducted proceedings and that no fair trial was granted to the appellant.

No doubt that justice always requires that the judge should have no bias for or against any party to the litigation whether individuals or groups of any racial, political, religious or cultural or gender based denominations. His or her judicial mind should be perfectly free to act as the law requires. Bias could also arise from personal interest (pecuniary or otherwise) the judge may have in the subject matter or acquire from the outcome of his decision.

It is truism that the safety of a conviction does not merely depend upon the strength of the evidence alone which the judge heard. It also depends on the observance of due process by the judge who presides over and conducts the trial. Although the judge in a criminal trial has the power to control, regulate and conduct the proceedings, it is a power which ought to be exercised impartially with integrity, without fear or favour, affection or ill will, for or against any party; needless to say, in accordance with law, equity and good conscience. This is and should be the judicial norm of the due process. A judge who exercises that power otherwise would be faulted for judicial bias. This can be shown by the remarks or comments he makes at or before the trial. It may also manifest in the decisions he makes contrary to fact,

reason or law. This can also be shown by some other unfair conduct of the judge in the proceedings. A judge who thus demonstrates bias for or against a party to the litigation in a hearing over which he presides, not only deprives the party of the right to a fair hearing but also fails in his duty to sit as an umpire and supervise fairly the course of the trial.

If the appellant could establish an obvious judicial bias on the part of the Judge in this matter, elucidating from the entire circumstances of the case, that would definitely constitute a valid ground for reversal of the conviction on appeal as argued by Mr Pardiwalla. However, judges are usually careful to display apparent fairness in their comments during trial. A judge may have a predisposition or a preconceived idea or opinion that could prevent the judge from impartially evaluating facts that have been presented for determination. However, human ideas or opinions are abstract and nonfigurative entities, trickily elusive, deeply subtle and hard to pin down. Hence, it is not easy to define, identify and prove judicial bias. Having said that, in light of all the above, I considered the submission by counsel on both sides on this issue. The question arises, what is the test the court should apply to find judicial bias if any in the instant case?

The test is simple and straightforward. After meticulously examining the entire record of proceedings in the case on hand, one should ask whether a fair minded and informed neutral observer would conclude in all the circumstances of the case that there was a real possibility that the judge had been biased against the defendant - see *R v Malcolm* [2011] All ER (D) 4; *R v Grafton* [1992] 4 All ER 609 considered; *R v Cordingley* [2007] All ER (D) 131 considered; *R v Cole* [2008] All ER (D) 181 considered; *Michel v R* [2009] All ER (D) 142 considered.

I gave careful thought to all the circumstances surrounding the nature including the background facts of the case, as demonstrated by Mr Pardiwalla soliciting this Court to infer and impute judicial bias against the Judge. To establish judicial bias, the appellant should substantiate the allegations of partiality or its strong likelihood on the part of the Judge by taking into account the entire circumstances of the case. In fact, all judicial acts are presumed to have been done rightly and regularly as the Latin maxim goes: *Omnia praesumuntur solemniter esse acta.* This presumption cannot be rebutted by mere conjecture and surmises or on guesswork as propounded by the appellant in this matter. When I look at the entire proceedings through the eyes of a fair-minded and informed neutral observer, I conclude in all the circumstances of the case that there has been no possibility that the Judge had been biased against the defendant. I do not find a scintilla of judicial bias or prejudice on the part of the Judge against the appellant before, at, or after the trial. There is no justification for the appellant to make such serious accusations against the Judge, for example that he favoured the prosecution throughout the trial by plugging the holes in the prosecution case. No such serious accusations can be made against judges simply on suspicion without substance. It is not only undesirable but also condemnable. And one should be cautious with such accusations that could be said to challenge the very integrity of the institution.

I am satisfied that the Judge heard and weighed the material evidence without any bias or prejudice, or even likelihood of bias or prejudice against the appellant, and

granted him a fair trial in this matter. Hence, I do not find any merit in ground (v) as well.

Ground (vi) – Evidential burden and standard of proof

It is the contention of the appellant that the prosecution failed to discharge its evidential burden to prove the case beyond a reasonable doubt. The charge against the appellant for the same offence was admittedly withdrawn in a previous case on 5 May 2008 for lack of evidence but was subsequently re-charged based on fresh evidence vide the statement of PC Dubel. This according to the appellant creates a strong doubt that the drugs could have been planted to foist the charge on the appellant in the present case.

Burden of proof

In criminal cases, it is a fundamental rule of common law that the prosecution bears the burden of proving the guilt of the defendant. In almost all cases, this means proving all essential elements of the offence charged. As Viscount Sankey LC beautifully stated in *Woolmington v DPP* [1935] AC 462:

> Throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt. ... If, at the end of and on the whole of the case, there is a reasonable doubt ... as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.

It is important to appreciate that the proper time for the bench to assess whether the prosecution has discharged their burden of proof is at the conclusion of the entire case, which I find the trial Court has properly done. In fact, establishing a prima facie case may not be enough to secure a conviction, because the defence is entitled to argue that the overall burden of proof has not been discharged. The fact that the court may be entitled to find the case proved does not mean that it must do so. Nonetheless, once the prosecution has established a prima facie case, as has been done in the present case, the defence runs a serious tactical risk in not calling evidence to rebut it, not because the defendant is called upon to prove his innocence (which would be contrary to the rule in *Woolmington's* case cited supra) but because the court may exercise its entitlement to accept the uncontroverted prosecution evidence. This is what the learned Judge has done in this matter and rightly so. Despite the rule set forth above, and although the prosecution must in all cases prove the guilt of the defendant, there is no rule that the defence cannot be required to bear the burden of proof on individual issues such as whether the drugs could have been planted by the police to foist a false case against the defendant, ie the appellant in this matter.

This does not require the appellant who stood charged with trafficking in drugs to prove his innocence, but only to show reasons as to how and why it was possible, but not in the least probable that the drugs were planted. And, of course, the appellant need not prove even this unless and until the prosecution establish a prima

facie case that the defendant in fact had such drugs with him in his bedroom.

Having considered the whole of the evidence on record, I am of the view that the prosecution has satisfactorily discharged its legal and evidential burden by adducing strong, cogent, corroborative, sufficient and admissible evidence to prove the charge against the appellant, which evidence has not been contradicted by the defence. Nothing more and nothing less is required to be proved by the prosecution to tip the scale in their favour and so I conclude.

Standard of proof

I gave serious thought to the defence contention on this issue of standard of proof. In fact, the standard of proof defines the degree of persuasiveness which a case must attain before a court may convict a defendant. It is true that in all criminal cases, the law imposes a higher standard on the prosecution with respect to the issue of guilt. Here the invariable rule is that the prosecution must prove the guilt of the defendant beyond reasonable doubt, or to put the same concept in another way, the Court is sure of guilt. These formulations are merely expressions of a high standard required, which has been succinctly defined by Lord Denning (then J) in *Miller v Minister of Pensions* [1947] 2 All ER 372:

> It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt ... If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence “of course it is possible, but not in the least probable” the case is proved beyond reasonable doubt, but nothing short of that will suffice.

Having said that, on a careful analysis of the evidence on record, first I find that the prosecution evidence is so strong and no part of it has been discredited or weakened or contradicted by any other evidence on record. I am sure on the evidence that the police officers did not plant the controlled drugs in question on the defendant at any stage before, during or after the investigation. Besides, the Attorney-General has unfettered discretion in law to withdraw the charge in a criminal case at any stage of the proceeding but before the closing of the case for prosecution. One cannot find fault with the prosecution for re-charging the same person subsequent to withdrawal of a charge, for the same offence with which he previously stood charged. This is permitted in law, provided he had neither been convicted (autrofois convict) nor acquitted (autrofois acquit) for that offence before. In the circumstances, I find there is nothing wrong, it is lawful in re-charging the appellant for second time for the same offence. No adverse inference can be drawn from a lawful act of withdrawal of the first charge as that is an extraneous matter and has nothing to do with the present trial or charge. Each case should be determined only on its own evidence and not on matters extraneous to evidence a fortiori on guesswork. Mere withdrawal of a charge cannot lead to the only inference of set-up theory that it was done to frame the appellant by planting drugs on him. Secondly, I am satisfied that looking at the evidence as a whole, the prosecution has proved the case beyond reasonable doubt covering the essential elements of the offence the defendant stood charged with.

An appellate court should not interfere with the judgment of trial court except in the presence of either mis-appreciation of evidence or wrong application of law. Ably as

the matter has been argued, I see no reason to question the decision of the Judge on conviction and sentence in this matter and I would accordingly dismiss the appeal in its entirety.

MICHEL v TALMA

MacGregor P, Fernando, Twomey JJ
13 April 2012 Court of Appeal 22/2010

Constitution – Right to property - Procedure - Limitation period – Moral damages

This is an appeal against a unanimous decision of the Constitutional Court, which made declarations that the respondents' rights under article 26(1) (right to property) of the Constitution had been infringed by the appellants and awarded damages of R 50,000. The respondents' development plan for their land in Anse Lazio had been approved by the appellants until an area of the land was declared an area of outstanding beauty and a "no development zone" by the Government. The Constitutional Court found there was no legal justification for the refusal to consider the respondents' project proposal and that the refusal to consider the project was unconstitutional. The appellant appealed.

JUDGMENT Appeal dismissed.

HELD

1 Where it is not clear when a definite and final refusal is recorded, there may be a continuing breach of the petitioner's rights and the limitation period will not begin to run. The action will not be time barred by rule 4(1)(a) of the Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules. If it were time barred, the Court could exercise its discretion under rule 4 of the Constitutional Court Rules to allow the petition to be filed out of time.
2 The limitation period in the Constitutional Court Rules may amount to a suppression of the right in art 45 of the Constitution.
3 A consent judgment entered by a court under s 131 of the Code of Civil Procedure is a judgment of that court and matters therein contained may be relied on in subsequent cases.
4 Article 46(5)(d) of the Constitution permits compensation for moral damages. The general principles for awards of moral damages in delict cases can apply to awards of damages caused by the infringement of constitutional rights.
5 The petitioner's burden of establishing the existence of the loss should not be an obstacle to the success of the claim. The existence of the harm is inferred from the infringement itself. Compensation for loss must naturally flow from a finding of wrongdoing.
6 There is no method for assessing moral damages. It is a subjective assessment. Appellate courts should decide if the trial court's award of damages was manifestly high and excessive, and not substitute its own judgment of appropriate damages for that of the trial court.
7 The infringement of a constitutional right is a serious matter and may justify an award of exemplary damages where the actions of the Government are oppressive, arbitrary and unconstitutional.
8 Actions against the Government should be brought against the Government of Seychelles and the Attorney-General and not against the President and Minister in their personal capacities.

9 When the Attorney-General appears in constitutional cases representing the Government, costs awarded against the Attorney-General are awarded against the Government and not against the Attorney-General in the capacity of amicus curiae.

Legislation
Constitution, arts 26(1), 27, 45, 46(5)(d), 76(4),(10)
Civil Code, arts 1382(1), 1383(1)
Code of Civil Procedure, ss 29(2), 31
Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules, rules 3(2),(3), 4(1)(a),(4)

Cases
Cable and Wireless v Michel (1996) SLR 253
David v Government of Seychelles (2008) SLR 46
Hall v Government of Seychelles (unreported) SSC 2012
Mousbé v Elisabeth SCA 14/1993, LC 41
Regar Publications Ltd v Lousteau-Lalanne SCA 25/2006, LC 304

Foreign Cases
De Boucherville Roger France Pardayan v Director of Public Prosecutions (2002) MR 139
Talbot Fishing Co Ltd v Ministry of Fisheries and Cooperatives (2002) SCJ 131
Uganda Association of Women Lawyers v Attorney-General (Constitutional Petition No 2 of 2003) [2004] UGCC 1 (10 March 2004)

Foreign Legislation
Constitution of Uganda 1995
Legal Notice No 4 of 1996 (Uganda)

A Madeline for the Attorney-General for the appellants
A Derjacques for the respondents

Judgment delivered on 13 April 2012

Before MacGregor P, Fernando, Twomey JJ

TWOMEY J:

This matter involves a protracted process culminating in the decision of the Constitutional Court on 28 September 2010. The respondents had brought a constitutional case arguing that their rights under article 26(1) (right to property) and article 27 (right to equal protection of the law) had been infringed by the first three appellants. The respondents, father and daughter, had invested time and money in a development plan for their land at Anse Lazio, Praslin with the approval of the first three appellants until an area of land which comprised the respondents' land was declared an area of outstanding beauty and a "no development zone" by the third appellant.

The respondents submitted that this unilateral decision had prevented them from peacefully enjoying and developing their property and was discriminatory as other development projects in the said area had been permitted, as had other projects on similar sites in Seychelles. They had argued that the appellants' decision was arbitrary, irrational and harmful to them and had rendered their property of nil value, nullifying past investments and costs they had incurred.

For their part the appellants had submitted before the Constitutional Court on a point of law that the matter was time barred and on the merits of the case, that the respondents' project's approval which had been subject to conditions had lapsed, that the prohibition of development was in the public interest, that the respondents' rights in being permitted to build a residential home as opposed to a hotel on the land was only a limitation to their property rights as was permitted under the law, and that they have not been treated any differently to other property owners in the area.

The Constitutional Court by a unanimous decision delivered by the Chief Justice found in favour of the second respondent; that there was no legal justification for the refusal to consider the project proposal of the applicant and that the refusal by the officers of Government to consider the petitioner's project, in accordance with the existing law, was unconstitutional. Hence declarations were made that the respondent's rights under article 26(1) of the Constitution had indeed been breached and an award of moral damages of R 50,000 was granted to the respondent against the Government of Seychelles and the Attorney-General. As the matter should have been preferred against the Government of Seychelles and not the first two appellants, President James Michel and Minister Joseph Belmont in their personal capacities, no costs were awarded against them but costs were awarded against the fourth respondent. There was no finding of any discrimination contrary to article 27 of the Constitution.

It is against these declarations that the present appeal is now brought. The appeal is on four grounds, namely that:

(i) The Constitutional Court erred in finding that the matter was not time barred;
(ii) The award for moral damages was manifestly high and excessive;
(iii) Costs should not have been awarded against the Attorney-General as he appeared amicus curiae; and
(iv) The Constitutional Court erred in declaring that the action should have been brought against the Attorney-General and not the first two respondents.

At the outset we wish to make an observation. A finding was made by the Chief Justice in relation to the first appellant, Alwyn Talma, in relation to the fact that since he had transferred his interest in the land, Parcel PR2552, he had no locus standi to bring this action. We fully endorse this view and are surprised to see the appeal is brought again against him and his daughter. We are of the view that the first respondent equally has no locus standi in this case and will treat this appeal as properly brought only against the second respondent Elke Talma.

We now propose to deal with the grounds as they arise:

Was the action time barred?

It is submitted by the respondents that rule 4(1)(a) of the Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules would preclude the respondent's action since it has been commenced outside the limitation period of three months. We note that a development of this kind does not go through a streamlined, seamless and efficient application process. Instead hopeful developers step into a Kafkaesque journey involving various ministries and departments which may be summarised (but not simplified) as follows: a project memorandum is sent to the Seychelles Investment Bureau (SIB), SIB circulates the memorandum to all departments including planning, environment and tourism. Comments are sent back to SIB. On this basis SIB confirms or denies permission for the project. Unfortunately it does not end there; if approval is granted the developer has to go through the planning process and meet the requirements of an environment impact assessment. Final approval results in the project finally getting off the ground.

To complicate matters, each stage of the process described may see refusals and appeals and eventual permissions granted. It is not in dispute that the respondents had ventured down the rabbit hole and had "won some and lost some" and after a series of project reappraisals, re-designs and re-submissions (vide: project with EXIM approved by President René, difficulties with Anse Lazio bridge, interest by Royal Resorts involving lease of Savoie land, approaches by Joe Albert and Southern Sun, United Resorts and finally, Dr Ramadoss) got the impression that the project would not go ahead. As late as April 2007, the first respondent was still writing to the first appellant appealing the decision.

It was obviously clear to the respondents that they still had a chance to see the decisions of the different authorities reversed. Further, that the appeal was still ongoing is clearly supported by the proceedings of the National Assembly of 27 October 2009 during question time with the Vice President:

> Vice President Belmont: Mr Speaker mon mazinen si Msye Talma I oule fer kek developman touristic I bezwen pas atraver bann lenstitisyon ki konsernen avek sa… I kapab toultan *fer rapel* pou ki ban lotorite *a konsidere si i annan keksoz ki sanze, si I kapab fer en keksoz ki lo sa morso later* kot i ete laba… [my emphasis] [page 7 of Assembly proceedings in respondents' bundle of documents before the Court]
>
> (my translation): Mr Speaker I think that if Mr Talma would like to carry put a tourism development he will have to go through the different institutions concerned with the project… he could always *appeal* so that the authorities *might consider if anything has changed or if he could do something with the land…* [my emphasis]

The respondents' petition to the Constitutional Court was dated 15 January 2010 and was received at the Registry on 22 January 2010. If the date of limitation started to run from the Vice President's statement in the National Assembly (27 October 2009) then the respondents were clearly not time barred. But as can be gleaned from the different stages described above, it is not clear when a definite and final refusal was recorded, if ever. In that case it may well be that the appellant's actions even today

continue to be a breach of the respondents' rights and as such, in the words of the Chief Justice:

> If the contravention continues to inhibit the person entitled to enjoy a right in relation to land, for as long as it inhibits that person from the enjoyment of one's land as one would wish to do, the contravention is continuing.

We would in this respect, therefore, have no hesitation in also distinguishing the cases of *Talbot Fishing Co Ltd v Ministry of Fisheries & Cooperatives* (2002) SCJ 131 (unreported) and *De Boucherville Roger France Pardayan v Director of Public Prosecutions* (2002) MR 139 from the present appeal. As rightly pointed out by the Chief Justice they are not cases of continuing breaches. The historical basis for the limitation of actions is one based in equity, namely that "equity defeats delay." Limitation periods by their very nature curtail the right or ability of a plaintiff to pursue a claim. For this reason they require strong justification – fairness and certainty (closure of claims) being the strongest reasons. This Constitutional Court rule has already undergone a change from the original provision of "30 days" limitation to the 3 month one now in force. I would like to support and reiterate the Chief Justice's view that it may be time to revisit this limitation period which may well run counter to article 45 of the Constitution, that is, that it may well amount to the suppression of a right.

This resonates with the Ugandan's Constitutional Court finding in *Uganda Association of Women Lawyers and Others v Attorney-General (Constitutional Petition No 2 of 2003)* [2004] UGCC 1 (10 March 2004):

> It seems to us that a constitution is basic law for the present and the future generations. Even the unborn are entitled to protection from violation of their constitutional rights and freedoms. This cannot be done if the thirty days [3 months for Seychelles] rule is enforced arbitrarily. In our view, rule 4 of Legal Notice No.4 of 1996 [the equivalent of the Seychelles Constitutional Court rules] poses difficulties, contradictions and anomalies to the enjoyment of the constitutional rights and freedoms guaranteed in the 1995 Constitution of Uganda. We wish to add our voice to that of the learned Supreme Court Justices, (Mulenga, JSC and Oder, JSC) that this rule should be urgently revisited by the appropriate authorities… To recast the words of Oder, JSC (supra) "It is certainly an irony that a litigant who intends to enforce his right for breach of contract or for a bodily injury in a run-down case has far more time to bring his action than the one who wants to seek a declaration or redress under… the Constitution.

We would finally point out that if everything else had failed, given the complicated process, the difficulty in ascertaining when a final decision had actually been communicated to the respondents, that this is one case when the discretion of the Constitutional Court would have been rightly exercised under rule 4(4) to allow the petition to be filed out of time. We therefore find no merit in Ground 1 of the appeal.

A related issue to this ground of appeal was brought tardily to this appeal but has a direct bearing to it. This is the authority of *Hall v Government of Seychelles*, a judgment by consent of the Supreme Court entered on 12 January 2012. Miss Madeleine for the appellants contends that this is a consent judgment and should be

distinguished from an ordinary judgment. We respectfully disagree. A consent judgment entered by the court under section 131 of the Code of Civil Procedure is a judgment of that court and matters therein contained may be relied on in subsequent cases just as in other cases. We agree with counsel that there are other distinguishing factors, namely that the land in question was much smaller and the development sought was of a residential nature. However, we are of the view that the salient point applicable to all cases where rights to the peaceful enjoyment of property is concerned is the statement that a –

> ...recent decision taken on the Cabinet of Ministers reviewed the issues in this nature (sic) that areas which were formerly not permitted for development have been reconsidered to permit the development in the said areas, with very low impact on nature if it is buildable, construct able (sic) due to the rapid technological development in the construction field.

This change of policy in our view confirms the inconclusiveness of actions of this nature. The right to peaceful enjoyment of property is without doubt subject to limitations as prescribed by law as is necessary in a democratic society but since laws and policies as permitted by these laws are also not immutable, it is questionable whether breaches to such rights are ever time barred. Each case will of course have to be decided on its merits.

Award of moral damages

We now turn to the next issue raised: that the award for moral damages was manifestly high and excessive. It is correct that no direct evidence was brought at the trial on this issue, nor was "moral damages" ever claimed for that matter. The respondents had claimed that as a result of the appellant's actions their property was of nil value that their past investments and costs incurred thus far were nullified and that damages of R 400,000 should be awarded. In awarding R 50,000 the Chief Justice in his judgment terms it an award for "moral damages."

Article 46(5)(d) of the Constitution makes provision for the award of "any damages for the purpose of compensation of the person concerned for any damages suffered." The wording is in our view very broad and would permit compensation under any head – pecuniary damage or moral damage and hence the Chief Justice was perfectly entitled to make such an award.

Both liability for moral damage and its assessment have always concerned courts. In tortious actions, the Seychelles Civil Code in article 1382(1) states "Every act whatever of man that causes damage to another obliges him by whose fault it occurs to repair it" and article 1383(1) "Every person is liable for the damage it has caused not merely by his act but also by his negligence or imprudence". The provisions make no distinction between pecuniary damage and moral damage. The French from whom we received the provisions in our Civil Code initially also had great difficulty accepting the basis for moral damages as in the words of Professor Ripert "Il peut être choquant d'aller monnayer ses larmes devant les tribunaux "(G Ripert, "Le prix de la douleur," 1948). In Seychelles, we also overcame our revulsion of valuing the invaluable – the monetary value of suffering - and have for many years in our jurisdiction accepted the indemnification of non-pecuniary loss. Although, the

provisions outlined apply to delicts I have no doubt that in the absence of a specific scheme or proviso in the Constitution dealing with awards for damages caused by the infringement of constitutional rights, general principles for awards of damages do not vary significantly.

It is also the law that the burden of establishing the existence of the loss which in principle lies with the plaintiff/petitioner should not be an obstacle to the success of his or her claim. The existence of the harm is inferred from the infringement itself. It is obvious that as the Constitutional Court found no basis for the refusal by the appellants to consider the respondent's project, such a refusal or even the withholding of such permission in the circumstances resulted in an infringement of her constitutional right to enjoy her property. The fact that the respondent had spent both considerable time and money in trying to secure permission to develop her property as was her right was never contested and hence compensation for that loss must naturally flow from a finding of wrongdoing.

However, the question does remain of how the sum of R 50,000 was arrived at. The Court of Appeal in *Cable and Wireless v Michel* (1966) SLR 1966 253 referring to Planiol and Ripert make the case that where a right has been violated, compensation can be awarded for moral damages even in the absence of a claim for material damages. These rights can be patrimonial or extra patrimonial as in this case. We agree that it is difficult to assess moral damages but the exercise must still be carried out and the plaintiff is entitled to them. There has however never been a method established in Seychelles to assess moral damages. No method of assessment is set out either in the Constitution or in the Civil Procedure Code.

The damages that occurred seem to me to relate to the fact that for well over twenty years the respondent and her father were involved in an emotional rollercoaster believing they were going to be permitted to develop their property and then having those same hopes dashed and the realisation that in commercial terms their property was of nil value; that their past investments and costs incurred thus far were nullified. Such emotional distress and stress is to my mind extremely punishing and can wear out even the most hard-nosed businessmen. In *David v Government of Seychelles* (2008) SLR 46 it was held that in such cases "The Court should make a subjective assessment of damages". Further, in *Mousbé v Elisabeth* (SCA 14/1993 unreported) it was held that in determining damages, the court should not substitute its own judgment of appropriate damages for that of the trial court. Rather, it should decide if the trial court's award of damages was manifestly high and excessive.

We have listened to both parties in this case and have studied the record meticulously and we bear in mind the authorities above and those cited by Miss Madeleine for the appellants. We are of the view that the award was far from being manifestly high and excessive. Indeed had the respondent cross-appealed on this ground we would have had no hesitation in raising the award made and would have considered other damages suffered by the parties. The infringement of a constitutional right is a serious matter and should be viewed as such by all concerned. In the defamation case of *Regar Publications Ltd v Lousteau-Lalanne* (SCA25/2006 unreported) the Court of Appeal made the following remark:

> Apart from the fact that exemplary damages should be specifically pleaded, it should be awarded only in cases falling within the following categories:
> (a) oppressive, arbitrary or unconstitutional action by servants or the Government...

It is our view that had a claim been made for such damages in this case they may well have been awarded given the magnitude of the oppressiveness, arbitrariness and unconstitutionality of the acts of the servants of the Government. The award of damages in this case is by no means punitive or exemplary but rather reflects the compensatory quality of the damage caused to the respondent. This ground of appeal therefore has no merit and we dismiss it.

The costs of the case

We would now like to consider the third and fourth grounds of appeal together as they are clearly linked, namely that costs should not have been awarded against the Attorney-General as he appeared amicus curiae in this matter and that the Constitutional Court was wrong in declaring that the action should have been brought against the Attorney-General and not the first two respondents. At the outset we must point out that the Constitutional Court made no such declaration. The award of costs was made in the penultimate paragraph of the Chief Justice's judgment in which he stated:

> With regard to the order for costs I note that this action was commenced against 4 respondents. Under section 29(2) of the Seychelles Code of Civil Procedure, hereinafter referred to as SCCP, all actions against the Government of Seychelles may be preferred against the Attorney-General as defendant. This petition is basically against the Government of Seychelles, and not respondent no 1 and 2 in their individual capacities. It was entirely unnecessary to name respondent no 1 and 2 as parties to the proceedings. Doing so just led to unnecessary multiplication of costs and time spent on this matter. I would allow petitioner no 2 only ¼ of the costs she has incurred against the Attorney-General who was the only proper defendant in the matter.

What we understand the Chief Justice to be stating is that the matter should not have been brought against the first two appellants (President James Michel and Minster Joseph Belmont) in their personal capacities. It did not state that the matter should not have been brought against the Government of Seychelles or any particular Ministry or its employees involved in the breach of the appellants fundamental rights. The respondent was entitled to bring a case against those who had occasioned the breach to her rights and against whom relief was sought, vide the Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules rule 3(2) – "All persons against whom any relief is sought in a petition under sub-rule (1) shall be made a respondent hereto".

The action therefore should have been brought against the Government and the Attorney-General in terms of the Constitutional Court Rule 3(3) which stipulates that the Attorney-General also has to be made a respondent in all Constitutional Court cases in cases which he is not himself bringing. In such cases his appearance is indeed amicus curiae as he is not representing any party but is there to advise the

court independently. The difficulty arises in this case as his role was blurred. Was he appearing for the Government as well as amicus curiae? In the pleadings and during the case he clearly conducted himself as the representative of all the appellants. Hence in apportioning costs, he is under the misconception of being burdened with those costs awarded against the Government of Seychelles. Article 76(4) of the Constitution clearly states that he is "the principal legal adviser to the Government" while article 76(10) emphasises his impartiality in the exercise of his powers namely "not to be subject to the direction or control of any other person or authority." When the Attorney-General appears in constitutional cases representing the Government the presumption is that his views are not in variance with the Government. Hence he is there representing the Government. Costs awarded against him in such cases are costs awarded against the Government and not against him in his capacity as amicus curiae. To make it clear the costs are against the Government of Seychelles.

In the circumstances this appeal is dismissed in its entirety with costs.

MONTHY v ESPARON

MacGregor P, Fernando, Twomey JJ
13 April 2012 Court of Appeal 29/2010

Concubinage – Division of co-owned property – Ultra petita – Ultra vires – Stay of execution

The parties lived together in an en ménage or concubinage relationship. They jointly purchased a house in January 1995. The relationship ended three years later. The trial court made a declaration (and related orders) that the plaintiff was entitled to sole ownership of the property and the defendant was entitled to R 70,000 compensation from the plaintiff in settlement of the defendant's share in the property. The defendant appealed the decision.

JUDGMENT Appeal allowed. The Registrar of Lands to restore ownership of the property to both parties; the respondent to pay the appellant R 54,000 (R 9000 as moral damages and R 45,000 as compensation for having to find alternative accommodation).

HELD

1 A judge who grants relief not sought in pleadings acts ultra petita.
2 Averring something in a court document necessarily needs supporting by affidavit.
3 In cases of co-ownership there are three options available under the Civil Code to a joint owner who does not wish to remain in indivision: sale by licitation, partition, or action de in rem verso (based on unjust enrichment). If the plaint is not an action based on any of these causes of action, but on equity alone, the judge will be acting ultra vires if an order of property division is made. Equity cannot be resorted to because there are other legal remedies available.
4 A co-owner will be entitled to compensation if he or she is unlawfully ejected and cannot enjoy his or her property.
5 The Land Registrar is entitled to transfer land in accordance with an order of a judgment. Section 230 of the Seychelles Code of Civil Procedure provides that unless there is an order or an application before the court "an appeal shall not operate as a stay of execution." An appellant should be alive to the risk of transfer and apply for a stay of execution pending appeal.

Legislation

Code of Civil Procedure, ss 71, 169, 170, 230
Courts Act, s 6
Matrimonial Causes Act

Cases

Barbe v Hoareau SCA 5/2001, LC 250
Charlie v Francoise SCA 12/1994, LC 72
Edmond v Bristol (1982) SLR 353
Hallock v d'Offay (1988) 3 SCAR 295
Leon v Volare SCA 2/2004, LC 266

D Sabino for the appellant
F Bonté for the respondent

Judgment delivered on 13 April 2012

Before MacGregor P, Fernando, Twomey JJ

TWOMEY J:

In Seychelles many unmarried parties live together in partnerships colloquially called "en ménage, or "in concubinage". They build homes together and raise a family. Relationships unfortunately do somehow turn sour and the partners separate. What then are the rights of these parties in property held in joint ownership at the dissolution of the relationship?

Whilst the Matrimonial Causes Act and Rules adequately provide for the exact situation for married parties, there is no specific legislation dealing with the rights of "en ménage" parties. This is surprising and most unsatisfactory given the number of people in such relationships - the Population and Housing Census 2010 show the percentage of married couples in Seychelles at 24.6% while the percentage of cohabiting but unmarried couples closely behind at 19.3%.

Fortunately, the laws of Seychelles are not silent on the matter. The prescient Civil Code provides several remedies and to these must we turn in such situations. Sauzier J in his landmark decision of *Hallock v d'Offay* (1988) 3 SCAR 295 attempted to bring justice to the situation even when the property was not held in joint ownership. A shame it was that his was a dissenting judgment.

In this case, the parties jointly purchased a house at Glacis, Mahé in January 1995 and started cohabiting, but theirs was a short relationship, the cohabitation ending barely 3 years later. That at least is admitted by both parties. Their versions however differ on the payments of the mortgage in relation to the house.

It was the appellant's case that since the mortgage of R 250,000 was taken out in 1995 he had made all the payments to it. It was the respondent's case that she has paid R 114,509.98 and that the appellant has only paid R 56,446.60 towards the mortgage. The parties vehemently and acrimoniously denied each other's averments in court and the evidence adduced was long, convoluted and painstaking and resulted in the trial judge losing the carriage of the case before him, which may explain the dénouement of the case.

At the end of his judgment the trial judge made the following statements:

> a) I hereby declare that the plaintiff Ms Miranda Esparon is entitled to sole ownership of the property, namely, parcel of land Title H2557 situated at Glacis, Mahé, whereas the defendant Alexis Monthy is entitled to compensation in the sum of R 70,000 payable by the plaintiff in settlement of the defendant's share in the property.
> b) Further, I order the plaintiff to pay the said sum of R 70,000 to the defendant within four months from the date of the judgment hereof.

> c) As and whereupon such payment under paragraph (b) above, is made in full by the plaintiff either directly to the defendant or through his attorney, I order the defendant to transfer thenceforth all his rights and undivided interest in Title H2557 including all or any super structure thereon to the plaintiff.
> d) In the event, despite receipt of the said sum in full, should the defendant fail or default to execute the transfer in terms of order above, I direct the Land Registrar to effect registration of the said parcel Title H2557 in the sole name of the plaintiff, upon proof to his satisfaction of payment of the said sum R 70,000 by the plaintiff.
> e) I make no order as to costs.

It is against the said orders that the appellant brings this appeal. His counsel contends that the judge's orders are ultra petita and that he has acted ultra vires when depriving the appellant of his rights in land. He further contends that an order was made against the Land Registrar when she was not even a party to the suit and that the trial judge erred in rejecting his counterclaim. He further claims that the Land Registrar has already transferred the title in the sole name of the respondent without his client having received any funds.

Counsel for the respondent for his part argues that this appeal is largely frivolous and vexatious and is an abuse of the process of the Court. He contends that the prayer in his plaint had asked the Court for an "order against the defendant in terms of paragraph 9…with costs and any other order as that the property should bear her sole name upon repayment to the defendant of all moneys paid towards the said housing loan and the court deems fit in the circumstances" (sic) and since the orders of the Court are in line with the prayer they are therefore not ultra petita. He submits that the law permits the Court to decide matters as per the limits of the law and that therefore the trial judge was entitled to come to the conclusions and make the orders he did. He also resists any argument that the judge's order directing the Registrar to transfer the land in the sole name of the respondent did not make her a party to the matter. He further submits that the appellant's counterclaim was rightly dismissed.

I shall first deal with procedural matters. Section 71 of the Seychelles Code of Civil Procedure requires specific pleadings to be included in plaints, in particular a plain and concise statement of the circumstances constituting the cause of action and of the material facts which are necessary to sustain the action. It must also contain a demand for the relief which the plaintiff claims. Courts cannot grant relief not sought in pleadings (*Barbé v Hoareau* SCA 5/2001, *Léon v Volare* SCA 2/2004). If they do they are acting ultra petita. In the case of *Charlie v Francoise* SCA 12/1994 this court succinctly articulated the position when it stated:

> The system of civil justice does not permit the Court to formulate a case for the parties after listening to the evidence and to grant a relief not sought by either of the parties...

The respondent in her plaint prayed for the orders as set out above in terms of his paragraph 9. Paragraph 9 states –

> The plaintiff avers that it is just and necessary that the defendant's name be erased from all property documents and that the property should bear her

> sole name upon repayment to the defendant all moneys (sic) paid towards the said housing loan and that the defendant be evicted for the house at Glacis.

These statements should have alerted both counsel for the respondent and the trial judge that such matters should not be set out in a plaint. An averment cannot be proved except by affidavit and one can only aver "such facts as the witness is able of his own knowledge to prove…" vide sections 169 and 170 of the Seychelles Code of Civil Procedure. Averring something in a court document necessarily needs supporting by affidavit. In any case a comparison of the respondent's pleadings with the orders made by the trial judge clearly shows that the matters they contain are ultra petita. Even at this stage we are not sure what the prayer of the respondent was.

In terms of the actual cause of action, a division of co-owned property, the order of the court is clearly ultra vires. Much as one might have sympathy for either party and it is certainly not the wish of this Court that the rights of the parties in co-ownership, rights now denied to the appellant, continue in a state of limbo, it was up to the respondent who wished no longer to remain in indivision to bring the correct suit to court. In cases of co-ownership there are three options available under the Civil Code to the joint owner who does not wish to remain in indivision: sale by licitation, partition or action de in rem verso (based on unjust enrichment). Vide *Edmond v Bristol* (1982) SLR 353. These remedies could have been availed of by the respondent.

Instead both the respondent and the trial judge erroneously dealt with the matter either as if it was a case of matrimonial property or matter of equity. At submission stage an exchange between counsel for the appellant and the trial judge showed how alive both were to these issues vide page 208 of the record of proceedings:

> Court: If the Court dismisses the plaint, is that going to solve the problem?
> Mr Sabino: There are legal means and measures. Our position is that the process she is using is inappropriate….
> Court: So you want another round of litigations? This case has already been before the court for more than 11 years.…

The Court then proceeded to give the orders it did. With respect, the trial judge was acting ultra vires in so doing. The plaint as it stood before him was not an action based on any of the above-mentioned cause of actions; it seems to have been based on equity alone. Equity however, is only available in Seychelles when no other legal remedy is available (section 6, Courts Act). As there were three possible legal courses of action, the Court could not and should not have resorted to equity. The judge's order has only compounded the unjust enrichment of the respondent at the expense of the appellant. This case was begun in 1998 and the appellant ejected from his home since 1999. Although we are loathe to drag out this matter we cannot endorse a decision that is bad in law so as to put finality to the litigation. Rights in property are zealously guarded both by the Constitution and the Civil Code and remedies are provided for their infringement, but the guidelines, rules and regulations for settling disputes over ownership of property must be followed.

The appellant is a co-owner of the said parcel of land and will have to be compensated for the fact that he was unlawfully ejected and has not as a co-owner

been able to enjoy his property. He has claimed in his appeal the sum of R 54,000 comprising of R 9000 for moral damage and the rest for the cost of renting alternative accommodation. We do not find this figure excessive and find them reasonable given the circumstances and the period of time since the appellant has not been able to enjoy his property. We therefore grant this prayer.

Finally, I now wish to deal with the transfer of the land by the Registrar. The appellant claims that his rights in Parcel H2557 have already been alienated in that the Land Registrar has already transferred sole title onto the respondent. From the record we are unable to establish conclusively what the circumstances which led to this event were. However the appellant should have been alive to the risk of this transfer happening and should have applied for a stay of execution pending appeal. No fault can be attributed to the Registrar as it would appear that the respondent moved as per order of the judgment and section 230 of the Seychelles Code of Civil Procedure makes it clear that unless there is an order or an application before the court “an appeal shall not operate as a stay of execution.”

However as we are of the view that the order of judge was wrong in law, that order is quashed and the Registrar by notice of this judgment served on him should proceed to restore ownership of title to Parcel H2557 to both parties. We are relieved to know that the land in question has not been transferred to a third party.

We need to point out that fault has to be attributed to counsel for the respondent for bad pleadings in this case. The Seychelles Code of Civil Procedure exists for a purpose – to govern the methods and procedures in civil litigation. If they are not followed they may well result in the case being dismissed as should have been the decision of the judge in the Supreme Court when this matter came before it. The courts are not there to make the case for the parties. The parties are of course free to commence other actions should they wish to terminate their co-ownership in the land.

To avoid confusion we wish to state the orders we make clearly:

> i. We allow this appeal and quash the decision of Judge Karunakaran in its entirety including the award of R 70,000 he made in this case as the monetary value of the appellant’s share in the property co-owned by the parties namely Parcel H2257.
> ii. We order the Registrar of Lands to restore ownership of Title H2257 to both parties namely Alexis Monthy and Miranda Esparon.
> iii. We order the respondent to pay the appellant the sum of R 54,000, of which R 9000 as moral damage and R 45,000 as compensation for him having to find alternative accommodation.
> iv. We order the respondent to pay the costs of this matter.

MORIN v POOL

MacGregor P, Fernando, Twomey JJ
13 April 2012 Court of Appeal 14/2010

Civil procedure – Affidavits – Legal professional ethics

The Supreme Court found the respondent was a trespasser on the applicant's property and issued a writ of habere facias possessionem to evict the respondent. The respondent appealed.

JUDGMENT Appeal allowed.

HELD

An affidavit must not be sworn before counsel acting for the party or counsel's partner. If it is, the application will be unsupported as the affidavit is irregular and therefore invalid.

Legislation
Code of Civil Procedure
Court of Appeal Rules, rules 24(1),(2)(i), 26

Cases
Church v Boniface (2011) SLR 260
Poonoo v Attorney-General (2011) SLR 423
Re Louis and Constitutional Appointment Authority (unreported) SCA 26/2007

Foreign Legislation
Supreme Court Practice 1991, order 41 rule 8

Basil Hoareau for the appellant
Anthony Derjacques for the respondent

Judgment delivered on 13 April 2012

Before MacGregor P, Fernando, Twomey JJ

TWOMEY J:

This is an appeal against an order for the issue of a writ habere facias possessionem against the appellant issued ex-parte on 19 July 2010. It appears from the record that an affidavit supporting the motion for the writ was filed by the respondents and an affidavit in reply was also filed by the appellant. The matter was set for hearing on 19 July 2010 and on that day although the record marks the appellant's counsel as present, neither he nor his client were in court.

The Judge made the following order:

> This is an application for a writ habere facias possesionem. The respondent has defaulted appearance, in the circumstances I grant leave for the applicant to proceed ex-parte in this matter.
> On the strength of the affidavit filed in support of the application, I am satisfied that the respondent is now a trespasser in the property C948 and C949 situated at Anse Louis, Mahé. Accordingly, I hereby order the Respondent to vacate the said property on or before 30 September 2010, failing which I direct the Registrar of the Supreme Court to issue a writ habere facias possesionem to evict the respondent from the premises.
> In the interest of justice I direct the Registrar of the Supreme Court to forward a copy of this order to the respondent forthwith.

It is against this order that 5 grounds of appeal have been filed which in effect raise only two issues, one procedural namely should the judge have proceeded ex parte in hearing the application and the other on the substantive issues of whether the writ should have been granted given the averments in the affidavit. However at the hearing both counsel raised some preliminary but important procedural matters which this Court has to address.

Mr Derjacques for the respondent argues that since the appellant had not filed his heads of argument in sufficient time pursuant to rule 24(i) (sic) of the Seychelles Court of Appeal Rules, the appeal is deemed withdrawn. Mr Hoareau explained that his heads of argument had been filed on Friday 30 March 2012 on the respondent's previous counsel as he was ignorant of the fact that the respondent had changed counsel. According to Mr Derjacques this was in any case too late.

It would appear that the arguments of Mr Derjacques were in relation to rule 24(2)(i) of the Seychelles Court of Appeal Rules which states:

> Where at the date fixed for hearing of the appeal the appellant has not lodged heads of argument in terms of this rule, the appeal shall be deemed to be abandoned and shall accordingly be struck out unless the Court otherwise directs on good cause.

The date for hearing the appeal was fixed for 4 April and by that date both counsel had lodged the heads of argument complained of. It is true however that rule 24(1) makes provisions for parties to lodge copies of heads of arguments within two months from the date of service of the record. In this case the records were not served on parties even within two months of the date set for hearing. There was therefore also fault on the part of the Registry. In any case on the date of hearing all heads of arguments had been submitted and counsel for the appellant submitted that he had served the heads on previous counsel for the respondent. The respondent's new counsel also had a duty to inform counsel for the appellant that he was now representing the respondent. In view of these shortcomings by all and sundry we exercise our discretion under rule 26 and grant the extension of time.

Mr Hoareau also raised an objection at the appeal in relation to the affidavit filed by counsel in support of the application for the writ. He claims that since the affidavit is sworn before counsel who also signs the application for the writ, it is contrary to the

rules of evidence and procedure. As we have recently stated (*Poonoo v Attorney-General* (2011) SLR 423) an affidavit is evidence and it is indeed trite law that counsel cannot also be a witness in the case of his client. It is also ethically unacceptable. The Seychelles Code of Civil Procedure is silent on the matter but we are supported by the comment in the White Book explaining the origin of the rule (vide *Supreme Court Practice 1991* Order 41 rule 8). However, in this case the appellant's affidavit is also irregular in that it is attested by a partner of counsel, who appeared for the appellant in the Supreme Court - vide the same order and rule of the White Book -

> ... no affidavit shall be sufficient if sworn before the solicitor of the party on whose behalf the affidavit is to be used or before any agent, partner of clerk of that solicitor.

In some common law countries like Canada this rule has been abandoned and a lawyer can act as oath taker of his own client's affidavit. The White Book has of course been updated and we have tried to ascertain whether any significant change to this rule has occurred. The 2010 edition does indeed show an update of the rule in the practice directions but it only supports the traditional approach vide Practice Direction 9.2 in Volume1 at page 914 – **"**an affidavit must be sworn before a person independent of the parties or their representatives".

In the Court of Appeal case of *Re Doris Louis and Constitutional Appointment Authority* (SCA 26 of 2007), the deponent's name and signature did not appear on an affidavit which had nevertheless been attested to. The Court found the document did not constitute an affidavit and that the motion before the Court was not supported by affidavit and therefore invalid. In the recent Supreme Court case of *Church v Boniface* (2011) SLR 260 in a case on all fours with the present, the Chief Justice found that -

> This practice of an attorney acting for a party accepting to swear an affidavit is clearly contrary to the law of this land and ought to stop. For my part I shall not encourage it.

He also dismissed the application which he found unsupported by the irregular affidavit.

We are unable to find fault with the reasoning of both the Supreme Court and the Court of Appeal in such cases and therefore feel bound to follow their approach. Both the application by counsel for a writ habere and the defence to the writ are clearly unsupported as the affidavits are irregular. They are therefore invalid. We therefore allow this appeal and quash the decision of Judge Karunakaran.

SERRET v SERRET

MacGregor P, Fernando, Twomey JJ
13 April 2012 Court of Appeal 20/2010

Matrimonial property

The appellant appealed orders made in relation to the division of matrimonial property. She argued the judge had erred in law by not properly considering the whole evidence.

JUDGMENT Appeal allowed. Shares of the matrimonial property assessed at 55% for the appellant and 45% for the respondent. Respondent given the first option to purchase the appellant's share.

HELD

1 Where the evidence is equivocal in terms of contributions to the family home (monetary and in kind), the court will resort to the documentary evidence and principles of law.
2 Where the property is in joint names, the court will presume that it was intended that each party would be entitled to a half share in the matrimonial property (art 815 of the Civil Code).
3 The court can consider the availability of housing for the parties' minor children under s 20(g) of the Matrimonial Causes Act.

Legislation
Civil Code, art 815
Matrimonial Causes Act, s 20(g)

Cases
Charles v Charles SCA 1/2003, LC 248
Edmond v Edmond (unreported) SCA 2/1996
Florentine v Florentine (1990) SLR 141

N Gabriel for the appellant
W Herminie for the respondent

Judgment delivered on 13 April 2012

Before MacGregor P, Fernando, Twomey JJ

TWOMEY J:

A long relationship and marriage between Marjorie and Marcel Serret culminated after a number of years into its break up and the bitterest of battles, with both parties completely entrenched and unwilling to settle matters in relation to their matrimonial home amicably. They had lived together for a number of years, were formally married on 6 October 1992 and divorced on 17 May 2007. They have three children,

two are grown up and have set up homes of their own, the youngest only 12, is currently living with her mother, the appellant.

In July 2010 after a protracted court case over the division of matrimonial property pursuant to the Matrimonial Causes Act 1992, the trial judge Bernadin Renaud made the following decision and orders:

> In the final analysis of the matrimonial property between the parties I hereby make the following orders:
> 1. Taking into consideration all the evidence of the parties before this Court I find that the contribution of Mrs Serret towards the matrimonial asset is adjudged to be 40% of the market value thereof.
> 2. Considering the trajectory as to how the house and property were acquired over the years, it is my judgment that it is Mr Serret who should in the first instance be allocated the whole property parcel S3451.
> 3. Mr Serret has to pay Mrs Serret R 178,000 being 40% of the value of the property which is R 445,000 within 6 months from the date of this judgment.
> 4. Pending the payment of the said amount by Mr Serret, Mrs Serret shall occupy the property.

The rest of the Judge's orders relate to the consideration of what should happen in the event that Mr Serret was unable to pay the said amount to Mrs Serret. Dissatisfied with this decision the appellant, Marjorie Serret appealed on the grounds that the Judge had erred in law by not properly considering the whole evidence before him, in particular the evidence she had adduced. She also contends that the Judge was wrong in allocating a 60% share to the respondent and had failed to take into account that she had contributed much more than her husband because of her earning capacity and that given their present economic status her husband was in a much better position to build a new house.

In the intervening period between the decision of the Supreme Court and this appeal, the respondent's attorney wrote to the appellant advising her that a cheque of R 178,000 had been prepared and was ready for collection, and after receiving the payment she should vacate the matrimonial home. She did not collect the cheque but she was ejected from the family home.

Further, it appears from the court record that different battles have raged between the parties and their relatives both in the Supreme Court and the Family Tribunal, indicative of the extremely volatile situation between them. We are informed that the present status is such that the respondent resides in the matrimonial home and the appellant by her account is an errant resident of homes of friends.

In his submissions Mr Gabriel for the appellant argues that the trial judge based his findings purely in terms of monetary contributions to the matrimonial home. He contends that there was no value put on the appellant's love, nurturing and care for the family. He also argues that no reliance should be placed on the fact that the original house and property were transferred to the parties solely because of the respondent's employment with the Seychelles People's Defence Forces. Rather he points out, the house was allocated to the two parties because of the fact that the

appellant was pregnant at the time and the army wanted to provide a family home for one of their soldiers and his family. He also emphasizes that during a period of three years when the respondent was injured, the appellant single-handedly supported the respondent and the family.

Mr Herminie for the respondent argues that the decision of the trial judge should not be interfered with as he had ample opportunity to consider all the evidence adduced and had the opportunity to observe the demeanour of the parties. He adds that in subsequent years the appellant has paid off all arrears due on the mortgage of the house and has met the monthly payments sometimes by having to work two jobs. He emphasized his client's attachment to the house through his dedication and toil for it. He points out that the appellant's active membership of the Jehovah's Witnesses took her away from her duties, deprived him of the love, affection and care normally expected of a wife. He states that he had to cook, clean, wash and iron his own shirts.

We have studied the evidence on record and note that both parties have contributed to this matrimonial home. In our view the evidence is equivocal in terms of the parties' shares in the home. There was input from each of them both in monetary terms and in kind, bearing in mind that they both worked at different times in different jobs and also in self-employment. The practice of this Court where the evidence is equivocal in terms of contributions to the family home has been to resort to the documentary evidence and principles of law. As the title deeds clearly demonstrate that the property in question is in joint names, and by operation of article 815 of the Civil Code of Seychelles, and relying on previous authorities (namely *Florentine v Florentine* (1990) SLR 141, *Edmond v Edmond* SCA 2/1996 and *Charles v Charles* SCA 1/2003) we presume that it was intended that each party would be entitled to a half share in the matrimonial property.

In considering how to practically give effect to these shares we have given anxious thought to the possibility of dividing Parcel S3451 into two. It would certainly be big enough given the fact that it comprises 1,471 square meters and has two buildings, the matrimonial home and a bakery cum shop standing on it. However, having acquainted ourselves with the ongoing volatile relationship between the parties we have hastily disabused ourselves of that option. It would be impossible to divide the land and place the parties in such close proximity to each other without inviting further dire consequences.

We are also of the view, given the respondent's emotional and familial attachment to the village of Anse Boileau and the house and the fact that he has been in exclusive occupation of the matrimonial home for a considerable time now, that he should have first option to buy out the appellant's share.

There is yet another matter which troubles us. We find that there is a minor child of the parties, presently aged 12 for whom no consideration was made when the matrimonial property was settled - vide section 20(g) of the Matrimonial Causes 1992. The mother was granted custody of this child. She is not in the matrimonial home and we are concerned about both their access to alternative housing.

We realise that a half share in the house valued at R 222,500 (R 445,000 ÷ 2) may not fetch very much given the current housing market. With this in mind we further enhance the appellant's share in the matrimonial home to 55%, hence R 244,750. We know that this is an extra R 66,750 that the respondent will have to find over and above the amount already assessed by the judge but we feel that he is wholly compensated by the possibility of exclusive ownership and final closure of this matter.

We therefore assess the shares of the parties in the matrimonial property at 55% for the appellant and 45% for the respondent. We give the respondent first option to purchase the share of the appellant within three months of the date of this judgment failing which the option shall revert to the appellant on the same terms. If neither party within 6 months hereof succeed in buying out the other party's share the property shall be sold on the open market and each party will receive equal shares from the proceeds of the sale.

We order accordingly but make no additional order as to costs.

MOULINIE v GOVERNMENT OF SEYCHELLES

Egonda-Ntende CJ, Burhan, Dodin JJ
8 May 2012 Constitutional Court 11/2011

Constitution – Compulsory acquisition of land - Redress

The petitioner sought a declaration that the decision of the Government not to return land that had been compulsorily acquired is a violation of the petitioner's constitutional right. The petitioner made an application under s 14(1) in Schedule 7 part 3 of the Constitution for redress. He negotiated with the government for the return of all properties that had been compulsorily acquired but which had not been developed, and for monetary compensation for land that had been sold to third parties. The negotiations ended with the government making an offer of R 4,800,000 as total compensation less the sum initially paid. The petitioner rejected that offer.

JUDGMENT Petition granted. Order for the return of land to the petitioner and compensation for the portions that had been transferred to third parties.

HELD

1 The four options for redress under s 14(1) in Schedule 7 part 3 of the Constitution for compulsorily acquired land must be considered in order by the Government. The Government cannot decide on option 4 and tell the applicant he or she is entitled only to monetary compensation. The options are -
   a. Following *Atkinson v Government of Seychelles & ors* SCA 1/2007, it is the duty of the Government to transfer land back to the person it was acquired from where the land has not been developed or where there is no Government plan to develop it;
   b. If there is a Government plan to develop the land, the Government is obliged to present the person from whom it acquired the land with the government plan. It is then for that person to satisfy the Government that he or she is able and willing to implement that plan or has a similar plan. In that event the Government should transfer that land back to that person;
   c. If the land cannot be transferred back, the Government is obliged to offer another parcel of land of corresponding value as full compensation for the land acquired; and
   d. If that is not possible, the Government may consider, as a fourth option, monetary compensation.
2 Where the land has not been developed between the date of compulsory acquisition and date of receipt of the application for return under s 14(1)(a) in Schedule 7 part 3 of the Constitution, the land must be returned to the former owner. 'Development' does not include development carried out by the former owner prior to compulsory acquisition (departing from *Lise du Boil v Government of Seychelles and Ors* SCC 5/1996).
3 Loss and damages must be specifically proved and claimed.
4 Section 14(3) in Schedule 7 part 3 of the Constitution provides that interest cannot be awarded on claims under this section. A delay in resolving the matter may be a special circumstance where the Government may consider paying interest as it thinks just.

5 (per Dodin J) The basis of compensation under s 14(2) in Schedule 7 part 3 of the Constitution should be the market value of the land at the time the Constitution came into force, unless otherwise agreed.
6 (per Dodin J) Holding a property without doing anything extra to improve or change it does not amount to development.

Legislation
Constitution, art 26, Sch 7 (pt 3, s 14)
Land Registration Act, s 75
Lands Acquisition Act

Cases
Atkinson v Government of Seychelles (unreported) SCA 1/2007, CM III 56
Lise du Boil v Government of Seychelles (unreported) SCC 5/1996

Phillip Boulle SC for the petitioner
Alexandra Madeline for the respondents

Judgment delivered on 8 May 2012

Before Egonda-Ntende CJ, Burhan, Dodin JJ

EGONDA-NTENDE CJ:

This petition is brought by Mr Charles Alfred Paul Moulinie. He is the executor to the estate of the late Michel Paul Moulinie. Prior to his death the deceased was the owner of the following land. Parcel no PR13 situated at Cote D'Or on Praslin. This was approximately 76.5 acres of land. Parcel no V5320 situated at Les Mamelles, approximately 0.97 acres of land. Parcel no V5317 situated at Les Mamelles. Parcel no V5318 situated at Les Mamelles and lastly parcel no V5319 on Albert Street in Victoria. The Government of Seychelles on 1 September 1980 and on 10 December 1987 acquired the said properties compulsorily.

The late Paul Moulinie made an application under section 14(1) of Part 3 of Schedule 7 of the Constitution to exercise his constitutional rights of redress thereunder. The late Paul Moulinie and now his executor Charles Alfred Paul Moulinie negotiated with the Government for the return of all the properties that had been compulsorily acquired but had not been developed and negotiated for monetary compensation for land that had been sold to third parties. The negotiations were protracted and only ended quite recently with an offer from the Government of Seychelles to the petitioner of R 4,800,000 as total compensation for all the properties compulsorily acquired less the sum that was initially paid.

The petitioner rejected the Government position and asserts that it has a right under section 14(1)(a) of Schedule 7 Part 3 of the Constitution to the return of all land that has not been developed by the Government and there was no government plan to develop it. The petitioner contends that the failure of the Government to transfer this land back to the petitioner is a contravention of the petitioner's constitutional rights under the said provisions. The petitioner therefore claims a declaration that the

decision of the Government not to return the said land to the petitioner is a violation of the petitioner's constitutional right.

The petitioner prays that the respondent be ordered to transfer parcels number V5318, V5319 and V5320 and unsold portions of PR13 within one month of the judgment of this court and failing which the court should order the Land Registrar to effect a transfer under section 75 of the Land Registration Act.

The petitioner prays that this court orders the respondent to pay to the petitioner full monetary compensation for the properties V5317 and part of PR13 sold by the Government and for the loss and damage suffered by the petitioner.

The petitioner prays to this court to order the respondent to pay to the petitioner interest at the rate of 4% compound interest per annum on all monetary compensation with effect from January 1995.

In reply to the petition the respondent asserts that notwithstanding that Mr Paul Moulinie has been compensated under the Land Acquisition Act 1977 in good faith and within the spirit of the Constitution, respondent no 1 accepted the application made on behalf of Mr Moulinie for review. The respondents accept that negotiations have been ongoing in good faith with a view to providing monetary compensation to the petitioner in respect of all properties as at June 1993 in terms of section 14(2) of Part 3, Schedule 7 to the Constitution.

The respondents contend that the petitioner was not deprived of the said properties for 28 years as claimed, since compensation had been paid to Mr Moulinie for the properties in question. In answer to the claim for return of the properties, the respondents state that as of the date of receipt of the application made under paragraph 2 of the petition, the properties could not be transferred back to the petitioner as they were developed and there were plans to continue developing those that were partly developed.

It is claimed that parcel V5317 was subdivided into parcels V7121, V7122 and V7123 for subsequent sale to housing applicants. Property V5318 was being used for accommodation purposes for government expatriate workers. Property V5319 was transferred to the Seychelles Industrial Development Corporation in 1989 for a redevelopment project. And property V5320 was used as a multipurpose court for use by the community. Property PR13 was subdivided and part of it was transferred to the Seychelles Housing Development Company for housing development.

The respondents contend that the petitioner has a right to full monetary compensation for the acquired properties, calculated at the market value of the said properties as at June 1993 when the Constitution came into force less the sum of R1.95 million paid under the Land Acquisition Act 1977 in respect of the said properties. The respondents therefore ask this court to declare that the petitioner is entitled to monetary compensation calculated at the market value of the properties as at June 1993 less the sum paid to him.

The facts of this case are largely not in dispute. I start with PR13, the land that is found on the island of Praslin. Counsel for the respondent Ms Alexandra Madeleine

conceded in effect the plaintiff's claim and abandoned the position that had been set out in the reply to the petition. She indicated to the court that the respondents are willing and ready to give back the undeveloped remainder of PR13 and are willing to compensate the petitioner in respect of the plots of land that were carved out of PR13 and sold to third parties. As this is conceded I would have no hesitation in entering judgment for the petitioner in those terms as conceded by counsel for the respondents.

The rest of the claim remains with regard to parcel V5317, parcel V5318, parcel V5319 and parcel V5320. It is not contested that the land in question belongs to the petitioner and that they were compulsorily acquired by the Government. Parcel V5317 has been subdivided into three plots V7121, V7122 and V7123. The respondents contend that this was done for subsequent sale to housing applicants. However, it has not been disclosed whether at this time or at the time this petition was lodged sale to housing applicants had or has occurred. Notwithstanding the foregoing the petitioner claims only its value as he believes it has been transferred to third parties. I shall act on the premise that this property has been transferred to third parties.

Parcel V5318 was a developed property with a block of flats at the time of compulsory acquisition. The government has always used it and continues to use it now for accommodation purposes for government expatriate workers. Parcel V5319 - it is contended for the respondents that it was transferred to the Seychelles Industrial Development Corporation in 1989 for redevelopment. It has been contended for the petitioner that actually the Seychelles Industrial Development Corporation or rather its successor in title later re-conveyed this property back to the Government. A certified copy of the transfer was availed to the court during the hearing. Mr Boulle submitted that this was evidence of the bad faith on the part of the Government as it did so merely to attempt and put this property beyond the reach of the petitioner.

The transfer is dated 23 July 2008 and there is certification by the Registrar General of the said transfer. It is clear that at the time this petition was presented this parcel had been transferred to and was in the name of the Government. Clearly the affidavit of the respondent on this matter at the very least failed to convey to the Court the actual status quo by failing to disclose the subsequent transfer back to the Government.

Parcel V5320 remains undeveloped and it is contended that it is used as a multipurpose court for use by the community.

At the hearing of this petition, counsel for the petitioner Mr Boulle submitted that the law in this jurisdiction is very clear and that it is now governed by the Court of Appeal decision in the case of *John Atkinson v Government of Seychelles and Attorney-General* SCA 1 of 2007. He submitted that the Court of Appeal has held that on receipt of an application under section 14 of Part 3 of Schedule 7 of the Constitution, the Government is obliged to negotiate with a view to returning the land in question where such land has not been developed and where it has no plans to develop it. He submitted that in the current instance, the Government has not developed the

land in issue and therefore prayed that it be ordered to transfer the land in question back to the petitioner.

Counsel for the respondent submitted that the case of *Atkinson v Government of Seychelles* does not apply in this particular instance. She submitted that what the petitioner is entitled to with regard to the land on Mahe is a claim for compensation and that the Government is willing to compensate the petitioner the full market value of the said land less the amount paid to the petitioner as compensation earlier on.

At the commencement of my discussion of this matter I must bring into view section 14 of Part 3 of Schedule 7 of the Constitution.

> (1) The State undertakes to continue to consider all applications made during the period of 12 months from the date of coming into force of this Constitution by a person whose land was compulsory acquired under the Lands Acquisition Act 1977 during the period starting June 1977 and ending on the date of coming into force of this Constitution and to negotiate in good faith with the person with a view to –
> (a) where on the date of receipt of the application the land had not been developed or there is no government plan to develop it, transferring back the land to the person.
> (b) where there is a government plan to develop the land and the person from whom the land was acquired satisfies the government that the person will implement the plan or a similar plan transferring the land back to the person.
> (c) where the land cannot be transferred back under sub paragraph (a) or sub paragraph (b)—
> (i)As full compensation for the land acquired transferring to the person another parcel of land of corresponding value to the land acquired;
> (ii)Paying the person full monetary compensation for the land acquired; or
> (iii) As full compensation for the land acquired devising a scheme of combination combining items (i) and items (ii) up to the value of the land acquired.
> (2) For the purposes of sub paragraph (1) the value of the land acquired shall be the market value of the land at the time of coming into force of this Constitution or such other value as may be agreed to between the Government and the person whose land has been acquired.
> (3) No interest on compensation paid under this paragraph shall be due in respect of the said land acquired but government may in special circumstances pay such interest as it think just in circumstances.
> (4) Where the person eligible to make an application or to receive compensation under this paragraph is dead the application may be made or the compensation may be paid to the legal representative of that person.

It appears to me that it is clear that the duty of the Government, following the decision of the Court of Appeal in *Atkinson v Government of Seychelles*, where the Government is in receipt of an application for land that has not been developed or where there is no government plan to develop it, is to transfer that land back to the person it was acquired from.

The Court of Appeal in *Atkinson v Government of Seychelles* has stated -

> [12] First, it is trite law that in all situations where a statutory or constitutional provision gives any discretion as "may" "as the State deems fit" "As the State thinks fit" "decide in its best judgment". As much as we read paragraph 14(1)(a), we find no such or similar language used. Second, we do not know how the Court of Appeal read that the paragraph created "primary obligations" and "Secondary obligations." These terms have not been used. As much as we try to find the reasoning behind such re writing of the text, we find none. The text is plain. It is a canon of interpretation that where the text is plain full effect should be given to the intention of the legislator. The clear and plain language of paragraph 14(1)(a) did not lead to any absurdity and required no judicial acrobatics but the simple application.
>
> [13] Rather than reading in the section any discretionary power, we read, instead, the very ominous and telling term "undertakes" in the very first three words: "The State undertakes to continue to consider, …to negotiate in good faith…with a view to transferring."

Secondly, if there is a government plan to develop that land then it appears that by virtue of section 14(1)(b), the Government is obliged to present the person it acquired the land from with the Government plan for that person to be able to satisfy the Government that he is able and willing to implement that plan or he has a similar plan, and transfer that land back to that person.

The third option under paragraph (c) is where land cannot be transferred back. The Government is obliged to offer, as full compensation for the land acquired, another parcel of land of corresponding value to that person. If that is not possible then the Government may consider, as a fourth option, full monetary compensation for the land acquired or full compensation for the land acquired devising a scheme of compensation that combines (c)(i) and (c)(ii). What the Government has done in this instance is to ignore options (1), (2) and (3), which it was obliged to consider first in priority before jumping to option 4 to tell the applicant that he is entitled to only monetary compensation.

The affidavit of Mr Raymond F Chang Tave and in particular paragraph 10 contends that this land cannot be returned because it is developed. The question that must be determined is what is the development referred to in section 14?

This question was considered in *Lise du Boil v Government of Seychelles and others* Constitutional Case No 5 of 1996. The Constitutional Court held that as long as the property was developed it was not available for return to the original owner regardless of the person who had developed the property.

My view is somewhat different. Certainly the section does not identify who carried out the development. It just states, 'where on the date of the receipt of the application the *land has not been developed* or there is no government plan to develop it.' [Emphasis is mine.] However the words 'has not been developed' can only be meant to refer to development carried out subsequent to the compulsory acquisition and not development carried out by the former owner prior to compulsory acquisition. The words import some kind of action carried out in the period prior to the application for return being submitted and I would infer by necessary implication the start date for that period must be the date of acquisition. If the meaning intended

is simply whether a property is developed or not it would have been sufficient to state, "Where on the date of the receipt of the application the land *is* developed, or…" There would be no need to use the expression 'has not been developed' which imports action in the immediate past.

It appears to me that the objective of these provisions was to address an injustice that had occurred in the past. The intent of the constituent assembly must have been to provide for a return of all land which had remained in the same state as at the time of the compulsory acquisition, hence the expression, 'has not been developed.'

With respect I would depart from the reasoning and holding of this court in *Lise du Boil v Government of Seychelles and others* Constitutional Case No. 5 of 1996 and would hold that where land has not been developed between the date of compulsory acquisition and date of receipt of the application for return under section 14(1)(a), such land must be returned to the former owner. Property V5318 was not developed between the date of compulsory acquisition and at the time of receipt of the application for return. It is available therefore for return to the former owner.

Property V5319 may have been transferred to the Seychelles Industrial Development Corporation in 1989 but it was re-conveyed back to the Government in 2008. In any case, once it is in government ownership then the Government is in a position to return it. No evidence has been adduced that this property has been developed or in any case was developed at the time of receipt of the application of the petitioner.

Property V5320 was used as a multi-purpose court for use by the community. Use is not one of the conditions for non-return. Development is the condition and clearly no evidence has been shown that there has been any development of this property. Property V5320 remains available for return.

Save for the developed land, the respondents have not assigned any reason why it is not possible to return back parcels V5318, V5319 and V5320, other than the claim that they are willing to pay full monetary compensation and that is the obligation of the State. Clearly that is not the law. The respondents had to show that the options which are in priority, in my view, were not available in this particular instance, leaving it with no choice but compensation by payment of monetary value of the properties in question.

The Government was obliged to consider the option of return of undeveloped land which the Government had plans to develop. The Government had to make known to the applicant the Government plan or plans for development, and it would be up to the applicant to satisfy the Government that he could effect that plan or plans; or the applicant had a similar plan. The Government did not do so.

Thirdly in event that the land was not available for return on account of being developed, the Government had the option to then consider compensation by transferring to the petitioner land of a corresponding value. In event of all the foregoing not being available or possible, the Government would then have to offer either a combination of monetary compensation and return of some land or monetary compensation alone. The Government did not do so save to offer monetary

compensation. This was in breach of the petitioner's constitutional rights under section 14, Part 3 of Schedule 7 of the Constitution.

In the result I am satisfied that the petitioner has made out his case and I would order the return of properties V5318, V5319 and V5320 to the petitioner.

The petitioner has claimed the value of parcel V5317 as having been sold to another person and has claimed R 600,000. The petitioner has further claimed a sum of R 9 million for part of Parcel PR13 that was sold, bringing the total claim for monetary compensation to R 9,600,000. The question of monetary value is one that must be proved by evidence. What is the evidence before us?

There is an affidavit by Mr Boulle in which he claims that those sums are the value of the said piece of land. He does not indicate in his affidavit that he instructed a land valuer to value the land who has come up with that value. Nor has he attached to his affidavit a copy of the valuation report that supports such claim. Attached to his affidavit are a series of correspondence between the Government and his clients. Subsequently the petitioner filed a document or a batch of documents on 30 January 2012 and stated that the petitioner will rely on certain documents at the hearing of the application. That document contains an apparent report by a Quantity Surveyor which among other things purports to give the value of the property in question in the manner or in the sums that the plaintiff has claimed.

Firstly this is not the proper way of adducing evidence. Evidence must be adduced either by affidavit or oral testimony. It is not enough to put a batch of documents on the court file and be content that you have proved your point. I am satisfied that the petitioner has failed to prove by way of evidence the value of the land in question. The claim for R 9.6 million is unsupported by evidence on record.

The plaintiff has also claimed loss of rent for buildings in Victoria on parcel V5319 for 15 years from 1995 to 2009 at R 15,000 per month up to a total of R 2,700,000 and at paragraph 12(ii) he has claimed rent for 6 blocks of flats for 15 years for a total of R 3,780,000. He has adjusted the said claim by 100% on account of inflation doubling the claim to R 12,960,000.

This court has the jurisdiction to consider loss and damages a petitioner may have suffered and to be able to grant redress but the loss and damages claimed must not only be specifically claimed. The loss and damage must be specifically proved. A claimant cannot just throw heads of damage to the court and say 'This is what I have lost. Give it to me'. How does he for instance arrive at a claim of R 15,000 per month or R 20,000? Was that the market rate? Is that the going rate in that area? And has it been so since 1995 to 2009 for 15 years unchanged? In my view the petitioner has failed to adduce evidence to support this claim. The claim on that account fails.

The petitioner claimed interest on all monetary compensation at the rate of 4% per annum from 1995. This is contrary to section 14(3) of Schedule 7 of the Constitution which provides -

> No interest on compensation paid under this paragraph shall be due in respect of the land acquired but Government may, in special circumstances, pay such interest as it thinks just in the circumstances.

This court cannot order the payment of interest in light of the foregoing provisions of the law. However given the delay in resolving this matter, part of which delay can only lie with the Government, the Government may well consider doing so, as it thinks just.

I would therefore enter judgment for the petitioner as follows:

(a) the return of the remainder of PR13 to the petitioner and order compensation for the portions that have been transferred to third parties;
(b) order the return of parcels V5318, V5319 and V5320 to the petitioner;
(c) order monetary compensation for parcel V5317 to be agreed to by all the parties or in event of disagreement the parties would appoint one valuer each and the two valuers would appoint a third to chair the team and the three of them would asses by majority vote the value of the property in question;
(d) monetary compensation shall be at the market rate as at the time of the coming into force of the Constitution or such other sum as the parties may agree upon;
(e) dismiss the claim for interest; and
(f) dismiss the claim for loss and damages.

As Burhan and Dodin JJ agree, judgment is entered for the petitioner as set out above with costs.

DODIN J:

I have had the opportunity to read the draft judgment of the Chief Justice and for this reason I shall not repeat in my judgment the pleadings, facts and submissions which have been extensively set out in the Chief Justice's judgment.

I also concur with the judgment of the Chief Justice for the reasons contained in my judgment.

I reproduce here two relevant provisions of the Constitution, namely article 26 and paragraph 14 of Part 3 of Schedule 7, both of which this petition refers to.

Article 26 of the Constitution states:

(1) Every person has a right to property and for the purpose of this Article this right includes the right to acquire, own, peacefully enjoy and dispose of property either individually or in association with others.
(2) The exercise of the right under clause (1) may be subject to such limitations as may be prescribed by law and necessary in a democratic society –
    (a) in the public interest;

(b) for the enforcement of an order or judgment of a court in civil or criminal proceedings;
(c) in satisfaction of any penalty, tax, rate, duty or due;
(d) in the case of property reasonably suspected of being acquired by the proceeds of drug trafficking or serious crime;
(e) in respect of animals found trespassing or straying;
(f) in consequence of a law with respect to limitation of actions or acquisitive prescription;
(g) with respect to property of citizens of a country at war with Seychelles;
(h) with regard to the administration of the property of persons adjudged bankrupt or of persons who have died or of persons under legal incapacity; or
(i) for vesting in the Republic of the ownership of underground water or unextracted oil or minerals of any kind or description.

(3) A law shall not provide for the compulsory acquisition or taking of possession of any property by the state unless-
(a) reasonable notice of the intention to compulsorily acquire or take possession of the property and of the purpose of the intended acquisition or taking of possession are given to persons having interest or right over the property;
(b) the compulsory acquisition or taking of possession is necessary in the public interest for the development or utilisation of the property to promote public welfare or benefit or for public defence, safety, order, morality or health or for town and country planning;
(c) there is reasonable justification for causing any hardship that may result to any person who has an interest in or over the property;
(d) the state pays prompt and full compensation for the property;
(e) any person who has interest or right over the property has a right access to the Supreme Court whether direct or an appeal from any other authority for the determination of the interest or right, the legality of acquisition or taking of possession of the property, the amount of compensation payable to the person and for the purpose of obtaining prompt payment of compensation.

(4) Where the property acquired by the State under this Article is not used, within a reasonable time, for the purpose for which it was acquired, the state shall give, to the person who owned it immediately before the acquisition of the property, an option to buy the property.

(5) A law imposing any restriction on the acquisition or disposal of property by a person who is not a citizen of Seychelles shall not be held to be in consistent with clause (1).

Paragraph 14 of Part 3 of Schedule 7 of the Constitution states:

(1) The State undertakes to continue to consider all applications made during the period of 12 months from the date of coming into force of this Constitution by a person whose land was compulsory acquired under the Lands Acquisition Act 1977 during the period starting June 1977 and ending on the date of coming into force of this Constitution and to negotiate in good faith with the person with a view to –
(a) where on the date of receipt of the application the land had not been developed or there is no government plan to develop it, transferring back the land to the person.
(b) where there is a government plan to develop the land and the person from whom the land was acquired satisfies the government that the

person will implement the plan or a similar plan transferring the land back to the person.

(c) where the land cannot be transferred back under sub paragraph (a) or sub paragraph (b)—

(i) As full compensation for the land acquired transferring to the person another parcel of land of corresponding value to the land acquired;

(ii) Paying the person full monetary compensation for the land acquired; or

(iii) As full compensation for the land acquired devising a scheme of combination combining items (i) and items (ii) up to the value of the land acquired.

(2) For the purposes of sub paragraph (1) the value of the land acquired shall be the market value of the land at the time of coming into force of this Constitution or such other value as may be agreed to between the Government and the person whose land has been acquired.

(3) No interest on compensation paid under this paragraph shall be due in respect of the said land acquired but government may in special circumstances pay such interest as it think just in circumstances.

(4) Where the person eligible to make an application or to receive compensation under this paragraph is dead the application may be made or the compensation may be paid to the legal representative of that person.

It is not in dispute that the acquisition of the petitioner's properties and the negotiations for their return or for compensation fall within the ambit of the provisions of paragraph 14 of Part 3 of Schedule 7 of the Constitution. Counsel for the respondents has indeed admitted that the first respondent is ready and willing to return the land that has not been developed and that negotiations in good faith have been ongoing with a view to settle the matter in accordance with the provisions of the Constitution. However, counsel for the respondents is restricting the concession to which land the first respondent is willing to return to only a portion of parcel PR13 and maintains that the other parcels, namely, V5317, V5318, V5319 and V5320 should not be returned and compensation calculated at the 1993 rate should be paid.

With regard to parcel PR13, there is agreement that the undeveloped portion should be returned and appropriate compensation would be paid for the portion that cannot be returned. As for parcel V5317, it has been virtually agreed by both sides that it cannot be returned and compensation should be paid. The only disagreement with regards to these two parcels is the rate at which compensation should be paid.

Sub-paragraph 2 of paragraph 14 of Part 3 of Schedule 7 states that for the purpose of calculating compensation –

> the value of the land acquired shall be the market value of the land at the time of coming into force of this Constitution or such other value as may be agreed to between the Government and the person whose land has been acquired.

The problem here is what happens when one side maintains the first limb of the provision should apply and the other side maintains the second limb of this provision should apply. Should the first limb apply, then compensation should be calculated at the value of the land at the coming into force of the Constitution in 1993 as argued

by counsel for the respondents. On the other hand counsel for the petitioner argued that compensation should be calculated at today's market value.

Whilst this Court is being called upon to decide on the amount of compensation, neither party has brought reliable evidence to prove to this court why compensation should be paid on the basis of their respective arguments. Indeed this court has been left in ignorance of the process of the negotiations conducted prior to the petitioner filing this petition, which could have assisted this court in determining whether in the circumstances of this case it would be just and fair to apply the first or the second limb of sub-paragraph 2. A careful reading of sub-paragraph 2 of paragraph 14 of Part 3 of Schedule 7 in my view first and foremost place the market value of the property to be calculated as "shall be the market value of the land at the time of coming into force of this Constitution". In my considered view this should be the basis of the calculation of compensation unless otherwise agreed. In the absence of an alternative agreement, I must conclude that compensation for the above mentioned properties should be calculated as per its 1993 market value.

With regard to parcels V5318, V5319 and V5320, the submission of the respondent is that these parcels should not be returned because they have been developed or have been earmarked for future development. However, counsel for the respondent had great difficulty to define what type of development had taken place on these properties since they were acquired by the first respondent. At most, counsel argued that the first respondent has used one parcel which already had buildings on it to house expatriates and had transferred it back to the first respondent.

The term "development" is often used in the following combinations which are purely economic development, social or socio-economic development, the development of the region, town, village or city. In each case, development generally refers to progressive changes primarily in the economic, social or physical spheres. If the change is quantitative, it usually refers to economic growth. A qualitative change refers usually to the structural changes or changes in social status. Moreover, the social characteristics of development have long been full performance, assessed by the degree of improvement of a region.

Development always has a direction determined by the purpose or purposes of the system. If this direction is positive, then we speak of progress, if negative, we would speak of regression, or degradation. In other words, the nature of development always involves a certain goal or several goals that must have been met for the benefit of the community or the targeted group.

It is my considered opinion that holding onto a property without doing anything extra to improve or change it in terms of the exceptions allowed by article 26 does not amount to development in the true sense of the meaning of the provisions of the Constitution. I therefore cannot subscribe to the argument of counsel for the respondents that by simply transferring land or using it as it was acquired for certain purposes amount to development.

In applying the above reasoning it is evident that parcel V5318 has only been used for accommodation purposes for expatriates and nothing more has been carried out with respect to that plot of land. Parcel V5319 was transferred to SIDEC and then

transferred back to the first respondent without any activity having been carried out by the first respondent or SIDEC which can qualify as development. Parcel V5320 was used as a multi-purpose court for the community but nothing more. The petitioner is not averse to taking back the said parcel as it is and I am of the opinion that the multi-purpose court would not hamper any real future development of the parcel and has not significantly changed the nature of the property in terms of real development as anticipated by the provisions of the Constitution.

In such circumstances, I must conclude that with regard to parcels V5318, V5319 and V5320, the proper option that should be taken by the first respondent should be to return the properties to the petitioner. The issue of payment of compensation in lieu should not arise in respect of these parcels as compensation should only be considered if it is not possible to return acquired land due to the nature and extent of development which has been carried out on the land since acquisition.

I therefore enter judgment for the petitioner with the following orders:

(a) The first respondent shall return the remainder of parcel PR13 to the petitioner and shall pay compensation for the portions that have been transferred to third parties at its 1993 market value.
(b) Parcels V5318, V5319 and V5320 shall be returned to the petitioner.
(c) That monetary compensation for parcel V5317 shall be agreed to by all the parties or in the event of disagreement the parties would appoint one valuer each and the two valuers would appoint a third to chair the team and the three of them would assess by majority vote the value of the property in question at its 1993 market value.
(d) The claim for interest by the petitioner is dismissed.
(e) The claim for loss and damages is by the petitioner is dismissed.
(f) Costs are awarded to the petitioner.

CONSTANCE v LEGUIRE

Renaud J
18 May 2012 Supreme Court Civ 183/2007

Delict - Employment – Sexual harassment

The plaintiff claimed she was sexually harassed by a customer at the restaurant/hotel where she worked as a cleaner. This led to the termination of her employment when she refused to clean the customer's room. The plaintiff sought damages in delict against the customer and the owner and the manager of the restaurant.

JUDGMENT Awarded R 25,000 damages with interest and costs against the customer.

HELD

1 In normal circumstances an employer has a duty of care to provide its employee with a working environment which is free from sexual harassment. This duty must be viewed in relation to the type of work and the prevailing physical environment.
2 Employers and managers will not be liable for sexual harassment by customers where the sexual harassment is not known to and made with the connivance and condonation of the employer or manager.
3 Employers and managers cannot be held vicariously liable for sexual harassment committed by customers.

Legislation
Employment Act 1995

A Derjacques for the plaintiff
C Lucas for the defendants

Judgment delivered on 18 May 2012 by

RENAUD J:

This plaint was entered on 14 June 2007 whereby the plaintiff is seeking for a judgment ordering the defendants to jointly or in solido pay her the sum of R 95,000 with interest and costs.

The plaintiff was a kitchen cleaner and inhabitant of Belle Vue, La Digue, at all material times. She is married to one Mr Pierre Constance and has three children, namely, Nathaniel Constance aged 22 years; Prisca Constance aged 18 years and Kris Constance aged 12 years. The plaintiff was aged 38 years at the time of entering the plaint.

In their joint statement of defence the defendants averred that the duties of the plaintiff were also to work as room cleaner, yard cleaner and to do any other duties

assigned to her. Her duties were that of cleaner but not restricted to kitchen cleaning of the premises known as Tarosa.

The first defendant is a Mauritian national and was the football coach of the "La Passe" football club. He resided at Tarosa Restaurant at the material time.

The second defendant is the owner and director of the restaurant known as Restaurant Tarosa and was the employer of the plaintiff who was a kitchen cleaner at that restaurant.

The third defendant was the manager, employee and agent of the first defendant at Tarosa Restaurant and she supervised and operated the said restaurant. The third defendant averred that she is also assisted by the second defendant when he is on site and in attendance.

The plaintiff averred that during the first week of May 2007 and continuing up to 30 May 2007, the defendants committed a *faute* in law against her rendering the defendants liable in law to her. The particulars of the *faute* alleged by the plaintiff are:

1. First defendant sexually harassed plaintiff by touching her on her body and buttocks repeatedly at the said restaurant and in its rooms;
2. First defendant made sexually explicit statements and remarks to plaintiff during the course of her duties at the said restaurant;
3. First defendant followed plaintiff in the said restaurant and whilst plaintiff was cleaning rooms of the restaurant on several occasions;
4. Second defendant, despite complaints by plaintiff ordered plaintiff to clean first defendant's rooms;
5. Second defendant issued warnings and a termination letter on plaintiff attempting to force her to clean first defendant's rooms thereby exposing plaintiff to additional sexual harassment by first defendant despite plaintiff's complaints;
6. Second defendant failed and omitted to provide plaintiff with a safe working environment free from sexual harassment by first defendant;
7. Third defendant omitted and failed to act to protect plaintiff from sexual harassment by first defendant;
8. Third defendant failed to provide plaintiff with a safe working environment free from sexual harassment by first defendant and ordered plaintiff to enter and clean first defendant's rooms.

This averment and the particulars set out above are vehemently denied by the defendants in the joint statement of defence and put the plaintiff to strict proof.

The plaintiff also averred that she made several complaints of sexual harassment by the first defendant to Lance Corporal Leggaie of the Seychelles Police Force at La Passe, La Digue, and these complaints have been entered into the police occurrence book at the said police station.

The plaintiff also averred that she made several complaints of sexual harassment by the first defendant at the Ministry of Employment Office, at La Passe La Digue.

The defendants pleaded that the averments contained in the two paragraphs immediately above were not within the knowledge of the defendants until after the plaintiff had resigned from her post on 24 May 2007 and that the allegations of sexual harassment were made after May 2007 which in any event are denied.

The employment of the plaintiff by the second defendant was terminated on 30 May 2007 for her refusal to enter and clean the room of the first defendant at the said restaurant. This is denied by the defendants who averred that the plaintiff resigned by letter addressed to the second defendant dated 24 May 2007 for reasons other than that pleaded in the plaint.

For reasons set out in her plaint the plaintiff averred that she has been put to loss and damages which she particularized as follows:

(a)	Moral damages for humiliation, depression, anguish, psychological trauma	R70,000
(b)	Special damages for future loss as a result of loss of employment	R25,000
	TOTAL	R95,000

The defendants denied the above stated claims of the plaintiff and averred that the plaintiff suffered no loss or damage and was paid all benefits in terms of the Employment Act 1995, and the plaintiff is put to strict proof for all heads of claim including quantum.

At the hearing of this suit the plaintiff and her husband testified and adduced in evidence nine documents as exhibits.

The second and third defendants also testified and adduced in evidence seven documents as exhibits.

The first defendant who is a Mauritian national had since left the country and appeared by counsel and did not adduce evidence.

The Issues

The case of the plaintiff is that she was employed by the second defendant working under the direct supervision of the third defendant in the restaurant of the second defendant, at which restaurant there are rooms one of which was occupied by the first defendant who was a football coach of La Passe Football Club, of which the second defendant was the manager and during the course of her employment she was sexually harassed by the first defendant that led to the termination of her employment to her financial detriment. The plaintiff claims that she was not protected by her employer and immediate supervisor from the sexual harassments of the first defendant and that amounted to a fault on their part that made them liable in law to pay her damages.

1. Was there sexual harassment of the plaintiff by the first defendant?
2. If so, were these harassments known to and made with the connivance of the second and/or third defendants?

3. Are the second and/or third defendants liable for the sexual harassment of the plaintiff by the first defendant?
4. Does an employer have a duty of care to provide its employee with the working environment of a restaurant free from sexual harassment from its customers?

Findings

The evidence of the plaintiff that the first defendant sexually harassed her stands uncontradicted. The first defendant did not adduce any evidence to the contrary. There are two rooms to let upstairs at the Tarosa Restaurant which the plaintiff has to clean as part of her duties. The first defendant was the occupier of the room. On the second occasion that the plaintiff went to clean that room the first defendant started saying such words to her, as – *"*you have a big buttock*"; "*I love you and I would like to have a deal with you*".* She did not appreciate these at all because she has self-respect as a married woman with children. The first defendant touched her waist and buttock and held her and asked her if she was coming to work at night to make herself available to him at night. She was not satisfied with this. She went and explained to the third defendant very well what had happened and informed her that she will not go again to that room because of the harassment of the first defendant. The third defendant expressed her understanding of the situation and she was not asked to clean that room for about three days. The first defendant kept walking behind her to get her to clean his room again. On the fourth day the third defendant told the plaintiff that the second defendant had asked that she (the plaintiff) should clean the room of the first defendant. The plaintiff then talked to the second defendant on the phone and the latter informed the plaintiff that he is not interested in her complaint and the room must be cleaned. The plaintiff wrote to the second defendant a letter on 24 May 2007 (Exhibit P4). The second defendant answered the same day and suspended her employment **(**Exhibit P5**).** She however continued to work up to 28 May 2007 when her employment was terminated. The plaintiff felt depressed at the material time. As her husband was not in the country she complained to the police and L/Cpl Leggaie on 30 May 2007 took a statement (Exhibit P6) from her. She also complained to the Ministry of Employment on 24, 29 and 30 May 2007. She also sought medical help through a psychologist. She went back to work and the second defendant terminated her employment for refusing to clean the room.

The plaintiff joined the second defendant in the suit for the reason that the latter, being an employer who had a staff member in his employment who was working well, had never refused to do any work, was never absent from work, should when a situation as such arose have taken the plaintiff and the first defendant and talked to both of them in order to resolve the matter instead of sacking the plaintiff and failing to protect her.

The plaintiff joined the third defendant in the suit because she had informed the third defendant who was very close to her as her manageress and who showed understanding of her situation; thereafter she had turned against the plaintiff and insisted that she continue to clean the room of the first defendant. In the opinion of the plaintiff both the second and third defendants were not doing the right thing

knowing full well the behaviour of the first defendant, and that disturbed her mentally.

The plaintiff pursued her complaint for wrongful termination of employment against the second defendant and that culminated in her complaint being upheld and judgment given in her favour in the sum of R 54,615.

Conclusion

I conclude that the first defendant sexually harassed the plaintiff by making verbal sexual advances towards her and touching her waist and buttock when she was performing her duties in cleaning the room occupied by the first defendant situated on the premises of the second defendant which is managed by the third defendant.

On the first occasion that such harassment started the plaintiff cautioned the first defendant not to do so. On a second occasion the first defendant repeated the sexual harassment.

In the circumstances and for the reasons stated I find on a balance of probabilities that the plaintiff has proven her case against the first defendant in that the first defendant sexually harassed the plaintiff and this amounts to a fault in law which the first defendant is liable to the plaintiff. I hereby give judgment in favour of the plaintiff as against the first defendant.

In the normal circumstances an employer has a duty of care to provide its employee with a working environment which is free from sexual harassment. This duty must be viewed in relation to the type of work and the prevailing physical environment.

There may be an environment which is such that the body of a male worker may have to touch a female worker when they are performing their duties. In such case if the female worker finds this to be a normal situation the issue of sexual harassment does not arise.

There may also be situations where male and female workers are working and words of a sexual nature are said among the workers and none of them take any offence in that. There again the issue of sexual harassment will not arise.

There is also the situation where by virtue and the nature of work, a female worker finds herself subjected to verbal sexual harassment by customers such as while serving in a restaurant or cleaning the room of a male customer in a hotel room, including physical harassment by touching of the buttock or any part of the female worker.

In my view there is no sexual harassment if that worker takes no offence in that and condoned the client's act. However, I believe that there is harassment if the worker takes offence and cautioned the customer not to repeat the harassment but yet again on a second occasion the same client repeats such act of sexual harassment. In that case the customer commits both a criminal offence and a fault in law.

On the basis of the evidence I do not find reason to believe that the sexual harassments of the plaintiff by the first defendant were known to and made with the connivance and condonation of by the second defendants and/or third defendants. In that circumstance I do not find the second and/or third defendants liable for the sexual harassment of the plaintiff by the first defendant. The first defendant was not an employee, agent or preposé of the second defendant and/or third defendant and the latter cannot be held vicariously liable for the action of the first defendant. I therefore dismiss the plaintiff's case against the second and third defendants but made no award as to costs.

The plaintiff is claiming a total sum of R 95,000 as particularized above. In assessing the quantum of damages I gave very careful thought as to what happened to the plaintiff as well as the non-public circumstances in which the fault occurred and the number of times it took place. It is my judgment that a fair and reasonable sum to be awarded as moral damages for humiliation, depression, anguish and psychological trauma suffered by the plaintiff in the circumstances is R 25,000.

I do not believe that any special damage for future loss as a result of loss of employment is called for as the plaintiff had taken up her employment complaint with the appropriate authority and had redress.

In the final analysis judgment is accordingly entered in favour of the plaintiff as against the first defendant in the sum of R 25,000 with interest and costs.

SALA v SIR GEORGES ESTATE (PROPRIETARY) LTD

Egonda Ntende CJ, Gaswaga, Burhan JJ
22 May 2012 Constitutional Court 17/2011

Constitution – Right to property – Restrictive agreements – Land Registration Act

Property was transferred by the respondent company to the petitioners. The transfer was subject to several conditions contained in the transfer document, which the petitioners contend contravene their constitutional right guaranteed under art 26(1) of the Constitution to peacefully enjoy and dispose of their property.

JUDGMENT Petition dismissed.

HELD

1 Article 26(2) of the Constitution provides limitations on the right to acquire, own, peacefully enjoy and dispose of property. If restrictions in a transfer document are based on limitations prescribed by law and necessary in a democratic society they will not be unconstitutional under art 26 of the Constitution.
2 Section 53 of the Land Registration Act and art 537 of the Civil Code are limitations prescribed by law that provide for the use of land to be limited or restricted by way of restrictive agreements and restrictive covenants.
3 A restrictive covenant that prohibits commercial enterprises on residentially zoned land may be necessary in the public interest under art 26(2) of the Constitution.
4 Section 54 of the Land Registration Act and art 537(3) of the Civil Code provide the procedure to be followed to set aside conditions in a restrictive agreement or restrictive covenant. It is not a matter for the Constitutional Court.
5 If parties have willingly and voluntarily signed a restrictive agreement, the obligations under arts 1134 and 1135 of the Civil Code apply.
6 Under s 2 of the Land Registration Act, "land" includes land and the conditions attached to the land.

Legislation
Constitution, arts 26(1),(2), 46(1)
Civil Code, arts 537, 537(2),(3), 1134, 1135
Land Registration Act, ss 2, 53, 53(1), 54

Cases
Leite v Attorney-General SCA 10/2002, LC 227
Mancienne v Government of Seychelles SCA 10(2)/2004, LC 262
Seychelles National Party v Michel (2010) SLR 216

Foreign Cases
Shelley v Kramer 224 US 1 (1948)
Silver v United Kingdom [1983] 5 EHRR 347 (ECHR)
President of the Republic of South Africa v Hugo CCT 11/96

B Hoareau for the petitioners
B Georges for the first respondent
V Benjamin State Counsel for the second respondent

Judgment delivered on 22 May 2012

Before Egonda Ntende CJ, Gaswaga, Burhan JJ

BURHAN J:

This is an application by the petitioners under article 46(1) of the Constitution of the Republic of Seychelles, claiming that the first respondent has contravened the petitioners' constitutional right guaranteed under article 26(1) of the Constitution, to peacefully enjoy and dispose of their property namely parcel PR 2464 situated at Cote D'or Praslin (hereinafter referred to as the said property).

Article 26(1) of the Constitution of the Republic of Seychelles reads –

> Every person has a right to property and for the purpose of this article this right includes the right to acquire, own, peacefully enjoy and dispose of property either individually or in association with others.

The background facts of this case are that the said property was transferred by the first respondent company to the petitioners who became co-owners in equal shares by transfer document dated 7 October 1998. It is apparent that the said transfer was subject to several conditions as set out in clauses (a) to (j) of the transfer document.

The petitioners contend that the conditions imposed in the transfer document prohibit the petitioners from peacefully enjoying and disposing of the said property and proceed to set out the prohibitory conditions in paragraph 3 of the petition which reads as follows:

i. That the petitioner shall use parcel PR 2464, for residential purposes only and they shall not:
   (a) Build more than one residential house on the said parcel, which residential house may be formed by not more than two separate units or sections joined together by a passage or connection showing that they form part of only one residential house; and
   (b) Sub-divide parcel PR 2464 for sale or for any other purpose;
ii. The first respondent may however, permit the petitioners to use parcel PR 2464 for some particular commercial propose to be agreed in writing between the first respondent and the petitioners but on no account shall permission be given for selling any drink, alcohol or otherwise food stuff provision;
iii. The residential house built on parcel PR 2464 shall be mainly built of stone or brick or cement and shall be a one ground floor level building, having no storey or upper floor of any kind thereto or thereon; and
iv. The petitioners or their agent shall only build on or cause to be built or erected a fence on parcel PR 2464 or along or around the said parcel, of such height, material and of such kind and colour as may be approved by the first respondent in writing.

It is further averred that the aforementioned conditions are not limitations prescribed by law or alternately if they are limitations prescribed by law, more specifically section 53 of the Land Registration Act CAP 107, they are not limitations necessary in a democratic society for any one of the purposes set out in article 26(2) (a) to (i) of the Constitution.

Article 26(2) (a) to (i) reads –

> The exercise of the right under clause (1) may be subject to such limitations as may be prescribed by law and necessary in a democratic society –
> (a) in the public interest;
> (b) for the enforcement of an order or judgment of a court in civil or criminal proceedings;
> (c) in satisfaction of any penalty, tax, rate, duty or due;
> (d) in the case of property reasonably suspected of being acquired by the proceeds of drug trafficking or serious crime;
> (e) in respect of animals found trespassing or straying;
> (f) in consequence of a law with respect to limitation of actions or acquisitive prescription;
> (g) with respect to property of citizens of a country at war with Seychelles;
> (h) with regard to the administration of the property of persons adjudged bankrupt or of persons who have died or of persons under legal incapacity; or
> (i) for vesting in the Republic of the ownership of underground water or unextracted oil or minerals of any kind or description.

The petitioners therefore seek the following relief as set out in their prayer to the petition:

(i) Declare that article 26 of the Constitution, more specifically the right to peacefully enjoy and/or dispose their property, namely parcel PR 2464, has been contravened in relation to the petitioners in their capacities as the co-owners of parcel S2464, by the conditions and limitations set out and paragraphs 3(i) to (iv) above and at paragraphs (a), (b), and (i) of the transfer document of 7 of October 1998;
(ii) Declare that article 26 of the Constitution, more specifically the right to peacefully enjoy and/ or dispose of their property, namely parcel PR 2464, is likely to be contravened in relation to the petitioners in their capacities as the co-owners of parcel PR 2464 by the conditions and limitations set out and paragraph 3(i) to (iv) above and at paragraphs (a), (b), and (i) of the transfer document of 7 October 1998;
(iii) Declare that article 26 of the Constitution more specifically the right to peacefully enjoy and/ or dispose of their property, namely parcel PR 2464, in their capacities as the co-owners of parcel PR 2464 had been contravened in relation to the petitioners by section 53 of the Land Registration Act;
(iv) Declare that article 26 of the Constitution, more specifically the right to peacefully enjoy and/ or dispose of their property, namely parcel PR2464, is likely to be contravened in relation to the petitioners by section 53 of the Land Registration Act;
(v) Declare that section 53 of the Land Registration Act is void; and/or
(vi) Make any such declaration or orders, issue such writ and give such directions as may be appropriate for the purpose of enforcing or securing the enforcement of the right of the petitioners under article 26 of the Constitution and disposing of all the issues relating to this petition.

It should be borne in mind that article 26(2) of the Constitution provides for the existence of limitations to the right to acquire, own, peacefully enjoy and dispose of property. It states that the exercise of such rights may be subject to such limitations as may be prescribed by law and necessary in a democratic society and in the instant application it is the contention of the respondents that the limitations are prescribed by law and are necessary in the public interest.

The main thrust of the petitioners' case is that the restrictive conditions contained in the transfer document did not fall under any limitation prescribed by law and even if it were to fall within the ambit of section 53 of the Land Registration Act as relied on by the first respondent, the section did not meet the requirement of a prescribed law in that it was vague and ambiguous in its wording.

In this regard it is the duty of this court to first decide whether the restrictive conditions in the transfer document fall under any limitations prescribed by law. It is the contention of counsel for the first respondent that section 53 of the Land Registration Act is not necessarily the only legal provision but that article 537(2) of the Civil Code of Seychelles Act CAP 33 (hereinafter referred to as the Civil Code) too recognizes restrictive covenants which are means by which the use of land can be limited by private agreement.

Section 53 of the Land Registration Act reads –

> (1) Where the proprietor or transferee of land or of a lease agrees to restrict the building on or the user or other enjoyment of his land, whether for benefit of other land or not, he shall execute an instrument to that effect (hereinafter referred to as a restrictive agreement), and upon presentation such restrictive agreement shall be noted in the encumbrances section of the register of the land or lease burdened thereby, and the instrument shall be filed.
> (2) Subject to its being noted in the register, a restrictive agreement shall be binding on the proprietor of the land or lease burdened by it and, unless the instrument otherwise provides, it shall also be binding on his successors in title.
> (3) Where a restrictive agreement has been entered into for the benefit of land, the proprietor of such land and his successors in title shall be entitled to the benefit of it, unless the instrument otherwise provides.
> (4) The provisions of this section shall apply to all restrictive agreements entered into with the Government or the Republic or any statutory body whether or not any land will benefit from such agreement.

Article 537 of the Civil Code referred to by counsel for the first respondent reads –

> (1) Persons shall enjoy the free-right to dispose of the property which belongs to them, subject to the restrictions laid down by law. Property which is not owned by private person must be managed in the manner and according to the rules which apply to such property specially; and such property can only be alienated in the manner and in accordance with the rules peculiar thereto.
> (2) A clause restricting the right of disposal of immovable property or of a right attached to immovable property shall be valid. However, such a

> restriction shall be subject to two conditions: (a) that there is a serious reason for the imposition of such restriction; and (b) that is shall only be binding upon the transferee during his lifetime.
> (3) The court shall be empowered to delete such a restriction if it is satisfied that it is just to do so.

While section 53(1) of the Land Registration Act provides for the proprietor or transferee of land or of a lease agreeing to restrict the building on or the user or other enjoyment of his land, article 573(2) provides for a clause restricting the right of disposal of immovable property and that such a restrictive right attached to immovable property shall be valid. It is apparent that the prescribed law be it the Land Registration Act or the Civil Code categorically provides for the use of land to be limited or restricted by way of restrictive agreements and restrictive covenants. It is apparent that the restrictive conditions set out in the transfer document were based on these limitations prescribed by law and therefore counsel for the petitioners' contention that the restrictions in the said transfer document were not based on any limitations prescribed by law fails.

Counsel for the petitioner next proceeded to challenge section 53 of the Land Registration Act on the grounds that it did not amount to a prescribed law. He relied on the case of *Silver and Ors v United Kingdom* [1983] 5 EHRR 347 (ECHR) and submitted that according to the said case the requirement of a prescribed law are -

> the law must be adequately accessible: the citizen must be able to have an indication that it is adequate in the circumstances, of the legal rules applicable to a given case.

and -

> a norm cannot be regarded as "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct; he must be able if need be with appropriate advice to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.

Counsel for the petitioners contends that section 53 of the Land Registration Act specifically 53(1) is vague and does not sufficiently set out the type of restriction.

It is my considered view having perused section 53(1) that it grants the proprietor or transferee of land (as in this instant case) or of a lease not vague but definite powers to restrict building on or the user or other enjoyment on the land thereby clearly indicating in no uncertain terms its intent to restrict the rights contained therein. I am satisfied that the said law is adequately accessible, precise enough to enable a citizen to regulate his conduct if he desires so in a land transaction and enables him to foresee the consequences of such restrictions. Therefore I am satisfied that section 53(1) of the Land Registration Act falls within the ambit of a prescribed law.

In the case of *The President of the Republic of South Africa & Anor v John Phillip Hugo* (CCT 11/96) relied on by counsel for the second respondent it was held that common law which was not codified had the necessary requisites to be included "as prescribed by law", while in the Seychelles in the case of *Mancienne v Government of Seychelles* SCA 10(2)/2004 it was held by the Seychelles Court of Appeal "as

prescribed by law" included statutes and case law as well. I therefore find no merit in the argument of counsel that section 53(1) of the Land Registration Act (a statute) is not a prescribed law and am of the same view in regard to article 537(2) of the Civil Code.

I therefore hold that restrictive agreements as set out in section 53 of the Land Registration Act and restrictive covenants as mentioned in article 537 of the Civil Code are both limitations prescribed by law. It is apparent that the restrictions contained in the transfer agreement are based on the above limitations prescribed by law and therefore are permissible.

Counsel for the petitioner next contended that the restrictions in the transfer document were not limitations necessary in a democratic society and did not fall into any of the categories mentioned in article 26(2) (a) to (j). Counsel for the first and second respondent both submitted that restrictions in the transfer document were not only limitations prescribed by law but limitations necessary in the public interest.

It is apparent on the facts before us as admitted by parties, that the first respondent had transferred 26 other adjoining plots of land to other persons with the same restrictions with the intention to ensure that the no commercial enterprise would be permitted in an area strictly reserved for all members of the community therein for residential purposes and approved accordingly by the Planning Authority. It is apparent from the submissions of the petitioners that they are now endeavoring to open up a commercial enterprise within this area which has been reserved strictly for residential purposes. It is the contention of the first and second respondents that the limitations prescribed by law such as restrictive agreements and restrictive covenants are necessary to ensure the homogeneity, maintain or enhance the value and provide a pressing social need for the community and therefore necessary in the public interest.

In this respect counsel for the first respondent directed our attention to the case of *Shelley v Kramer* 334 US 1(1948). In the case of *Seychelles National Party v James Alix Michel & Ors* (2010) SLR 216 the Seychelles Court of Appeal held that what is "necessary in a democratic society" implies the existence of a pressing social need.

On considering the facts before us I am satisfied that in this instant case limitations prescribed by law are necessary to ensure the homogeneity, continuity and value of all 27 residential premises and to continue to provide and maintain a pressing social need namely residential premises for the community living therein, and the use of restrictive agreements and restrictive covenants as set out by the prescribed law were necessary for the benefit of all the persons living in the 27 residential premises within the community. The Seychelles Court of Appeal held in the case of *Alfred Leite v Attorney-General* SCA 10/2002 that the acquisition of the land for the benefit of 36 families was in the "public interest" and, considering the salient facts of this case as admitted by parties, I hold that the limitations prescribed by law namely restrictive agreements and restrictive covenants on which the restrictions in the transfer document are based were necessary in this instant case in the public interest.

For the aforementioned reasons I am satisfied and hold that the restrictive conditions contained in the transfer document are based on limitations prescribed by law and necessary in a democratic society in the public interest and therefore the restrictions in the transfer document fall within the permitted derogation set out in article 26(2)(a) of the Constitution and therefore are not unconstitutional.

It is pertinent that at this stage that counsel for the petitioners' attention is specifically drawn to section 54 of the Land Registration Act and article 537(3) of the Civil Code.

Section 54 of the Land Registration Act reads –

> (1) Upon presentation of a duly executed release in the prescribed form or of an order of the court to the same effect, the registration of an easement or restrictive agreement shall be cancelled and thereupon the easement or restrictive agreement becomes extinguished.
> (2) On the application of any person affected thereby, the Registrar may cancel the registration of an easement or restrictive agreement upon proof to his satisfaction that –
> (a) the period of time for which it was intended to subsist has expired, or
> (b) the event upon which it was intended to determine has occurred.

Article 537(3) of the Civil Code reads as follows: *"*The court shall be empowered to delete such a restriction if it is satisfied that it is just to do so."

It appears that these two provisions clearly indicate the procedure to be adopted to set aside any conditions in a restrictive agreement or restrictive covenant. It appears these sections have escaped the eye of counsel for the petitioners and instead he has sought notably after a lapse of 13 years to come directly to the Constitutional Court.

It is also to be borne in mind that constitutional law and administrative law are branches of 'public law' as distinguished from 'private law' which deals with the rights and liabilities of private individuals in relation to one another. Constitutional law and administrative law deal with the relation of individuals with the State and other 'public' bodies, or the citizen and the State. (Dr (Justice) Durga Basu *Administrative Law* (2nd ed) at 1 and Hilaire Barnett *Constitutional and Administrative Law* (8th ed)).

On the face of the petition it is admitted that the infringement claimed in this case is based on a private transfer document between the petitioners and the first respondent, a private company registered under the Companies Ordinance. On this basis, as it is an agreement between two private individuals, public law would not apply unless the petitioners can satisfy us the constitutional rights of the petitioners had been infringed.

It is apparent that although the first respondent placed certain restrictions or limitations in respect of the transfer of the said property to the petitioners, the petitioners were well aware of these restrictions and limitations which were all part of a private agreement between the parties and which the petitioners knowingly and willingly agreed on.

Considering the background facts of this case I am inclined to agree with counsel for the first respondent that the proper forum of the petitioners would have been recourse to the civil courts if they wished to challenge or nullify the existing transfer agreement and not to attempt to challenge the existing laws which permit the existence of such limitations which would apply to very many other situations other than those limited to this particular transfer document or agreement between the parties to this case.

Counsel for the petitioners also contended that the petitioners, even though they may have willingly and knowingly signed the said transfer document, cannot by their own volition waive their fundamental rights. I am of the view that the petitioners' right to enjoy the said property has not been waived by them. They continue to do so and have been doing for the past 13 years subject to the permitted derogation set out in article 26(2)(a) of the Constitution which we have already held is applicable to this case. In this instant case the petitioners have not waived their rights set out in the Charter but have willingly and voluntarily limited their right under the permitted derogations available in article 26(2)(a) and having agreed to do so the effect of obligations between parties as contained in article 1134 and 1135 of the Civil Code take effect.

Article 1134 of the Civil Code reads –

> Agreements lawfully concluded shall have the force of law for those who have entered into them.
> They shall not be revoked except by mutual consent or for causes which the law authorises.
> They shall be performed in good faith.

Article 1135 reads –

> Agreements shall be binding not only in respect of what is expressed therein but also in respect of all the consequences which fairness, practice or the law imply into the obligation in accordance with its nature.

Counsel for the petitioners also attempted to dissociate the conditions from the property on the basis that the word "land" could only mean parcel PR 2464 and not the conditions attached to the land. It is to be noted that the definition of the word "land" is not limited to land alone as contained in the interpretation section 2 of the Land Registration Act. In this instant application before us it is clear the petitioners purchased the said property with the conditions contained in the transfer document. Had they purchased the land PR 2464 with no conditions attached and subsequently an attempt was made to impose the said conditions, then no doubt the petitioners' right to enjoy the parcel of land PR 2464 and the conditions to be imposed could be considered separately, but not otherwise.

For the aforementioned reasons I find no merit in the application of the petitioners and would proceed to dismiss the petition with costs.

GASWAGA J: I have had the benefit of reading in draft the judgment of Burhan J. I concur with the reasons and orders he has given.

EGONDA-NTENDE CJ: I have read in draft the judgment of Burhan J, and I agree with him that this petition has no merit. As Gaswaga J is in agreement, this petition is dismissed with costs.

PILLAY v PILLAY

Renaud J
25 May 2012 Supreme Court Civ 153/2010

Registration of Associations Act – Breach of association's rules

The plaintiffs are members of the Seychelles Hindu Kovil Sangam Association. Since 2004 the Association had not held an AGM as required under its rules. The plaintiffs claimed that the defendants had held office as the management committee without a formal mandate since 2004 and that there has been no accountability for finances. They sought removal of the defendants as committee members and fresh elections for the appointment of committee members.

JUDGMENT Application allowed.

HELD

1 Rules of a registered association bind the association and its members (Registration of Associations Act, s 11).
2 Any default under the Registration of Associations Act constitutes an offence (Registration of Associations Act, s 23).
3 Where the rules of an association have been breached, the court can invoke its residual and inherent powers to grant an equitable remedy.

Legislation
Code of Civil Procedure, ss 107, 108, 109, 110, 111, 112, 121(6), 304
Companies Act
Registration of Associations Act, ss 11, 23

Foreign Cases
Mulholland v St Peter Roydon Parochial Church Council [1969] 1 WLR 1842
Nutchetrum v Poudre d'Or Village Tamil Circle (2006) SCJ 104

S Rouillon for the plaintiffs
Divino Sabino for the defendants

Judgment delivered on 25 May 2012 by

RENAUD J:

This suit was initiated by a plaint entered on 5 May 2010 by 11 plaintiffs against five defendants. The plaintiffs prayed this Court for the following orders:

(a) Granting an injunction against the defendants purporting to act on behalf of the Association and/or adopting and putting into practice any new resolutions until the final completion of this suit;
(b) Terminating the appointments of the defendants as committee members of the Association;

(c) Ordering the defendants to hand over all Association documents, accounts, property and information presently in their possession to the new committee of the Association to be elected;
(d) Declaring that the defendants remain liable and accountable for all their acts in respect of the association affairs notwithstanding their removal from office;
(e) Orders in respect of holding an Annual General meeting of the Association involving the participation of all members and person wishing to become members and eligible to become members and to vote according to the rules of the Association, can participate and vote and such meeting to be held under the supervision and control of an independent authority such as officials of LUNGOS with minimum delay;
(f) Such other orders as may be fair, just and practical in the circumstances;
(g) The whole with costs jointly and severally against each defendant.

The plaintiffs pleaded that they are members of the Seychelles Hindu Kovil Sangam (SHKS) Association (hereinafter referred to as the "Association"), an Association registered under the Registration of Associations Act Cap 201 for the main purpose of facilitating the Hindus religious philosophy in Seychelles and they have an interest in the general running of the Association and the defendants are some of the present purported incumbent committee members of the Association.

The defendants denied this and averred that they are the incumbent committee members of the Association, and, furthermore the plaintiffs are required to prove that they are members of the Association.

It is not in dispute that there are other incumbent committee members of the same status as the defendants but these persons are permanently resident overseas and do not participate in the day to day running of the Association. The Association is governed by rules specifically created and approved by its members under the provisions of Cap 201 at General Meetings from time to time.

The defendant averred that not all of the other incumbent committee members are permanently resident overseas, and of the four other committee members not parties to this plaint, two are permanent resident overseas and two are intermittently in Seychelles.

It is also not in dispute that the plaintiffs would like fresh elections for the appointment of new committee members where all members and persons wishing to become members and eligible to become members and to vote according to the rules of the Association, can participate and vote and such meeting to be held under the supervision and control of an independent authority such as officials formally appointed by LUNGOS.

The defendants admitted the averment except that they denied that such a meeting should breach the rules of the Association by allowing non-members to take part and vote and that such meeting should be supervised by an authority appointed by the court such as LUNGOS.

It is further not in dispute that since the year 2004 the Association has not held an Annual General Meeting of the Association (hereinafter "AGM") as required under its

rules and Cap 201 and this despite several notices issued by the first defendant in the press for the collection of subscriptions and for holding AGM several years in a row.

Here the defendants averred that the first defendant issued notices for the collection of the subscriptions and for holding an AGM for several years in a row and that it is the Association, through its Secretary who issued notices for membership renewal in 2009 and in 2010, and that if no AGM has been held it was due to court injunctions or warnings prohibiting the holding of one.

The plaintiffs averred that since 2004 the Association has been wrongfully managed by the defendants and there has been no accountability whatsoever for monies collected and spent by the defendants, and, the clear irregularities in the finances and financial dealings of the Association have been highlighted in the latest report of the Auditor of the Association.

Other averments of the plaintiffs are:

- That the defendant have since 2004 continued in office without a clear legal mandate or status and any attempts to question their authority has been met with threats and negative responses;
- That over the years some of the plaintiffs have made many representations written and otherwise to the Registrar of Association concerning the affairs of the Association without any response or action being taken by the latter;
- That the defendants have continued in office with no formal mandate since 2004 and generally continue to purport to be the management committee of the Association and the plaintiffs have discovered many irregularities in the affairs of the Association including several legal suits against the Association and the plaintiffs verily believe that the incumbent have failed to uphold the trust of each member of the Association.
- That the first plaintiff whose name is associated with the incumbent committee but who has been excluded from participating and has de facto not participated therein for several years is ready to step down as a committee member for fresh elections to be held as requested herein.

The defendants averred that:

- They have continued with a clear mandate and have been willing to hold an AGM and fresh elections but the courts have prevented this through injunctions or warnings.
- They were duly elected at the Association’s last AGM, there have been no financial irregularities and certain of the suits mentioned have been commenced by the first plaintiff himself; furthermore, the plaintiffs are in no position to comment on the level of trust of each member of the Association.
- There are no grounds to terminate the appointments of the defendants as they have in fact organized an AGM but were prevented from carrying it out through court orders and warnings.
- The first plaintiff resigned as a committee member shortly after being elected in 2004.

After the hearing of evidence in the case and before the final submissions were to be made, the plaintiffs entered a notice of motion on 5 August 2011 moving this Court for an order of interlocutory injunction under the provision of sections 121(6) and 304 of the Seychelles Code of Civil Procedure, preventing the defendants from holding an AGM of the SHKS scheduled for 15 August 2011 pending the final judgment of this suit. The court granted the application on 10 August 2010.

The defendants in the statement of defence raised certain pleas *in limine litis* and these were disposed of by a ruling of this Court on 11 November 2010. Even in his submission, counsel for the defendants has again made allusions thereto. This Court will not address them as otherwise it will be acting as an appeal court on its own decisions. The court will address the case on its merits only.

The Law Applicable

Associations are entities that are governed by the Registration of Associations Act Cap 201, whereas companies are entities that are governed by the Companies Act 1972. The law applicable to one category ought not to be made applicable to the other category. Associations are non-profitable entities whereas companies are entities which are set up for profitable objectives. Companies have its articles and memorandum of association which governs its management whereas associations have its constitution and/or rules which governs its administration.

For the purpose of this suit the relevant provisions of the Registration of Associations Act Cap 201 and the Rules of the SHKS shall be followed and applied as the law applicable to this suit.

The Rules of the Association of the SHKS as filed with the Registrar of Associations on 21 October 2008 appear to be the up-to-date applicable rules. Rule 5 provides that the members of the Association constitute the “General Body” which shall meet once a year and at that meeting it shall transact businesses as set out in Rule 5.3, which includes the election of the General Council of the Association. The mandate of the Governing Council is set out in Rule 6. There is no provision in the Rules that allow the prorogation of the mandate of the Governing Council for a period extending its one year mandate.

Section 11 of the Registration of Associations Act Cap 201 states that the rules of any registered association shall bind the association and every member thereof and any person claiming through such member to the same extent as if such member or person has subscribed his name thereto. Section 23 makes every default under this Act to be an offence, if continued, shall constitute a new offence in every week during which the default continues.

The Issues

The thrust of this suit by the plaintiffs is that the defendants have exceeded their mandate by overstaying their one year period as the management committee as provided for by the Rules of the SHKS and they have failed in their responsibility to call for Annual General Meetings during the intervening period. Whether these averments are substantiated or not is to be determined.

The question that arises is why the plaintiffs chose to come to court to seek redress and not act according to the Rules and called an Annual General Meeting for the past 7 years. This is an issue that will be addressed in this suit.

The plaintiffs complained that the Association has not been properly managed during the period of stewardship of the defendants acting as the management committee. The plaintiffs based their allegations on the findings contained in the auditor's reports. This is another issue that has to be determined.

Another issue raised by the plaint is whether the defendants acting as the Management Committee of the SHKS appointed, without proper authority, a Temple Renovation or Rajagoparam Sub-Committee.

Other Related Court Cases

The defendants acting as the Governing Body have drawn, rightly or wrongly, justifiably or not, as many as 9 cases against them and/or the SHKS filed in the Supreme Court by the members of the Hindu community. Undoubtedly the SHKS is perceived by the people in general as a model religious institution for the Hindu community in Seychelles. For it to be embroiled in all these legal wranglings is indeed not conducive, and is a cause of considerable prejudice to its perceived status. It is incumbent on this Association to address all the contentious matters within their ranks in order to ensure its proper running in the future.

Findings

Sections 107 to 112 of the Seychelles Code of Civil Procedure deal with the issue of parties to a suit. There are specific instances where certain parties can be joined as plaintiffs or defendants. Section 112 states that –

> No cause or matter shall be defeated by reason of the misjoinder or non-joinder of parties and the court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.

The plaintiffs are members of the SHKS and have an interest in the proper running of that association in accordance with its established Rules. I find that the plaintiffs are not busybodies and their grievances are not frivolous and vexatious.

The defendants are the remaining existing members of the SHKS who were elected to serve on the Management Committee of the SHKS for a period of one year in 2004 to manage the affairs of the SHKS for a period of one year in terms of the Rules of the SHKS.

The other members who were elected as members of the management committee in 2004 are either living permanently overseas or have, for one reason or another, ceased to actively participate on the management committee, hence the reason for them not being cited by the plaintiffs as defendants in this suit.

I find that the parties to this suit have *locus standi* and are properly before this Court.

Have the defendants exceeded their mandate by overstaying?

Unlike companies which have been established for profits and which are liable to pay taxes, associations are different in the sense that they are sometimes left to drift aimlessly and operate outside the ambit of their rules, as in the case of the instant association under the control of the few individuals including the defendants as the purported Management Committee and these without proper accountability and management and moreover in breach of the Rules of the Association and the provisions of the Registration of Associations Act Cap 201. It can reasonably be said that the defendants acting as the purported Management Committee have taken advantage of the passivity of the members and have literally hijacked the Association by their attitudes, actions and conduct over the last 7 years.

Why did the plaintiffs chose to come to court?

After a period of over 7 years of the running of the Association by the defendants without holding any Annual General Meetings as required by the Rules of the Association, and, the plaintiffs having sought the assistance of the Registrar of Association to no avail, the plaintiffs were left with no other recourse, other than taking the law into their own hands, but to engage a judicial process. Several attempts were made in the intervening period by the plaintiffs and other members of the Association to request the incumbent committee consisting of the defendants to organize an AGM without success. There are conflicting factions as noted by this Court from the multiplicity of suits in relation to this Association which have been entered in court. The acrimonious relationships that exist among the parties and their respective groups of followers are unbefitting of those claiming to be members of a religious organization.

I find that the instant course of action taken by the plaintiffs is proper and it is in order in view of the circumstances of this case.

Has the Association been properly managed?

Under cross-examination the witness of the defendants Mr K Pillay stated that no elections were held and the books were not brought up to date because there were ongoing constructions of the temple going on at the time. I believe that this is not sufficient reason for not holding AGMs and elections for the Management Committee, bearing in mind that there was a separate committee appointed to be specifically responsible for the construction of the temple.

The audited accounts of the SHKS admitted as Exhibit P4 was a document circulated to all members of the Association and is deemed to be a public document in relation to the members, and as such is subjected to scrutiny by any one of them. The plaintiffs in their evidence brought out the following irregularities as gleaned by them from the auditor's report -

(a) On page 53 of the auditor's report there appears a procedural lapse in maintaining the accounts and collection of funds from the public. It was

also evident that all monies collected were not properly accounted for as appropriate receipts were not issued.

(b) There is not shown in the auditor's report any item of expenses relating to the numerous legal cases the SHKS has been engaged in over the last few years since 2008.

(c) At the AGM of 2002 the members appointed a group of members present to form a committee to manage and maintain the entire renovation cum construction of the Rajagopuram project in order to have a completely trustworthy group in view of the amount of "public" funds involved. That committee went out of its way and appointed an outside member of that committee to handle the financial assets of the Association by giving that person signatory rights to remove funds from the Association bank account. That was done on the pretence that that person was the ex-Chairman of the Association despite the AGM having not chosen him as members of that committee. The defendants as the incumbent Management Committee passively endorsed this anomalous situation.

The plaintiffs' witness brought out in evidence many instances of financial mismanagement which the auditor highlighted in his report.

The witness for the defendants stated that there were reasonable explanations to the shortcomings brought out by the auditor. Unfortunately, no such explanations were taken up at the time of the audit and if these were taken up the auditor must have found them non-acceptable otherwise the report would not have reflected the anomalies.

The plaintiffs have shown sufficient evidence of a lack of proper management and accounting from the accounts and from the lack of properly kept records and minutes of decisions of the various committees and as a result of which I find on a balance of probabilities that there has indeed been instances and elements of serious mismanagement of the Association by the defendants.

Issues relating to Temple Renovation or Rajagopuram Sub-Committee

The main issue here is the delegation by the sub-committee of its powers to another person without any provision for doing so under the Rules. This issue has been addressed earlier above as part of the allegations of mismanagement by the Governing Body and a finding has already been made.

On this specific issue I find that the sub-committee itself being a body operating under the delegated authority of the General Body does not have any mandate to delegate such authority to any other person or member.

Conclusion

Here is a case where members of an Association have, for over 7 years, been deprived of their rights under the Rules of the Association to participate in the management of the association. The defendants acted in breach of the Rules of the Association by not calling annual general meetings of the Association when that was due, thus depriving the plaintiffs of the right within the rules of the association. The plaintiffs, short of seeking redress before this Court after failing to get the Registrar of Association to intervene, were for them to take the law in their own hands, a course of action that would have been deplorable. It is evident that the plaintiffs have a genuine common interest in pursuing this suit because of their common element or grievance.

In the case of *Mulholland & Or v St Peter Roydon Parochial Church Council & Or* [1969] 1 WLR 1842, Pennycuick J said –

> As I understand it, the court has always assumed and exercised jurisdiction with regards to meetings held by corporations of any kind. In particular the court, upon the instigation of an interested party, will prevent a corporation from acting upon a resolution not duly passed in accordance with its constitution.

A similar situation has arisen in the instant case and I believe that the statement of Pennyquick J is the equitable approach which I subscribe to.

The Supreme Court of Mauritius entertained the case of *M Nutchetrum & Ors v Poudre D'or Village Tamil Circle & Ors* (2006) SCJ 104, involving 17 members of an Association and granted an interlocutory injunction to prevent the respondents, the Association and three Committee Members from holding an AGM.

Here we have an Association with hitherto reputable religious standing and substantial funds, finding itself in conflict with its members, in disarray and discord for not having held an AGM or elected a management committee since 2004. This is now required to reach some form of reconstruction and reformation in order that it may move ahead in its noble pursuits.

It is trite that, aside from exercising its civil jurisdiction under contract or tort, this Court is vested with considerable residual and inherent powers in order to permit it to properly administer justice.

In light of the findings made earlier above, I conclude that the plaintiffs' contention has been established on a balance of probabilities to the extent set out above and for these reasons I believe that they are entitled to equitable remedies deemed appropriate in the circumstances. As such I make the following orders:

(i) I hereby order the termination of the appointments of the defendants as members of the Governing Council of the Seychelles Hindu Kovil Sangam effective 30 days from today, or as soon as the new Governing Council is elected, whichever is earlier, for having exceeded their mandate under the Rules of the SHKS;

(ii) I hereby order the subsisting Governing Council of the Seychelles Hindu Kovil Sangam to hold a General Meeting of the Governing Body of the Seychelles Hindu Kovil Sangam within 30 days from today only to elect new members of the Governing Council and that the auditor shall preside over that General Meeting and conduct the elections with the assistance of two persons selected by him, one from among the plaintiffs and one from among the defendants;

(iii) The newly elected Governing Council of the Seychelles Hindu Kovil Sangam shall within 30 days after its election hold a meeting of the Governing Body of the Association to transact business set out in Rule 5.3 of the Association;

(iv) I further order that in respect of the holding of that General Meeting it shall include the involvement of participation of all members and eligible persons wishing to become members, and that they are allowed to participate and vote according to the Rules of Association of the Seychelles Hindu Kovil Sangam;

(v) I order the defendants to hand over all the documents, accounts, property and information presently in their possession relating to the Seychelles Hindu Kovil Sangam to the new Governing Council of that Association immediately after its election at that General Meeting;

(vi) I hereby declare that the defendants remain liable and accountable for all their acts in respect of the affairs of the Seychelles Hindu Kovil Sangam to the date of the General Meeting notwithstanding their removal from membership of the Governing Body; and

(vii) I order that the defendants jointly and severally pay the costs of this suit.

LOTUS HOLDING COMPANY LTD v SEYCHELLES INTERNATIONAL BUSINESS AUTHORITY

Renaud J
30 May 2012 Supreme Court Civ 244/2010

Judicial review – Natural justice

The defendant refused to renew the plaintiff's licence to operate as an international corporate service provider. The plaintiff sought review of that decision.

JUDGMENT Defendant ordered to renew the plaintiff's international corporate service provider licence and/or hear and reconsider the application, assess the fit and proper status of plaintiff's two employees, and pay the plaintiff damages of US$5,000 with interest and costs.

HELD

1 Reviews and appeals with regard to matters connected to international corporate service providers are covered by s 17 of the International Corporate Service Providers Act.
2 There are three grounds for judicial review – illegality, irrationality and procedural impropriety.
3 Procedural impropriety includes the failure to observe the rules of natural justice or failure to act with procedural fairness. Natural justice is the duty to act fairly.
4 Legitimate expectation is an equitable doctrine that constitutes a substantive and enforceable right. It can be based on an express promise, or representation or by established past action or settled conduct. It can be based on a representation to an individual or to a class of persons generally.
5 A decision will be procedurally improper and a breach of natural justice where a plaintiff is not given a real or sufficient opportunity to be heard or to rectify any deficiency before the decision is made, and where the defendant fails to conduct a thorough inspection of the plaintiff's control systems and procedures as required by law.

Legislation

Companies Act
International Business Authority Act
International Business Companies Act, ss 52(1), 70(1)
International Corporate Service Providers Act, ss 4(2)(4), 6(2)(3)(4)(5), 8, 10, 15, 15(2), 17, 17(1), sch 3

Cases

Jouanneau v Seychelles International Business Authority (unreported) SSC Civ 244/2010
Lotus Holding Company Ltd v Seychelles International Business Authority (unreported) SSC Civ 107/2010
Lotus Holding Company Ltd v Seychelles International Business Authority (unreported) SSC Civ 121/2010
Port Louis v Seychelles International Business Authority (unreported) SSC Civ 91/2010

Raihl v Ministry of National Development (2010) SLR 66
Timonina v Government of Seychelles SCA 38/2007, LC 318

Foreign Cases
Breen v Amalgamated Engineering Union [1971] 2 QB 175
Chief Constable of the North Wales Police v Evans [1982] 3 All ER 141
Cooper v Wandsworth (1863) 14 CB (NS) 180
Council of Civil Service Unions v Minister for the Civil Service [1984] 3 All ER 935
Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374
Dimes v Grand Junction Canal Proprietors (1852) 3 HLC 759
Khawaja v Secretary of State for Home Department [1983] 1 All ER 765
Perrina v Port Authority and Other Workers Union (1971) MR 168
Ridge v Baldwin [1964] AC 40

F Ally for the plaintiff
W Lucas for the defendant

Judgment delivered on 30 May 2012 by

RENAUD J:

Introduction

The plaintiff entered suits Civil Side No 107/10 on 30 March 2010 and Civil Side No 244/10 on 19 August 2010.

This Court at the instance of the parties consolidated the two cases and heard them together.

Whilst Civil Side No CS 107/2010 and Civil Side No CS 244/2010 were *pendente lite* this Court heard the petitions of *Ms Stella Port-Louis v SIBA* CS No 91/2010 and *Ms Agnes Jouanneau v SIBA* CS No 90/2010, and, on 29 July 2009 this Court quashed the defendant's decision revoking or removing their fit and proper status under the ICSP Act.

The Parties

The plaintiff is a company incorporated under the Companies Act 1972 of Seychelles, and is managed by two directors, namely, Mr Mark Reckins and Mrs Alexia Armsbury. It was an international corporate service provider (hereinafter "ICSP") and was duly licensed under the International Services Providers Act to render services connected with the formation, management or administration of specified entities as defined in the ICSP Act.

The defendant is a body corporate established under the Seychelles International Business Authority Act 1994 (SIBA) and *inter alia* monitors the provision of the international corporate services under the International Corporate Services Act (ICSP) and the Seychelles International Business Companies Act (SIBC).

Prayers of Plaintiff

The plaintiff entered Civil Side No 107/2010, wherein it prays as follows, following the defendant's refusal to reinstate the plaintiff's licence to operate as an ICSP, after the plaintiff had requested the defendant to do so.

(1) to review the defendant's decision given on 28 May 2010, refusing to renew the plaintiff's ICSP licence and to assess the fit and proper status of Mrs ARMSBURY and Ms GERMAIN under section 17(1) of the ICSP Act;
(2) in reviewing the said decision to declare that the defendant's decision given on 28 May 2010, refusing to renew the plaintiff's ICSP licence and to assess the fit and proper status of Mrs ARMSBURY and Ms GERMAIN is unlawful, unjustified, unfair, unreasonable, made maliciously and in bad faith and/or in breach of the parties' arrangement or agreement;
(3) in reviewing the said decision to order the defendant to -
    (i) to renew the plaintiff's ICSP licence; and/or
    (ii) hear and reconsider the plaintiff's application for the renewal of its ICSP licence in accordance with section 4(2) of the ICSP Act; and
    (iii) to assess the fit and proper status of Mrs ARMSBURY and Ms GERMAIN; and
    (iv) to order and condemn the defendant to pay the plaintiff loss and damage in the sum of US$25,900, which is due up till now and continuing until the date of judgment.

Plaintiff's Case

By letter dated 15 January 2010 addressed to the plaintiff, the defendant revoked the plaintiff's ICSP licence substantially on the grounds that the "fit and proper" status of Ms Stella Port-Louis and Ms Agnes Jouanneau, the plaintiff's two (2) employees, under the ICSP Act had been removed.

The plaintiff contends that in view of the fact that Ms Port-Louis and Ms Jouanneau's fit and proper status have been restored, the revocation of its licence should *ipso facto* be restored in that the revocation of its licence was based substantially on the revocation of the fit and proper status of Ms Jouanneau and Ms Port-Louis.

The plaintiff argued that it is clear in the defendant's letter of 15 January 2010 that it is because the "fit and proper status" of Ms Jouanneau and Ms Port-louis were removed that the plaintiff's licence was revoked and that the defendant had relied upon paragraph 3 (a), (b), (c), (e) and (f) of the Schedule 3 of the ICSP Act to revoke their fit and proper status, which relates to criteria for determining the fit and proper status of a person.

According to the plaintiff, in any event if during Ms Jouanneau and Ms Port-Louis' interview the defendant found that there was anything wanting in the plaintiff's control system and procedures, the defendant should have called the plaintiff and given the plaintiff an opportunity to be heard on the allegations. This, the defendant failed to do and thus its decision should be quashed.

The plaintiff claims that the defendant's decision in revoking the plaintiff's ICSP licence was taken in bad faith and contrary to the defendant's proper discharge of its

functions and powers. The plaintiff further claims that the defendant's decision revoking its ICSP licence is unlawful, unjustified and in breach of the arrangement or agreement entered into by and between the parties for the plaintiff's provision of the said services.

After this Court order made on 12 May 2010, the plaintiff applied to the defendant for the renewal of its ICSP licence, which was to expire on 15 May 2010, and in so doing complied with the provisions of section 4(2) of the ICSP Act, namely -

(a) paying the annual licence fee in accordance with plaintiff's prior arrangement or practice with the defendant in regards to the payment of any fees; and
(b) lodging the certificate of compliance.

The plaintiff by that same letter notified the defendant of the following changes in the plaintiff in accordance with section 6(3) & (4) of the ICSP Act -

(1) the proposed appointment of Alexia ARMSBURY, a practising Attorney of the Supreme Court of Seychelles and a Notary, as the director of the plaintiff; and
(2) the employment of Ms Stephanie GERMAIN as Corporate Manager of the plaintiff's operation as an ICSP.

That upon or after the plaintiff's application for the renewal of its ICSP licence and its notification of the changes in respect to the plaintiff, the defendant did not require any other documents or information from the plaintiff that it may request from the plaintiff under section 6(2) of the ICSP Act for it to deal with the plaintiff's application for the renewal of its ICSP licence.

By letter of 28 May 2010 addressed to the plaintiff, the defendant notified the plaintiff that -

(1) it will not grant the plaintiff with an ICSP licence; and
(2) it will not consider any application for candidates to undergo a fit and proper assessment for the proposed appointment with the plaintiff.

The decision of the defendant referred to above was on the following grounds –

(1) the plaintiff had failed to submit its application for renewal one (1) month prior to the expiry date in accordance with a circular dated 22 July 2009;
(2) the failure of the plaintiff to pay the annual licence fee;
(3) the serious problems within the control system and procedures of the plaintiff's office specially:-
    (i) the provision of directorship services by persons associated with the plaintiff;
    (ii) the failure to conduct proper staff appraisals;
    (iii) the absence of adequate professional indemnity insurance cover for its employees; and
    (iv) accounts have not been signed by the relevant persons, namely all the directors.

In view of the said refusal, the plaintiff filed Suit No CS 244/2010, wherein it claims that as an ICSP it had a legitimate expectation that its ICSP licence would be renewed and the fit and proper assessment of Mrs Alexia Armsbury and Ms Stephanie Germain would be completed, especially that this Court had ordered that its licence be reinstated.

The plaintiff contends that the defendant's decision refusing to renew its ICSP licence and to assess the said fit and proper status was wrongful, illegal, unjustified, unreasonable, unfair, made maliciously and in bad faith and contrary to the defendant's proper discharge of its functions and powers.

It further contends that the defendant's decision refusing to renew its ICSP licence is in breach of the arrangement or agreement entered into by and between the parties for the plaintiff's provision of its services.

The plaintiff prayed this Court to grant the relief stated above.

Defendant's Case

The defendant does not admit the averment of the plaintiff that as an ICSP it had a legitimate expectation that its ICSP licence would be renewed and the fit and proper assessment of Mrs Alexia Armsbury and Ms Stephanie Germain would be completed. The defendant averred that the renewal of or granting of a licence is not automatic in particular when a company has failed to comply with the legal requirements of an ICSP in the past.

The defendant contends in its statement of defence that the grounds for it to revoke the defendant's ICSP licence went beyond the fit and proper status of Mrs Port-Louis and Ms Jouanneau and as per the evidence of Mr Steve Fanny and as contained in the defendant's letter of 15 January 2010 to the plaintiff - "there are concerns in terms of the systems and controls which exist within the office (of the plaintiff)".

The defendant denied the averment of the plaintiff that the defendant's decision refusing to renew its ICSP licence and to assess the said fit and proper status was wrongful, illegal, unjustified, unreasonable, unfair, made maliciously and in bad faith and contrary to the defendant's proper discharge of its functions and powers.

The defendant averred that the decision not to renew the plaintiff's ICSP licence was not done in bad faith but was due to the fact that the plaintiff has failed to maintain proper management of its company and to safeguard the reputation of the offshore industry in the past.

The defendant also denied the averment of the plaintiff that further and alternatively to the above stated averment that the defendant's decision refusing to renew its ICSP licence is in breach of the arrangement or agreement entered into, by and between the parties for the plaintiff's provision of its services. The defendant averred that there was no such arrangement or agreement and put the defendant to strict proof of that allegation.

The defendant also does not admit the averment of the plaintiff that by reason of the matters (sic) the plaintiff is suffering loss and damage in the sum of US$350 per day from the date of the decision and continuing, which sum the defendant is liable to make good to the plaintiff. The defendant rejects any claim of liability or loss incurred by the plaintiff if it exists.

Evidence of Plaintiff

The plaintiff called Mark Reckins, its director, to give evidence on its behalf. Mr Reckins gave clear evidence that was not discredited at all by the defendant about the plaintiff's discharge of services under the ICSP Act and the fact that when Ms Port-Louis and Ms Jouanneau were called by the defendant it was for them to clarify their relationship to SP Trading Limited only.

According to Mr Reckins, Ms Port-Louis, Ms Jouanneau or the plaintiff had no direct involvement with SP Trading Ltd and were not involved in, or a director of SP Trading Ltd or linked in any way to its alleged illegal transaction.

Furthermore, he testified that there was no evidence to show and prove that the plaintiff has failed in its control and procedures as an ISCP. In fact it was admitted by the defendant that the defendant was conducting a compliance review of the plaintiff, which had not yet been concluded. In fact if there was anything alarming that needed the defendant to revoke the plaintiff's licence, it would have found during such exercise. This was not the case.

Mr Reckins also testified as to the plaintiff's application for the renewal of its licence after this Court had ordered that its licence be reinstated. The defendant in its letter of 28 May 2010 notified the plaintiff that -

> (1) it will not grant the plaintiff with an ICSP licence; and
> (2) it will not consider any application for candidates to undergo a fit and proper assessment for the proposed appointment with the plaintiff

on the following grounds -

> (1) the plaintiff has failed to submit its application for renewal one (1) month prior to the expiry date in accordance with a circular dated 22 July 2009;
> (2) the failure of the plaintiff to pay the annual licence fee;
> (3) the serious problems within the control system and procedures of the plaintiff's office specially -
> (i) the provision of directorship services by persons associated with the plaintiff;
> (ii) the failure to conduct proper staff appraisals; and
> (iii) the absence of adequate professional indemnity insurance cover for its employees; and
> (iv) accounts have not been signed by the relevant persons, namely all the directors.

Mr Reckins further testified that on 12 May 2010, the plaintiff applied to the defendant for the renewal of its ICSP licence, which was to expire on 15 May 2010,

and in so doing the plaintiff complied with the provisions of section 4(2) of the ICSP Act, namely -

(a) paying the annual licence fee in accordance with plaintiff's prior arrangement or practice with the defendant in regards to the payment of any fees; and
(b) lodging the certificate of compliance.

The plaintiff further notified the defendant of the following changes in the company in accordance with section 6(3) & (4) of the ICSP Act -

(1) the proposed appointment of Alexia ARMSBURY, a practising Attorney of the Supreme Court of Seychelles and a Notary, as the director of the plaintiff; and
(2) the employment of Ms Stephanie GERMAIN as Corporate Manager of the plaintiff's operation as an ICSP.

Mr Reckins testified that the plaintiff had an account with the defendant from which it was a standard practice that any expenses of the plaintiff with the defendant would be deducted and paid therefrom. It was on that basis that the defendant was to deduct and pay the fees for the annual fee. According to Mr Reckins upon or after the plaintiff's application for the renewal of its ICSP licence and its notification of the changes in respect to the plaintiff, the defendant did not require any other document or information from the plaintiff.

It should be noted that under section 6(2) of the ICSP Act the defendant may require a licensee to furnish further information or documents in respect of any change in the licensee for it to deal with a licensee's application for renewal of its ICSP licence. However, in regards to the plaintiff, the defendant failed to require from it any such further information or documents in respect of such change before dealing with its application for renewal.

Evidence of Defendant

The defendant called Mr Steve Fanny, its Chief Executive Officer, to give evidence on its behalf. Mr Fanny maintains that the defendant's decision for the revocation of the licence is based on good grounds and that the defendant could not renew the plaintiff's licence because the plaintiff's licence had been revoked, which he repeated over and over again in the course of his evidence.

Mr Fanny testified that directors should discharge their functions personally and should not give power of attorney or authority to third parties to act on their behalf. His stance proved his ignorance of the law and the unsoundness of his decision.

Mr Fanny was showed section 52(1) of the IBC Act which permits the directors of an IBC to appoint any person to be an officer or agent of the company, and to section 70(1) of the IBC Act that permits a company to authorise any person either generally or in respect of any specified matters as its agent to act on behalf of the company both in and outside Seychelles. He admitted that he was not aware of such provision.

Submissions of Plaintiff

Based on the facts testified by Mr Renkins, it is the plaintiff's submission that the defendant's decision to revoke the plaintiff's ICSP licence was taken without giving the plaintiff any prior notice, or a real opportunity to be heard and to defend itself of any allegations and neither was it given an opportunity to take any step to rectify any undesired situation.

Counsel for the plaintiff responded to the issue raised by the defendant in its closing submission in that the review should have been commenced by way of petition instead of by plaint.

It is a submission of the plaintiff that Mr Fanny's evidence as established under the plaintiff's case confirms the defendant's bad faith in processing the revocation and application for the non-renewal of the plaintiff's licence.

He added that Mr Fanny was adamant that in the circumstances of the revocation the plaintiff's licence could not be renewed. He disregarded the fact that the Supreme Court had ordered that the plaintiff's licence should be reinstated and as a result as the licence was to expire the defendant was under the obligation to renew the licence.

The plaintiff submits that the defendant's decision revoking the plaintiff's ICSP licence is unfair, unlawful and unjustified and contrary to the proper discharge of its functions.

It is also the plaintiff's submission that the defendant's decision refusing to renew its ICSP licence and to assess the said fit and proper status was procedurally improper, taken in bad faith and a breach of natural justice.

Furthermore, the plaintiff submits that it was clear from the evidence that the defendant took irrelevant matters into consideration and failed to take into consideration relevant matters.

According to the plaintiff, the defendant did not act fairly and acted in bad faith in its processing and dealing with the plaintiff's application for the renewal of its ICSP licence and to assess the fit and proper status of Mrs Armsbury and Ms Germain.

The plaintiff further submits that based on the evidence, the defendant's decision was wrongful, illegal, unjustified, unreasonable, unfair, made maliciously and in bad faith and contrary to the defendant's proper discharge of its functions and powers.

It is a further submission of the plaintiff that it was clear from the manner that the defendant treated the plaintiff's application for renewal in the defendant's letter to the plaintiff of 28 May 2010, and the reasons given by the defendant when one considers the evidence of Mr Mark Reckins and Mr Steve Fanny explaining each of the said grounds that the defendant was acting in bad faith and contrary to the defendant's proper discharge of its functions and powers.

In view of the fact that the Supreme Court had ordered the defendant to reinstate the plaintiff's licence, counsel for the plaintiff submitted that it is clear from the reasons given by the defendant refusing the renewal that it was trying to defeat the order of the Supreme Court and to find excuses to refuse the renewal of the licence.

The plaintiff's counsel submitted that as an ICSP, the plaintiff has suffered loss and damage as a result of the revocation of its licence. Mr Reckins gave evidence as to the source of income of the plaintiff and the amount of loss that it is incurring.

In the alternative, the plaintiff claims that it had an arrangement that the defendant entered with it for it to employ Ms Port-Louis and Ms Jouanneau as non-managerial staff as per the defendant's letter to it of 16 June 2005. The defendant recommended that the said persons receive immediate training in the field of corporate services, which Mr Reckins confirmed that they received.

Submissions of Defendant

In his final submission counsel for the defendant raised a point of law in that section 17(1) of the ICSP provides for a specific procedure and that the plaintiff ought to have entered an "application" instead of a "plaint" in the case of a judicial review. This matter has been addressed by counsel for the plaintiff in his submissions stated above.

Counsel for the defendant submitted that the criteria for awarding "fit and proper" status are set out in Schedule 3 of the Code of Practice of Licensees of ICSP. Section 3 provides a list of 9 different criteria to determine if a person is "fit and proper". Once a person is declared "fit and proper" the person must thereafter maintain that standard at all times.

He submitted that the Code however does not provide any mechanism to remove that status once acquired. It is the contention of the defendant that once the behaviour of a "fit and proper" person falls below the required standard that status may be removed by way of notification with reason.

The defendant, however, admitted that the person affected should be granted the opportunity to rectify the wrongdoing or to improve his or her behaviour.

Section 8 of ICSP provides for the duties of licensees and section 10 provides for the functions of SIBA in respect of licences.

Section 15 of ICSP provides a list of circumstances where SIBA can revoke a licence whereas its sub-section 2 requires that written notice be given of such revocation.

Section 17 of ICSP sets out the review procedure of a decision taken by SIBA by the Supreme Court and eventually by the Seychelles Court of Appeal.

There is no express procedure laid down for the revocation of a licence. Section 15(2) of ICSP simply states that SIBA shall give notice of such revocation to the licensee.

Counsel for the defendant submitted that Exhibit P7, a letter dated 15 January 2010 addressed to the plaintiff, is actually the letter of the defendant notifying the plaintiff of the revocation of its licence. He submitted that for this reason the defendant has complied with the requirement of ICSP in exercise of its power to grant and to revoke a licence.

It is also the submission of the defendant that it properly exercised its discretionary jurisdiction under ICSP and acted in good faith when revoking and refusing the renewal of the licence of the plaintiff and it did so in order to protect the Seychelles offshore industry.

The Law

When it comes to review and appeal with regards to matters connected to ICSP it is section 17 of ICSP that applies. Section 17(1) provides –

> An application may be made to the Court for the review of any decision of the Authority –
> (a) to refuse to grant or renew a licence under this Act;
> (b) to suspend a licence under section 17;
> (c) to revoke a licence under section 18.

In the case of *Khawaja v Secretary of State for Home Department* [1983] 1 All ER 765, it is stated that:

> Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made.

In matters of review, the Seychelles Court of Appeal in the case of *Doris Raihl v Ministry of National Development* (2010) SLR 66 provided much guidance and the quotes that follow are pertinent -

> The golden rule jealously guarded in administrative law by the Courts is that no executive decision adversely affecting the rights of the citizen, more particularly, his property rights, may be taken behind his or her back, without affording him or her an opportunity to be heard: *Ridge v Baldwin* [1964] AC 40; *Dimes v Grand Junction Canal Proprietors*; *Perrina v The Port Authority and Other Workers Union* (1971) MR 168.

Again, in the case of *Yulia Timonina v Government of Seychelles and The Immigration Officer* SCA 38/2007*,* the Seychelles Court of Appeal at paragraph 15 of its judgment in reviewing the role of the judiciary in judicial review applications stated that it is –

> … to ensure that what is done by the Executive is proper and in accordance with given laws and procedures. Where a law gives power to the Executive, it is a fundamental principle that such power be exercised by the Executive judiciously and within the limit provided, the key concept being fairness. In other words, where a law requires the Executive to give reasons for its decision, the required reason should be adequately given. Failing to do so, a citizen or whoever is affected by that failure has the right to come to court seeking the necessary redress.

The Seychelles Court of Appeal in *Raihl* stated that an authority exercising quasi-judicial powers –

> which is by law invested with power to affect property of one of her majesty's subjects, is bound to give such subject an opportunity of being heard before it proceeds and that rule is of universal application, and founded on the plainest principles of justice…

The Seychelles Court of Appeal quoted the above excerpt from the case of *Cooper v Wandsworth* (1863) 14 CB (NS) 180.

The Seychelles Court of Appeal went on to state that –

> Administrative law is not about judicial control of Executive power. It is not Government by Judges. It is simply about judges controlling the manner in which the Executive chooses to exercise the power which Parliament has been vested in them. It is about exercise of Executive power within the parameters of the law and the Constitution. Such exercise of power should be judicious. It should not be arbitrary, nor capricious, nor in bad faith, nor abusive, nor taking into consideration extraneous matters.
> (From the cases of *Breen v Amalgamated Engineering Union* [1971] 2 QB 175; *Chief Constable of the North Wales Police v Evans* [1982] 3 All ER 141).

In the case of *Council of Civil Service Unions and Ors v Minister for the Civil Service* [1984] 3 All ER 935 the three grounds on which a decision may be subject to judicial review were classified as – illegality, irrationality, and procedural impropriety. Procedural impropriety concerns not only the failure of an administrative body to follow procedural rules laid down in the legislative instruments by which jurisdiction is conferred, it includes the failure to observe the rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision.

In the appeal case of *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, with respect to the modern concept of natural justice, the term now used is "the duty to act fairly" -

> Principles of natural justice" is a term now hallowed by time, through overuse by judicial and other repetition. It is a phrase often widely misunderstood and therefore is often misused. That phrase perhaps might now be allowed to find a permanent resting-place and be better replaced by another term such as "a duty to act fairly.

With regard to the concept or doctrine of "legitimate expectation", I share the same view with reference to an excerpt found in "Wikipedia".

It cannot be overemphasized that the concept of legitimate expectation has now emerged as an important doctrine. It is stated that it is the latest recruit to a long list of concepts fashioned by the court to review an administrative action.

It operates in public domain and in appropriate cases constitutes a substantive and enforceable right.

As a doctrine it takes its place beside such principles as rules of natural justice, the rule of law, non-arbitrariness, reasonableness, fairness, promissory estoppel, fiduciary duty, and perhaps, proportionality to check the abuse of the exercise of administrative power. The principle at the root of the doctrine is the rule of law which requires regularity, predictability and certainly the Government's dealing with the public.

An expectation could be based on an express promise, or representation or by established past action or settled conduct. It could be a representation to the individual or generally to a class of persons. Whether an expectation exists is a question of law, but clear statutory words override any expectation, however founded. However, as an equity doctrine it is not rigid and operates in areas of manifest injustice. It enforces a certain standard of public morality in all public dealings.

However, considerations of public interest would outweigh its application. It would immensely benefit those who are likely to be denied relief on the ground that they have no statutory right to claim relief.

Exercise of discretion is an inseparable part of sound administration and, therefore, the State which is itself a creature of the Constitution, cannot shed its limitation at any time in any sphere of State activity. A discretionary power is one which is exercisable by the holder of the power in his discretion or subjective satisfaction. The exercise of discretion must not be arbitrary, fanciful and influenced by extraneous considerations. The defendant is no doubt a creation of and an agency acting on behalf of the State, hence the doctrine of legitimate expectation is equally applicable to it in its process of decision making.

Findings and Conclusions

It is not in dispute that the plaintiff held an international corporate service provider's licence (ICSP licence) issued by the defendant under the ICSP to provide international corporate services in Seychelles, namely the formation, management or administration of specified entities as defined in the ICSP Act.

Upon or after the plaintiff's application for the renewal of its ICSP licence and its notification of the changes in respect to the plaintiff, the defendant did not require any other document or information from the plaintiff that it may request from the plaintiff under section 6(5) of the ICSP Act for it to deal with the plaintiff's application for the renewal of its ICSP licence.

By letter of 28 May 2010 addressed to the plaintiff, the defendant notified the plaintiff that -

(1) it will not grant the plaintiff with an ICSP licence; and
(2) it will not consider any application for candidates to undergo a fit and proper assessment for the proposed appointment with the plaintiff.

The decision of the defendant referred to above was on the following grounds -

(1) the plaintiff has failed to submit its application for renewal one (1) month prior to the expiry date in accordance with a circular dated 22 July 2009;
(2) the failure of the plaintiff to pay the annual licence fee;
(3) the serious problems within the control system and procedures of the plaintiff's office specially -
    (i) the provision of directorship services by persons associated with the plaintiff;
    (ii) the failure to conduct proper staff appraisals; and
    (iii) the absence of adequate professional indemnity insurance cover for its employees; and
    (iv) accounts have not been signed by the relevant persons, namely all the directors.

The plaintiff filed a petition for the review of the defendant's revocation of the plaintiff's licence in *Lotus Holding Company Limited v SIBA* CS No 121/2010.

The petition was fixed for hearing before the Chief Justice and at the hearing the defendant's counsel drew the Court's attention to the fact that the plaintiff had also filed Civil Side 107/2010, and as a result thereof this petition should be dismissed. The Chief Justice heard the preliminary objection and the petition in *Lotus Holding Company Limited v SIBA* CS No 121/2010, and dismissed the petition for abuse of process on the defendant's motion.

His Lordship FMS Egonda-Ntende CJ at page 2 of the judgment (no 5) states –

> I agree with learned counsel for the Petitioner, Mr. Frank Ally, that the statutory scheme for review under section 17 of the ICSP Act would provide a more comprehensive opportunity for the parties to agitate their case without the limitations inherent under judicial review under the supervisory jurisdiction of the Supreme Court. Under the Judicial Review the Supreme Court does not look at the merits of the decision as such, outside of the 3 main grounds of procedural impropriety, irrationality and illegality. Judicial review is more concerned with the process of decision making of the subordinate court, tribunal or body rather than the merits of the decision so made.

It should be noted that section 17(1) of the ISP Act states – "An application may be made to the Court for the review of any decision of the Authority (a) to refuse to grant or renew a licence under this Act".

Under Part IV of the ICSP Act – Enforcement - this Court is invested with all the powers to review the decision of the defendant and to make appropriate orders.

I have carefully considered the case of both the plaintiff and the defendant as pleaded, together with the testimonies of the witness of the respective parties, as well as the contents of the written submissions of counsel for the parties, and what follow are my findings and conclusions in relation to the issues raised.

The Chief Justice in his considered judgment when dismissing the petition for abuse of process in the directly related case of *Lotus Holding Company Limited v SIBA* CS No 121/2010, addressed the point raised by counsel for the defendant with regard to the procedure that ought to be followed when seeking review of matter under the ICSP Act.

For this reason I find no merit in the point raised and I do not intend to consider that issue again now as it will amount to this Court sitting on appeal on its own decision.

I find that the defendant's decision to revoke the plaintiff's ICSP licence was taken without giving the plaintiff any prior notice whatsoever of any act of the plaintiff detrimental to the public interest or the interest of its clients or in contravention of any relevant laws of Seychelles, and without giving the plaintiff a real or any opportunity to be heard and to defend itself of any allegations and also without giving the plaintiff an opportunity to take any steps to rectify any undesired situation.

I find that the defendant's decision in revoking the plaintiff's ICSP licence is unfair, unlawful and unjustified and contrary to the proper discharge of its functions because any previous review by the defendant of the plaintiff's operation as an ISCP has not revealed any act committed or being committed by the plaintiff detrimental to the public interest or the interest of its clients and any contravention of any of the relevant laws of Seychelles.

I also find that the defendant failed to conduct any inspection or review or a thorough inspection or review of the plaintiff's control systems and procedures as an ICSP, as required by law, immediately before taking such action against the plaintiff or any member of staff of an ICSP.

In the circumstances I find that the defendant's decision in refusing to renew the ICSP licence of the plaintiff and to assess the said fit and proper status was procedurally improper and a breach of natural justice, because the plaintiff was not given any real opportunity or sufficient opportunity to be heard before the defendant took its decisions regarding appraisals, payment of the annual licence fee, directorships of persons associated with it or companies incorporated and existing out of Seychelles, professional indemnity insurance, and, signatures on the audited accounts of the plaintiff.

Furthermore, I find that the defendant did not require any document, explanation or information from the plaintiff relevant to its application for renewal of the ICSP licence for it to deal with the plaintiff's said application before it took its said decisions.

I find that the plaintiff was not given any real opportunity to be heard and to defend itself against any complaint regarding the plaintiff's discharge of its duties as an ICSP and an opportunity to defend itself or take steps to comply with the law or to rectify any purported or alleged deficiency in its control system and procedures.

I likewise find that the defendant failed to conduct a thorough inspection of the plaintiff's control systems and procedures, as required by law, before refusing the plaintiff's ICSP licence.

It appears that the defendant has based its decisions substantially on a compliance review that it effected at the plaintiff's office on 28 August 2009, without giving the plaintiff the opportunity to be heard thereon or producing the final report of the review.

The defendant having not completed its report following its compliance review of 28 August 2009, thus not knowing whether indeed the plaintiff was carrying business in contravention of any law or detrimental to the public interest or to the interest of its clients, and as such, the defendant did not and could not have requested the plaintiff to comply with the law failing which to suspend or revoke its ICSP licence. If the defendant had any reason to believe that the plaintiff was carrying on its business in a manner detrimental to the public interest or to the interest of its clients or in breach of any of law, it should have notified the plaintiff thereof immediately after the compliance review and require it to take urgent and immediate steps to comply with the law or rectify any deficiency, which the defendant failed to do.

I also find that the defendant failed for no valid reason to consider the application of Mrs Armsbury and Ms Germain and to assess them for fit and proper status.

It is evident that the defendant took irrelevant matters into consideration and failed to take into consideration relevant matters, because:

(a) Ms Jouanneau and Ms Port-Louis are non-managerial staff of the plaintiff under the initial arrangement that it had with the defendant;
(b) the plaintiff had appointed or was proposing the appointment of a new director in the person of Mrs Alexia Armsbury, an Attorney--At-Law and Notary of long standing practising in the same building as the plaintiff conducts its business; and
(c) the employment by the plaintiff of Ms Germain, a university graduate holding a Bachelor of Commerce (Property) with Distinction from the Curtin University of Technology, Australia.

All these show that the defendant did not act fairly and rationally when processing and dealing with the plaintiff's application for the renewal of its ICSP licence, and in its assessment or non-assessment of the fit and proper status of Mrs Armsbury and Ms Germain.

It is also my finding that the defendant's decision was wrongful, illegal, unjustified, unreasonable, unfair, and is contrary to the defendant's proper discharge of its functions and powers because:

(a) the defendant kept making reference to the removal of the fit and proper status of Ms Jouanneau and Ms Port-Louis, which were no longer relevant considerations for the plaintiff's application for the renewal of its licence as they are non-managerial staff of the plaintiff and the plaintiff had appointed a new managerial staff and director;
(b) the plaintiff had not contravened the ICSP Act which warranted the defendant's refusal of its ICSP licence and not to assess Mrs Armsbury and Ms Germain for fit and proper status;
(c) if the defendant had any good reason to believe that the plaintiff carried on its business under the licence in a manner detrimental to the public interest or to the interest of its clients or in breach of any law it should have required the plaintiff to take steps to comply with the law or rectify the

deficiency, which it failed to do, rather than refuse the renewal and perform the fit and proper assessment;
(d) the deficiencies that the defendant raised could be easily remedied and the defendant failed to give the plaintiff any opportunity to remedy them.

The defendant took the decision he did, contrary to the proper discharge of its functions and powers specially its reliance on the following flimsy grounds, that -

(a) the signature by Ms Port-Louis (who is a shareholder of the plaintiff) on the audited accounts as a director when she was not a director, which was an oversight (even to the defendant at the time);
(b) the plaintiff had no insurance cover for its employees in the USA;
(c) the provision of directorship services by persons associated with the plaintiff in companies incorporated outside the jurisdiction of the defendant and Seychelles laws; and
(d) the failure to conduct proper staff appraisals.

I find that the circular of 22 July 2009, which the defendant referred to, is merely administrative and any non-compliance thereof cannot disbar an applicant's licence from being renewed or warrant the refusal of the renewal in that the ICSP Act as amended (vide section 4(4)) permits the defendant to renew licences with retrospective effect subject to payment of a penalty.

The plaintiff paid or could have paid the annual licence fee as it had an account with the defendant in which there were sufficient funds from which the defendant would deduct any fees due. The defendant was aware of this arrangement which is a settled arrangement between the defendant and all ICSPs whereby all ICSP holds a credit account facility with the defendant which is occasionally replenished and whenever a transaction is effected by the defendant on the ICSP's behalf, the ICSP's account is debited accordingly. If the ICSP's account had insufficient funds, the defendant informs the ICSP and the ICSP credits more fund into it.

I therefore do not consider the failure to pay the annual licence fee such a material breach that warrant the refusal of the renewal of the ICSP licence because such failure could have been easily remedied. In my view, this reasoning appears to be vexatious and capricious on which the defendant relies upon to refuse the renewal the plaintiff's licence.

On the basis of the evidence, it is clear from the manner that the defendant treated the plaintiff's application for renewal and the reasons given, that the defendant was not acting rationally and in good faith, but displaying emotional reaction to a perceived situation, contrary to the proper discharge of its functions and powers, because -

(a) the defendant disregarded its discretion that it can renew licences under the ICSP Act with retrospective effect having admitted that several licences are renewed with retrospective effect subject that the licensee pays a penalty;
(b) that an IBC can give Power of Attorney to any person to act on its behalf in terms of section 52(1) and 70(1) of the IBC Act;

(c) the Chief Executive Officer of the defendant in his evidence admitted that he was not aware of the provisions of section 52(1) and 70(1) of the IBC Act and vehemently defended his stance that such was not permitted under our law;
(d) the defendant was still in the process of conducting a compliance review of the plaintiff, which was not completed and the plaintiff had commented on the defendant's first report and the plaintiff was awaiting the defendant's response to its comments; and
(e) the defendant failed to give the plaintiff any opportunity to be heard on the said allegations or issues that the defendant relied upon to refuse the renewal of the licence.

In view of the fact that this Court had ordered the defendant to reinstate the plaintiff's licence it is clear from the reasons given by the defendant in refusing the renewal of the plaintiff's ICSP licence, that it was trying to defeat the order of this Court and to find excuses to refuse the renewal of the licence.

I find that no doubt the plaintiff as an ICSP must have suffered certain loss and damage as a result of the revocation or non-renewal of its licence by the defendant and this Court has to determine the appropriate quantum.

The plaintiff is claiming the sum of US$25,900 and continuing until the date of judgment. The CEO of the defendant adduced details of the plaintiff's revenue statistics for the past 4 years in order to refute the plaintiff's claim. The basis of the claim of the plaintiff is rather vague but nonetheless I am satisfied that in the circumstances the plaintiff suffered losses. I assess such losses at a global nominal sum of US$5000.

Orders

In the final analysis and for reasons stated above I make the following orders:

(i) I hereby order the defendant to renew the plaintiff's ICSP licence; and/or hear and reconsider the plaintiff's application for the renewal of its ICSP licence in accordance with section 4(2) of the ICSP Act; and
(ii) I hereby also order the defendant to assess the fit and proper status of Mrs Armsbury and Ms Germain; and
(iii) I hereby further order and condemn the defendant to pay the plaintiff loss and damage in the nominal sum of US$5,000 with interest at the legal rate. I also award the plaintiff costs of this suit.

FARABEAU v CASAMAR SEYCHELLES LTD

Egonda-Ntende CJ
31 May 2012 Supreme Court Civ 159/2011

Fault – Negligence – Safe system of work – Damages – Loss of future earnings

The plaintiff was injured in the course of his employment. He was on top of a container that was being pulled by a tractor and tripped and fell off. The plaintiff fractured his left patella, suffered permanent injury and is unable to work. He claimed damages from the defendant, his former employer, on the basis of failure to provide a safe system of work.

JUDGMENT Awarded R 1,322,000 with costs: R 350,000 for injuries and R 972,000 for loss of future earnings.

HELD

1 An employer will fail to provide a safe system of work where an employee is required to undertake dangerous work where the potential for accident is quite high and there is no protective gear and equipment to prevent injury.
2 If the plaintiff has followed instructions issued by the defendant's supervisor on site, the plaintiff cannot be held to have contributed to or been the sole cause of the accident.
3 In calculating loss of future earnings, the number of years of the plaintiff's expected working life is multiplied by the plaintiff's annual income, and discounted for accelerated benefit and other imponderables (in this case, 33%).

Cases
Tirant v Banane (1977) SLR 219
Tucker v La Digue Island Lodge (unreported) SSC Civ 343/2009
Yune v Civil Engineering (1973) SLR 259

A Amesbury for the plaintiff
Frank Ally for the defendant

Judgment delivered on 31 May 2012 by

EGONDA-NTENDE CJ:

The plaintiff is a 36 year old former employee of the defendant. The defendant is a company registered in Seychelles carrying on the business of repairing, maintaining and fitting of fishing nets to commercial fishing vessels. It is contended for the plaintiff that on 11 August 2008 at New Port Victoria in the course of his employment with the defendant the plaintiff was injured when a bale of new fishing net fell on him. The plaintiff avers that the said accident was caused by the fault and negligence of the defendant and its employees, by reason of which he suffered injury, loss and damages.

The plaintiff sets out the particulars of fault and negligence of the defendant as follows: (a) that the defendant failed to provide a safe system of work and a workplace for its employees which included the plaintiff; (b) that the defendant failed to provide adequate supervision or any supervision at all; (c) that the defendant failed to warn or provide adequate warning of the dangerous nature and risk involved in the performance of the job at hand; (d) that the defendant failed to provide protective gear and equipment; and (e) that the defendant and its employees were negligent or reckless in all the circumstances of the case.

The plaintiff claims to have suffered the following injuries: (a) swelling and tenderness of left knee and a comminuted fracture of the left patella; (b) patella-femoral anchillosis restriction of movement; (c) atrophy of the quadriceps muscle; and (d) permanent disability.

The plaintiff therefore claims from the defendant the following sums of money under the said headings: (a) pain and suffering – R100,000; (b) loss of amenities – R150,000; (c) distress and inconvenience – R149,300; (d) permanent disability – R500,000; (e) medical report – R700; and (f) loss of earnings – R1,497,600; totaling to a sum of R2,397,600.

The defendant opposed the plaintiff's claim. The defendant accepts that the accident occurred on 11 August 2008 at New Port Mahé during the course of the plaintiff's employment with the defendant. The defendant further states that the plaintiff was assigned to zone 14 to remove a fishing net from a 40 foot container. The plaintiff climbed on top of the container to hook the net onto a crane. Once the net was hooked the plaintiff was required to descend from the top of the container. The tractor which was pulling the container moved forward and the plaintiff who remained on top of the container tripped and fell off. The defendant contends that the plaintiff was injured as a result of his own sole negligence or fault or in the alternative the plaintiff contributed substantially to the said accident.

The defendant sets out particulars of negligence of the plaintiff as follows: (a) that the plaintiff failed to follow any or all of the safe systems of work provided by the defendant to all employees and supervisors; (b) that the plaintiff failed to follow any or all instructions of the supervisors on site; (c) that the plaintiff failed to listen and or follow any or all warnings regarding the safe mounting on and decent from the container; (d) that the plaintiff failed to use any or all of the safety equipment provided on site; (e) that the plaintiff failed to wear any or all of the protective gear provided on site; (f) that the plaintiff failed to descend from the container when required as per procedure; and (g) that the plaintiff was negligent and reckless in all circumstances of the case.

The defendant denies that the plaintiff suffered any injury, loss and damage or in the alternative that the plaintiff's claim is grossly exaggerated. He prayed that the plaintiff's action be dismissed with costs.

The plaintiff called five witnesses and the defendant called one witness. From the account of eyewitnesses at the scene of the accident what happened on that day is clear. The plaintiff arrived at his place of work in the morning. There was an assistant supervisor Mr Smith who was driving the tractor and there was another colleague

named Mr Jim Mellon. The plaintiff in his ordinary clothes climbed onto a 40 foot container to remove the fishing net and hook it onto a crane. There was a tractor attached to the container which would pull the container forward. The plaintiff remained on the container.

The assistant supervisor, the most senior official of the defendant who was on site on that day, testified that he instructed the plaintiff to remain on top of the container as they continued to work. While the plaintiff was on top of the container he tripped and fell to the ground, most probably due to the container being pulled by the tractor. The plaintiff was injured and he was rushed to Victoria Hospital.

The plaintiff suffered multiple injuries including a fracture of the left patella. He was operated on twice but in spite of his recovery he has suffered among other things a certain level of permanent disability. He is not able to move his leg as he used to. Neither is he able to stand for long. He is no longer able to participate in sports. His sex life has been inhibited. He has failed to get alternative employment and lost the employment he had with the defendant. At the time he was working with the defendant as a labourer he used to earn R4500 per month. He claimed he was able to work with another organisation at the same time and his total monthly income would come up to about R8000 per month.

In terms of determining liability it appears to me important to determine whether, as the defence contended, a safe system of work was provided and protective clothing provided to the workers but that the plaintiff failed to follow the safe system of work and/or at the same time failed to wear protective clothing. The defendant contends that they provided head gear and boots as well as a ladder for climbing the 40 foot container. Secondly that the plaintiff failed to care for his safety as a reasonable man ought to have done and thereby was responsible solely for the accident or contributed to the accident. See *Tirant and Anor v Banane* (1977) SLR 219.

The evidence available from those who were on the scene is that there were no helmets available at the scene that day. And though a ladder might have been available, it was unhelpful to climb and get on top and down of the 40 foot container as it was too short. As regards the instructions to hook the net onto a crane and then come down, Mr Smith who was the assistant supervisor and highest official of the defendant on site testified that that was not the way they worked. In fact he stated that he specifically instructed the plaintiff to remain on top of the container as the net was pulled out because repeatedly the plaintiff would be required to help and pull the net onto the crane. It would not be practical for the plaintiff to climb up and down every time that the net had to be hooked to the crane and that is why he was required to stay on top of the container.

I accept the evidence of Mr Smith on this point which is consistent with the testimony of the plaintiff as to the method of work that was being employed at the site. I'm satisfied that firstly in light of the nature of the work the defendant failed to provide for a safe system of work for an employee in the nature of the work that the plaintiff was doing. To stand on top of a container which was periodically being moved by a tractor is fairly dangerous work and the potential for accident quite high as happened in this case. There was no protective clothing provided at the site and in any case the helmet or boots that the defendant had claimed he made available without

indicating where they were would not have protected the plaintiff from the injuries he suffered which was a fracture of the left patella. I am therefore satisfied that the defendant is liable for the injury suffered by the plaintiff.

In light of the testimony of Mr Smith I am unable to accept the defence case that the plaintiff was either the sole cause or contributed to his injuries. The plaintiff was following instructions of the most senior official of the defendant on site. If those instructions were contrary to the defendant's company instructions for safe working the blame would not lie upon the plaintiff but upon the defendant's supervisor giving such instructions to the plaintiff for which the defendant would be liable. As I have accepted the evidence of Mr Smith on this point I hold that there were no such instructions as has been put forth by Mr David Fabien. As the plaintiff followed instructions issued by the defendant's supervisor on the scene I am unable to find that he contributed to or was the sole cause of the accident.

The plaintiff has claimed damages for pain and suffering, loss of amenities, distress and inconvenience and permanent disability. From his testimony I accept that he suffered pain and suffering. And that there has been a loss of amenities together with permanent disability. He has not proved that he spent R700 on the medical report. I am hesitant with regard to the claim for distress and inconvenience. I suppose distress will fall into pain and suffering or if the distress is caused by the permanent disability it would be subsumed in the claim for permanent disability together with inconvenience.

The plaintiff has claimed a sum for each item without necessarily explaining why it should for instance be R100,000 rather than R50,000. No guide by way of past awards of this court or other court for similar injuries has been provided to me by counsel for the plaintiff, Mrs Amesbury. Ms Alton who assisted Mr Frank Ally, counsel for the defendant, referred to some cases in her submissions but did not provide the citation nor make copies of the decisions available. As I a result I have been unable to obtain any guidance therefrom.

In *Alan Tucker and Anor v La Digue Island Lodge* Civil Side No 343 of 2009 the Supreme Court awarded R190,000 to a plaintiff that had suffered a fracture of the knee with residual swelling and impairment of movement which was likely to grow worse with the development of osteoarthritis. He had incurred pain and suffering too. Rather than approach each head of claim separately, that is pain and suffering including distress and inconveniences, loss of amenities, and permanent disability which assessed at 30, I will give a joint award in respect of those injuries. In my estimation R350,000 will be sufficient recompense for injuries that the plaintiff suffered and continues to suffer by reason of the accident.

I accept, as he testified, that he was earning R4,500 per month and that since his accident he has been incapacitated in such a way that he is not able to get similar work or indeed any other work. I will generally apply the principles adopted by Sir George Souyave in *Chang Yune v Civil Engineering* (1973) SLR 259. I shall take the number of years of the plaintiff's expected working life (the difference between his age at the time of the accident (36) and the age of 63) and multiply the same by his annual income, and discount it for accelerated benefit and other imponderables

including that he may well not have worked up to that age. I will discount it by a factor of 33%. I award the plaintiff the sum of R972,000 for loss of future earnings.

I therefore enter judgment for the plaintiff in the total sum of R1,322,000 [one million, three hundred and twenty two thousand only] with costs.

As the plaintiff's counsel was retained by the Legal Aid Fund, I direct that the party to party costs to be recovered from the defendant shall be paid into the Legal Aid Fund. Plaintiff's counsel shall present a bill of costs in this regard in the normal way.

LE ROUX v EDEN ISLAND

Renaud J
31 May 2012 Supreme Court Civ 325/2009

Contract - Stay of proceedings – Arbitration clause

The plaintiff sued the defendant on the basis of an agreement entered into by the parties. The defendant applied for an order staying the proceeding because the agreement contained an arbitration clause. The plaintiff, as respondent, argued the agreement was null and void because the plaintiff is a non-Seychellois and is precluded from purchasing property under the Immovable Property (Transfer Restriction) Act.

JUDGMENT Stay of proceedings ordered.

HELD

1 An arbitration clause in a written agreement is a collateral agreement in its own right which is separate and severable from the main agreement.
2 Article 110(4) of the Commercial Code provides that an arbitration clause will be valid even if the main agreement is void and unenforceable. An arbitration clause can be voidable only on grounds specific to the arbitration clause itself.
3 An arbitrator has jurisdiction to consider whether an agreement is valid and enforceable.
4 Article 113(1) of the Commercial Code provides an exception to art 111(1) of the Commercial Code. The Court can declare that it has jurisdiction if an arbitration agreement is not valid or has terminated.

Legislation
Commercial Code, arts 110(4), 111(1), 113, 113(1)
Immovable Property (Transfer Restriction) Act, ss 3, 3(1)(a), 4, 4(1)(a),(1)(c), 5, 6, 7(1),(2)

Cases
Abu v Winstanley (1978) SLR 62

Foreign Cases
Assari v Ramjauny (unreported) CS 284/1999
Fiona Trust v Privalov [2007] 4 All ER 951 (HL)
Harbour Assurance v Kansa [1993] QB 701

F Elizabeth for the plaintiff
K Shah SC for the defendant

Ruling delivered on 31 May 2012 by

RENAUD J:

By plaint entered on 24 November 2009 the plaintiff sued the defendant on the basis of an agreement entered by them. The defendant sought further and better particulars of the plaint which were duly provided by the plaintiff.

Instead of proceeding to enter its statement of defence, the defendant, acting as applicant on 24 March 2010 entered a notice of motion seeking for an order staying the proceeding on the ground that the agreement contains an arbitration clause in terms of which any dispute shall be referred to and be determined by adjudication in accordance with clause 25 (which expressly states that it does not preclude any party from obtaining interim relief on an urgent basis from a court of competent jurisdiction), and that, in terms of clause 25.10 it constitutes an irrevocable consent by the parties to any proceeding in terms thereof and no such party shall be entitled to withdraw therefrom or claim at any such proceedings that it is not bound by such provisions, and constitute a separate agreement severable from the rest of the agreement and shall remain in effect despite termination, or invalidity for any reason, of the agreement.

Counsel for the respondent submitted that undoubtedly the agreement purports to sell or to offer for sale a plot of land and villa thereon at Eden Island, Seychelles. The agreement itself is entitled Agreement of Sale Villa. In annexure (c) at number 1 it is entitled “Offer to Purchase”.

He submitted that the plaintiff is a non-Seychellois and as such is precluded from purchasing property in Seychelles and any agreement which purports to sell or offer to sell immovable property in Seychelles to a non-Seychellois without first having obtained sanction of the Government is unlawful, null and void.

Section 4(1)(c) of the Immovable Property (Transfer Restriction) Act provides as follows:

> A non-Seychellois may not enter into any agreement which includes an option to purchase or lease any such property or rights, without having first obtained the sanction of the government.

The consequences of such an agreement are that it is rendered “unlawful and void.” Section 5 of the Act 95 provides as follows:

> Any transaction effected in contravention of the provisions of section 3, 4, 7(1) or (2) shall be unlawful and void, and in the case of a sale, purchase or acquisition of immovable property or rights therein, purporting to have been purchased or acquired shall be forfeited to the Republic.

Section 6 of the Act makes it an offence for any person to knowingly participate in such a transaction including a notary, estate agent or legal practitioner. Any person found guilty under the Act shall be liable to a term not exceeding two years or a fine not exceeding R50,000 or to both imprisonment and fine.

Counsel for the respondent in support of his submissions cited the case of *Abu v Winstanley & Ors* (1978) SLR 62, where it was held that in view of the prohibition contained in section 4(1)(a) (now section 3(1)(a)) of the Immovable Property (Transfer Restriction) Act (Cap 95), the purchase of land by a non-Seychellois was unlawful and void.

He also cited the case of *Bertha Alvina Assari v Ahmad Rajack Ramjauny* CS No 284 of 1999, where the Court held that a Mauritian national who had purchased immovable property jointly with a Seychellois had "no legal capacity to purchase" and therefore the Seychellois, Bertha Assari, was entitled to be registered as the sole owner of the whole of the property.

He argued that the agreement which purports to sell or to offer for sale immovable property to the respondent, a non-Seychellois, is not valid. Counsel submitted that in terms of article 113 of our Commercial Code, this Court can declare that it has jurisdiction at the request of the respondent.

Counsel for the applicant made particular and separate submissions in answer to the submissions of counsel for the respondent. He submitted that the agreement is neither illegal nor contrary to the provision of the Immovable Property (Transfer Restriction) Act (Cap 95), and that the case of *Abu v Winstanley & Ors* (1978) SLR 62 cannot be relied upon.

Counsel for the applicant, citing *Chitty on Contracts* (13th ed) at 1094*,* submitted that there is a startling consequence to the submission of the plaintiff that the entire agreement is illegal for want of sanction to purchase in that –

> Where a contract is illegal as formed, or it is intended that it should be performed in a legally prohibited manner, the courts will not enforce the contract, or provide any other remedies arising out of the contract.
>
> The principle of public policy is this: No Court will lend its aid to a man who founds his cause of action upon an immoral or illegal act… It is upon that ground the court goes; not for the sake of the defendant, but because, they will not lend their aid to such a plaintiff.
>
> The effect of illegibility is not substantive but procedural. It prevents the plaintiff from enforcing the illegal transaction.

Counsel for the applicant further submitted that accordingly the consequences would be that the plaint filed by the respondent cannot be entertained by the Court because, based on the submission of counsel of the respondent, the transaction is illegal for want of sanction. The Court would have to strike out the plaint thereby bringing an end to these proceedings.

The pleadings revealed that the parties have entered into the agreement which is entitled Agreement of Sale Villa and its annexure (c) at number 1 entitled "Offer to Purchase". This being so because the applicant has not responded to paragraphs 35 and 36 of the plaint which state as follows:

35. The agreement was subject to the resolutive condition that the Government of Seychelles grant the sanction in terms of which the plaintiff, being a non-Seychellois, to acquire the parcel in terms of the agreement in terms of the Immovable Property (Transfer Restriction) Act (Cap 95 of the Laws of Seychelles)**.**
36. Notwithstanding the lapsing of a period of sixty (60) days from the date of signature, the Government of Seychelles has refused and/or failed to grant the sanction.

This notice of motion can be decided only on the contents of the pleadings to determine whether or not the applicant had already obtained the sanction of the Government in respect of the agreement for the sale of an immovable property to a non-Seychellois. The applicant (as defendant) has not yet entered its statement of defence.

This Court at this stage of the proceeding cannot therefore establish on the basis of the pleadings so far laid before this Court as to whether or not the agreement between the parties is unlawful null and void, until evidence to that effect is adduced and proved by the plaintiff at the hearing.

In the circumstances this Court, at this stage of the proceedings, declines to make any finding as to whether the agreement between the parties is unlawful, null and void.

Counsel for the respondent objected to the motion and advanced three arguments as to why such a stay of proceedings should not be granted:

(a) that the written agreement is void and unenforceable because its Schedule C is incomplete and the land parcel not described, and thus clause 25 is not enforceable in law;
(b) that clause 25.1 of the Agreement does not oust the jurisdiction of the Supreme Court; and
(c) that clause 25.1 is not mandatory but only constitutes an option for either party to refer disputes to adjudication.

I have the benefit of perusing the submissions of Counsel for the respective party and these have provided much assistance.

At common law, it is well established that an arbitration clause in a written agreement is a collateral agreement in its own right which is separate and severable from the main agreement. This was recognized by the decision of the English Court of Appeal in *Harbour Assurance v Kansa* [1993] QB 701. Ralph Gibson LJ said at 711:

> An arbitration clause in ordinary terms that is to say, without special words to ensure survival is usually, and has been held to be self contained contract collateral to the containing contract.

Because the arbitration agreement is severable from the main agreement, even if the main agreement is attacked as void or unenforceable, it does not necessarily follow

that the arbitration agreement is also void and unenforceable. If the arbitration agreement is valid, then the arbitration tribunal has jurisdiction to determine whether the main agreement is invalid or unenforceable.

The principle is found in article 110(4) of our Commercial Code which provides –

> If an agreement containing an arbitration clause is judicially declared to be void, the arbitration clause therein shall also be void. However, an arbitration clause in an international agreement shall not be ipso facto void by reason only of the invalidity of such agreement.

A challenge to the validity of an arbitration clause in an agreement must therefore be based on grounds specific to the arbitration clause itself. It is not sufficient merely to allege that the main agreement is invalid or unenforceable. In the case of *Fiona Trust v Privalov* [2007] 4 All ER 951 (HL), Lord Hoffman at [7] said:

> the principle of severability enacted in s 7 means that the invalidity or rescission of the main contract does not necessarily entail the invalidity or rescission of the arbitration agreement. The arbitration agreement must be treated as a "distinct agreement" and can be void or voidable only on grounds which relate directly to the arbitration agreement.

In the instant case, clause 25.10 gives effect to the principle of severability enshrined in article 110(4) of our Commercial Code by expressly providing that the agreement to refer disputes to arbitration is separate from the main agreement and remains in effect notwithstanding the termination or invalidity of the that agreement for any reason.

Clause 25(1) of the agreement between the parties, which agreement is attached to the affidavit of the applicant in support of its motion, states:

> subject to any specific provision to the contrary in this AGREEMENT, in the event of any dispute of any nature whatsoever arising between the PARTIES on any matter provided for in, or arising out of, this Agreement, that dispute shall be referred to and be determined by adjudication in accordance with this 25.

That agreement goes on to provide in its clause 25.3.4 that the adjudication shall be held in terms of the Arbitration Act of the Republic of Seychelles.

Clause 25.10.2 of that agreement further expressly provides that the provisions of its clause 25.2 -

> constitute a separate agreement, severable from the rest of this AGREEMENT, and shall remain in effect despite termination, or validity for any reason, of the AGREEMENT.

It is evident from the affidavit of counsel for the respondent that it is not his contention that the arbitration clause in the agreement is invalid or unenforceable or that he is not bound by it. He only raised the argument to the effect that the main agreement is void and unenforceable because Schedule C is not complete and the

land parcel is not described. This relates solely to the main agreement and these do not concern the validity of clause 25.1 and it is not said that clause 25.1 is invalid or incomplete for any reason specific to clause 25.1 itself.

Accordingly, I find that the validity of clause 25.1 is unaffected by the arguments made in relation to the main agreement, and an arbitrator or adjudicator has jurisdiction to determine those arguments if the situation arises.

Does clause 25.1 of the sale agreement oust the jurisdiction of this Court as argued by the respondent?

Article 111(1) of our Commercial Code provides as a general rule that:

> An arbitration agreement shall be constituted by an instrument in writing signed by the parties or by other documents binding on the parties and showing their intention to have recourse to arbitration.

Article 113(1) provides:

> The Court seized of a dispute which is the subject matter of an arbitration agreement shall, at the request of either party, declare that it has no jurisdiction, unless, insofar as the dispute is concerned, the agreement is not valid or has terminated.

As can be seen, article 113(1) provides an exception to the rule contained in article 111(1) and according to this article the Court may declare that it has jurisdiction at the request of either party, if in the opinion of the Court the arbitration agreement "is not valid or has terminated."

Clause 25.1 of the agreement provides for the referral of any dispute falling within its scope to an agreed dispute resolution forum. Its wording is sufficiently wide and it can apply to a dispute as to the validity and enforceability of the agreement.

I find that the Court can give effect to that provision of the agreement of the parties by declining its jurisdiction over the substance of the dispute.

Is clause 25.1 of the agreement optional or mandatory?

Clause 25.1 is worded:

> subject to any specific provision to the contrary in this AGREEMENT, in the event of *any dispute* of *any nature whatsoever* arising between the PARTIES on *any matter* provided for in, or arising out of, this Agreement, that dispute *shall* be referred to and be determined by adjudication in accordance with this 25 [emphasis added]

It is evident that the mandatory word "shall" and/or "shall be" has been used in that clause and it leaves no doubt that that provision of the agreement is mandatory, so I find.

Conclusion

In the final analysis I find, on the basis of the reasons stated above, that all the three arguments raised by the respondent are not maintainable and are accordingly dismissed.

I accordingly order a stay of the proceeding of this suit on the ground that the agreement between the parties contains an arbitration clause in terms of which any dispute shall have to be referred to and be determined by adjudication in accordance with its clause 25 thereof and that, in terms of its clause 25.10 it constitutes an irrevocable consent by the parties that no such party shall be entitled to withdraw therefrom or claim that it is not bound by such provisions which constitute a separate agreement severable from the rest of the agreement and remain in effect despite termination, or invalidity for any reasons, of the agreement.

For avoidance of doubt, if the referral to arbitration under the agreement is required to be done within a prescribed time, that prescribed time shall start from the date of this judgment.

I so order.

BRADBURN v SUPERINTENDENT OF PRISONS

Karunakaran, Renaud, Burhan JJ
12 June 2012 Constitutional Court 9/2010

Constitution – Equal protection - Prisons Act – Remission – Misuse of Drugs Act

The petitioners are serving a term of imprisonment in respect of offences under the Misuse of Drugs Act. Prior to their conviction and sentencing, s 30 of the Prisons Act was amended so that remission of prison terms would not apply to prisoners serving a sentence of imprisonment under the Misuse of Drugs Act. The petitioners allege the amendment contravenes their constitutional rights.

JUDGMENT Petition dismissed.

HELD

1 Equality before law is a negative concept: all are equally subject to the ordinary law of the land and no one is above the law.
2 Equal protection of laws is a positive concept. It does not mean that the same law should apply to all persons equally without distinction, but that the same laws should apply without discrimination to all persons similarly situated.
3 An action will not be time barred if the contravention is a continuing cause of action where the petitioners will carry on losing the benefit unless and until such time as the situation is redressed by the court.
4 The Prisons Amendment Act 2008 was not an ex post facto law. It did not create any new offence nor enhance the sentence imposed by the court. The denial of remission to a prisoner does not amount to a new conviction or new penalty. Denial of remission has no relevance to equal protection of law or to a fair trial. Remission is a conditional privilege and no prisoner can claim remission as a constitutional right.
5 The Prisons Amendment Act 2008 did not discriminate between prisoners convicted of the same offence under the Misuse of Drugs Act and therefore upholds the concept of equal protection under the law.
6 The Constitution does not place any bar on the competence of the Legislature to formulate a prison policy and make laws for its administration in the larger interests of the community. The amended s 30 represents a clear policy not to extend the benefit of remission to prisoners sentenced for drug offences and is a reasonable qualification based on intelligible differentia.

Legislation
Constitution, art 19(4)
Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constituion) Rules, rule 5
Misuse of Drugs Act
Prisons Act, s 30
Prisons Amendment Act 2008

Cases
Chow v Michel (2011) SLR 1
Larue v Court Martial (unreported) SCC 1/1996
Talma v Michel (2010) SLR 477

K Domingue for the petitioners
C Jayaraj for the respondents

Judgment delivered on 12 June 2012

Before Karunakaran, Renaud, Burhan JJ

The first and the second petitioners are convicts. They are currently serving a term of imprisonment in respect of offences under the Misuse of Drugs Act. They were convicted and sentenced by the Supreme Court on 24 July 2009 and 28 January 2009 respectively for the offences of trafficking and being in possession of a controlled drug.

The Prisons Act as it existed prior to the conviction and sentence of the petitioners had then contained a provision, which had granted the benefit of remission from prison terms to certain categories of prisoners including those who were serving a prison term for offences under the Misuse of Drugs Act.

In fact, on 25 August 2008, almost a year prior to the said conviction and sentence of the petitioners, the law under section 30(2) of the Prisons Act, which contained the provision for remission, had been amended. This amendment in effect had taken away the benefit of remission, which had otherwise been granted in the past to the drug offenders. This amendment had been made by repealing subsection (2) and substituting the following:

> Sub Section (1) shall not apply to a prisoner —
> (a) serving sentence of imprisonment for life; or
> (b) serving a sentence of imprisonment under the Misuse of Drugs Act; or
> (c) detained under custody during President's pleasure.

Following the said amendment, section 30 of the Prisons Act now reads thus:

> Remission
> (1) Subject to subsections (2) and (3), a person sentenced, whether by one sentence or by consecutive sentences, to imprisonment for a period exceeding 30 days, including a person sentenced to imprisonment in default of payment of a fine or other sum of money, may, on the ground of his industry and good conduct while in prison be granted a remission of one third of the period of his imprisonment.
> (2) Sub Section (1) shall not apply to a prisoner —
> (a) serving sentence of imprisonment for life; or
> (b) serving a sentence of imprisonment under the Misuse of Drugs Act; or
> (c) detained under custody during President's pleasure.
> (3) …
> (4) For the purpose of giving effect to subsection (1), each prisoner on the commencement of his sentence shall be credited with the full period of

remission which he would be entitled to under that subsection and shall only lose such remission as a punishment for idleness, lack of industry or other offence against prison discipline.

(5) The preceding provisions of this section shall be without prejudice to the prerogative of mercy vested in the President under the Constitution.

The petitioners herein seek a constitutional remedy, alleging that the said amendment made in 2008 to the Prisons Act contravenes their constitutional rights, although the amendment had been made almost a year prior to their conviction and sentence. As per the pleadings in the petition, it is the case of the petitioners:

1. That the above amendment is discriminatory amongst those who are convicted under the Misuse of Drugs Act;
2. The Amendment Act cannot apply retrospectively to persons who committed the offence prior to 25 August 2008, the date on which the amendment came into force;
3. Amendment violates the underlying constitutional principle of the "equal protection of laws"; and
4. The petitioners' constitutional right to a fair hearing had been contravened by the said amendment.

According to Ms Domingue, counsel for the petitioners, the amendment in question and the subsequent act of refusal by the prison authority to grant remission of sentence to the petitioners are unconstitutional as it contravenes the constitutional rights of the petitioners.

In the circumstances, the petitioners pray this Court for a judgment:

1. Declaring that the petitioners are entitled to remission on their sentence;
2. Declaring that the petitioners are entitled to remission on the ground that they committed the offences before the Amendment Act 2008 came into force;
3. Declaring that the Prisons Amendment Act, 2008 is discriminatory and therefore null and void;
4. Directing the respondents to re-instate the practice of remission of sentences; and
5. Awarding the petitioners moral damages in the sum of R50,000 each.

On the other hand, the respondents have raised a preliminary objection contending that this petition is time barred since it has not been filed within 90 days of the alleged contravention as required by the Constitutional Court Rules. The Amendment Act came into force on 25 August 2008, and the petition was filed on 25th October 2010. Hence, the respondents contended that the instant petition is not maintainable in law and liable to be dismissed *in limine*.

On the merits of the case, the respondents contended that the above amendment is not discriminatory amongst those who are convicted under the Misuse of Drugs Act, as it equally and universally applies to all prisoners who served imprisonment under the Misuse of Drugs Act on the day the amendment came into force. Further, the amendment according to the respondents, should apply retrospectively to all persons who committed the offence prior to 25 August 2008 on which date the amendment came into force. The respondents contended that the impugned Amendment Act first

of all, does not create any offence retrospectively and that it is not *an ex post facto* law. Denial of remission to the petitioners by virtue of the provisions under the Prisons Act is neither a new conviction nor a new or enhanced penalty in law. Denial of remission in accordance with the amendment has no relevance either to the presumption of innocence on the part of the petitioners or to fair trial. Obviously, the issue of remission arises only after a fair trial and proper conviction and sentence. Therefore, the amendment to the Prisons Act is neither an amendment to any penal provision of law nor does it fall under "ex post facto laws". Hence, counsel for the respondents submitted that the instant petition is devoid of merit and therefore moved for its dismissal.

At the very outset we would like to observe that the pleadings in the petition appear to be somewhat vague and indecisive. In fact, the pleadings do not state the material facts concisely nor does it refer to the specific provision of the Constitution that has been contravened as required by rule 5 of the Constitutional Court Rules. If the petitioners' clear intention had been to challenge the constitutionality of the legislation that brought in the amendment to the Prisons Act, it should have been explicitly, clearly and specifically pleaded in unequivocal terms in the petition. Accordingly, the petitioner should have simply prayed for a declaration on the alleged unconstitutionality of the legislation and sought an annulment of the said amendments.

On the other hand, if the petitioners' clear intention had been to challenge the constitutionality of the acts of the Prison Authority in denying the petitioners the remission of sentence otherwise given to prisoners serving the prison terms under the Misuse of Drugs Act, such constitutional contravention should have been explicitly, clearly and specifically pleaded in the petition without any ambiguity. Pleadings obviously need clarity as to the nexus between their constitutional grievance and the loss of remission since the petitioners have no explicit constitutional right as such to claim any remission of sentence after conviction.

On a careful perusal of the petition, we observe under paragraph 6(b) it is averred that the petitioners were discriminated against, implying that the impugned amendment is tantamount to a "discriminatory or colourable legislation", whereas under paragraph 6(c) it is averred that the said amendment cannot apply retrospectively, implying that the impugned amendment is tantamount to an "ex post facto law". At the same instance, it is averred under paragraph 7 that the said amendment or refusal to grant remission contravenes the petitioners' "right to equal protection of laws" and also their rights to a "fair trial". Obviously, the pleadings of this hybrid without specific reference to the exact provision/s of the Constitution that has/have been allegedly contravened or is/are likely to be contravened are in our view defective in form. They do not comply with the requirement under rule 5 of the Constitutional Court Rules 1994, which reads –

> (1) A petition under rule 3 shall contain a concise statement of the material facts and refer to the provision of the Constitution that has been allegedly contravened or is likely to be contravened or in respect of which the application, enforcement or interpretation is sought.
> (2) Where the petitioner alleges a contravention or likely contravention of any provision of the Constitution, the petition shall contain the name and particulars of the person alleged to have contravened that provision or

> likely to contravene that provision and in the case of an alleged contravention also state the date and place of the alleged contravention.

It is pertinent to note herein that the constitutional principles of “equality before law” and “equal protection of laws” emanate from two different concepts. The first is a negative concept which ensures that there is no special privilege in favour of anyone; that all are equally subject to the ordinary law of the land. All are equal before law and that no person, whatever be his rank or condition, is above the law. This is equivalent to the second corollary of the Dicean concept of the rule of law in Britain.

The second concept “equal protection of laws” is positive in content. It does not mean that identically the same law should apply to all persons, or that every law must have universal application within the country irrespective of difference in circumstances. Equal protection of law does not mean or postulate equal treatment of all persons without distinction. What it postulates is the application of same laws alike and without discrimination to all persons similarly situated. It denotes equality of treatment in equal circumstances. It implies that among equals the law should be equal and equally administered, that like should be treated alike without discrimination. In other words the equals should be treated equally. Vide, M P Jain *Indian Constitutional Law* (5th ed, 2003) at 1000. However, the pleading in the instant petition does not seem to comprehend and distinguish the difference between the two concepts. Equal protection of law as has been pleaded in the petition is not a substitute for “equality before law”.

We meticulously perused the pleadings and written submissions filed by counsel on both sides. We carefully examined the relevant provisions of the Constitution and the authorities cited by counsel.

On the preliminary issue, we agree with the contention of Ms Domingue that the alleged contravention is in the nature of a continuous cause of action as the petitioners shall carry on losing the benefit of remission unless and until such time the situation is redressed by the Court. Hence, the cause of action namely, the alleged contravention arose on 25 August 2008, it continues beyond the 90 days time-limit. Indeed, the position of case law in this respect has already been set by the precedents of the Constitutional Court in *Georgie Larue v Court Martial* [Constitutional Case No 1 of 1996], *Alwyne Talma and Another v James Alex Michel and Others* (2010) SLR 477, and *Paul Chow v James Alex Michel and Others* (2011) SLR 1.

In the circumstances, and on the strength of the said precedents, we find that the instant petition is not time-barred as the alleged contravention or breach is continuous in nature. Therefore, we dismiss the preliminary objection raised by the respondents on the issue of limitation in this matter.

We will now proceed to examine the case on its merits. It is true as submitted by counsel Mr Jayaraj that the first respondent (Superintendent of Prisons) is statutorily obliged to carry out the mandate of the Prisons Amendment Act 2008, as it was the law in force on the day the petitioners were convicted, sentenced and remitted to prison. In fact, the amended law, which had done away with remission for drug offenders, had been in force ever since 25 August 2008, whereas the petitioners

were sentenced in or after January 2009. Hence, the first respondent did not apply remission to the petitioners in accordance with the law that was in force that time. Had he acted otherwise, obviously he would be faulted for disobeying the law in force. In the circumstances, it is wrong to assume and allege that the Superintendent of Prisons committed an act in violation of the petitioners' constitutional rights in this matter.

The Prisons (Amendment) Act 2008 applied to all convicted prisoners serving a sentence of imprisonment under the Misuse of Drugs Act 1990 on the date the amendment came into force, irrespective of whether they committed the offence before or after the amendment to the Prisons Act. The date of the commission of the offence is obviously irrelevant to the amendment made to the Prisons Act. The Amendment Act clearly applies to all prisoners serving a sentence under the Misuse of Drugs Act at the time that it came into force. The amendment did not create any new offence nor did it affect or enhance any penal provision under the Penal Act, namely Misuse of Drugs Act. Indeed, at the time the Amendment Act came into force in 2008, both the petitioners were not even convicted or sentenced and were not serving any sentence of imprisonment under the Misuse of Drugs Act as envisaged under section 30(2)(b) of the said Act. Therefore, in our view there is no contravention of the petitioners' constitutional rights at the time the amended Act came into force.

As rightly submitted by Mr Jayaraj, we also find that denial of remission to a prisoner who had been charged, convicted and sentenced before the amendment came into force does not amount to imposition of a penalty for the commission of any offence. In other words, those prisoners convicted and sentenced under the Misuse of Drugs Act 1990 are not given any retrospective punishment for the offence they committed because of the amendment, or as and when it came into force, as the petitioners mistakenly claim.

In fact, the Amendment Act does not create any offence retrospectively nor enhance the sentence imposed by the Court. The denial of remission by the Prison Authority does not amount to or can no way be equated to any new conviction or new penalty. Denial of remission in accordance with the amendment has no relevance to the presumption of innocence on the part of the petitioners or the fair trial. The issue of remission arises only after a fair trial and proper conviction and sentence. Hence, the contention of the petitioner that their rights to equal protection of law and to a fair trial are contravened is obviously misconceived. As we see it, there is no causal link between the benefit of remission and the alleged contravention of the petitioners' constitutional rights. In any event, grant of remission to a prisoner is nothing but a conditional privilege, which may be granted if and only if the prisoner concerned had been industrious and of good behaviour while in prison. Those who are given that privilege will lose it as a punishment for idleness, lack of industry or other offence against prison discipline. Therefore, no prisoner can claim remission as of right constitutional or otherwise and so we find.

We also find that the intention of the legislature in amending section 30(2) was simply not to extend the benefit of remission on sentences to all prisoners convicted and sentenced under the Misuse of Drugs Act 1990. Undoubtedly, the amendment has universal application and stipulates no discrimination or classification among

persons who are convicted and sentenced under the Misuse of Drugs Act 1990 as they all fall within a class by themselves as compared to other prisoners.

Further, the Amendment Act does not discriminate between any two classes of prisoners who were convicted for the same offence under the Misuse of Drugs Act. In other words, as rightly submitted by Mr Jayaraj, only if the respondents apply the Amendment Act to one prisoner and do not apply it to another prisoner who has committed the same offence would it amount to discrimination and would violate the concept of "equality before law". The petitioners in the instant case have not shown that the impugned amendment has made any such discrimination among the same class of prisoners, in that one prisoner is denied remission whereas another is given remission for having committed the same offence under the Misuse of Drugs Act. As we discussed supra, what this amendment postulates is the application of same laws alike and without discrimination to all persons similarly situated. It denotes the "equal protection of laws" and equality of treatment in equal circumstances. It implies that among equals the law is equal and equally administered and that like is treated alike without discrimination.

We also note that the Amendment Act demonstrates a nexus between the object and classification of prisoners serving a sentence under the Misuse of Drugs Act from the rest of the prison population. The Legislature has clearly expressed its legislative policy on its choice not to extend the benefit of remission to the prisoners sentenced for drug offences. Such classification is in our view a reasonable classification based on "intelligible differentia". This amendment simply relates to the administrative policy and regulations of prisons, which is very much within the competence and powers of the Legislature. It has unfettered discretion to legislate on prison security and policy issues, taking into account the public revulsion felt against certain types of crime such as drug offences, robbery with violence, murder etc.

We agree with the contention of the respondents that the Constitution does not place any bar or limitation on the competence of the Legislature to formulate a prison policy and make laws for its administration in the larger interests of the community.

In the final analysis, we find that the impugned amendment to the Prisons Act is not a "discriminatory or colourable legislation". It is not an "ex post facto law". This amendment did not create any new offence nor did impose any penalty for any drug offence that is more severe in degree or description than the maximum penalty that has already been prescribed for the offences under the Misuse of Drugs Act. This Amendment Act does not contravene any provision of the Constitution, and particularly does not contravene article 19(4) of the Constitution, which reads:

> Except for the offence of genocide or an offence against humanity, a person shall not be held to be guilty of an offence on account of any act or omission that did not, at the time it took place, constitute an offence, and a penalty shall not be imposed for any offence that is more severe in degree or description than the maximum penalty that might have been imposed for the offence at the time when it was committed.

Besides, we find that the said amendment or refusal by the Prison Authority to grant remission to the petitioners does not contravene any of the provisions of the Constitution or any constitutional right of the petitioners.

For these reasons, we conclude that the instant petition is devoid of merit and hence, is dismissed.

CESAR v SCULLY

Egonda-Ntende CJ
28 June 2012 Supreme Court Civ 242/2011

Defamation – Civil Code article 1383(3) - Publication - Identification

The plaintiff is an attorney and notary public who runs a bar in Victoria. It is alleged that on 1 December 2011 the defendant's agency, the National Drug Enforcement Agency, carried out a search of the bar. The plaintiff brought an action in defamation against the defendants for words spoken to the plaintiff during and after the search, and for publication in the *Seychelles Nation* that stated 'professionals have allowed themselves to be used by drug dealers to conceal the ill-gotten gains'.

JUDGMENT Plaint struck out for failing to state a cause of action.

HELD

1 Words spoken to the plaintiff alone cannot constitute a cause of action in slander as there is no publication.
2 The law of defamation in Seychelles (art 1383(3) of the Civil Code) is governed by the English law as it was in 1975 when the Civil Code came into effect.
3 If the plaintiff is not named in the publication, the plaint must set out an innuendo which connects the plaintiff with the alleged defamatory statement. There must be material facts that can be reasonably construed as identifying the plaintiff in the minds of some people reasonably reading the publication. If this is not set out in the plaint, there is no cause of action disclosed and the plaint will be struck out.

Legislation
Civil Code, art 1383(3)
National Drugs Enforcement Agency Act, s 7

Cases
Biscornet v Honoré (1982) SLR 451

Foreign Cases
Bruce v Odhams Press Ltd [1936] 1 All ER 287

Joel Camille for the plaintiff
Mathew Vippin for the defendants

Ruling delivered on 28 June 2012 by

EGONDA-NTENDE CJ:

This is a ruling in respect of a plea *in limine litis* by the defendants who assert that the action against the defendants is bad in law on two grounds. Firstly, that the first defendant has immunity by virtue of section 7 of the National Drugs Enforcement Agency Act, Act 20 of 2008. Secondly, that the plaint does not disclose a cause of action and therefore ought to be struck out.

The plaintiff is an attorney and notary public who also runs a bar known as Honey Pot in Victoria. The first defendant is the director of the second defendant, a statutory agency set up to fight drug trafficking. It is alleged in the plaint that on 1 December 2011 the first defendant accompanied by officers of the second defendant carried out a search on the premises where the plaintiff runs the Honey Pot at Lodge Street, Victoria.

I will start by considering the second limb of the objection and that is whether or not the plaint in this case discloses a cause of action. The plaintiff's cause of action is set out in paragraphs 4,5, 6, 7 and 8 of the plaint –

> 4.That on Thursday 1 December 2011, during and after the search, the 1st defendant inter alia uttered the following words to the plaintiff: "that the defendants had credible information that the plaintiff was dealing in drugs and that the 2nd defendant held a dossier on the plaintiff which indicated that the plaintiff was not an honest person." It is further averred that the 1st defendant caused to the publication in Seychelles Nation that stated 'professionals have allowed themselves to be used by drug dealers to conceal the ill-gotten gains'.
> 5. The plaintiff avers that the said words refer to and are understood to refer to the plaintiff.
> 6. The plaintiff further avers that the said words either by innuendo or in their natural and ordinary meaning mean and are understood to mean that the plaintiff is a drug dealer, harbours drug dealers and allows his chambers to be used so as to launder money for drug dealers. Further the said words are also understood to mean that the plaintiff is dishonest.
> 7. The plaintiff avers that the said words are slanderous, false and malicious in that the plaintiff is not a drug dealer and does not harbour drug dealers nor does the plaintiff launder monies.
> 8. By reason of the publication of the said words, the plaintiff has been severely injured in his credibility as an individual, his character and reputation as a lawyer and has been brought into ridicule, hatred and contempt and has as a result suffered prejudice loss and damage.

The first set of words complained of were spoken to the plaintiff and to no one else. There was therefore no publication of the same by the first defendant on the basis of this plaint. The said words cannot constitute a cause of an action in slander against the first defendant.

The second set of words which, it is alleged, were published in the *Seychelles Nation* makes no reference to the plaintiff. The date of the publication is not disclosed. A copy of the publication is not attached to the plaint. The innuendo that connects the

said statement to the plaintiff is not spelt out in the plaint. The plaintiff has not shown on the plaint that this libel is in relation to the plaintiff. Is there a cause of action against the defendants?

Article 1383(3) of Civil Code of Seychelles provides -

> The provisions of this article and of article 1382 of this Code shall not apply to the civil law of defamation which shall be governed by English Law.

The Civil Code was enacted in 1975 and this means that the English law applicable to Seychelles is English law as it was in 1975 when the Civil Code came into effect. See *Francis Biscornet v Eugene Honore* (1982) SLR 451.

In *Francis Biscornet v Eugene Honore* (1982) SLR 451 the plaintiff sued the defendant for slander but failed to state in the plaint the names of the person to whom the slander was published. The defendant sought to have the plaint struck out on the ground that the plaint failed to disclose a cause of action. Sauzier J, as he was then, held that the plaint should disclose the case the defendant was to meet and as the names of the persons to whom the slander was published were not mentioned in the plaint the plaint should be dismissed.

A somewhat similar point arose in *Bruce v Odhams Press Ltd* [1936] 1 All ER 287. The plaintiff in that case complained that she had been libelled by a newspaper article concerning certain aeroplane smuggling exploits of “an English woman.” The plaintiff was not referred to by name or description but alleged that the words “an English woman” referred to her.

Greer LJ observed at 289 -

> The first observation that occurs to me as relevant is that it is an essential part of the cause of action of a plaintiff in cases of defamation, whether of slander or libel, that the words are defamatory of the plaintiff. If they are defamatory of some other person, real or imaginary, they do not provide the plaintiff with any cause of action at all. Defamatory statements which are in the air, as it were, and do not appear by their words to refer to the plaintiff, have got to be made referable to the plaintiff by reason of some special facts and circumstances which show that the words can be reasonably construed as relating to the plaintiff. It is not sufficient under existing rules of practice merely to allege in general terms a cause of action. Such cause of action must be alleged with particularity. …….. ……The material facts on which the plaintiff must rely for her claim in the present case seem to me necessarily to include the facts and matters from which it is to be inferred that the words were published of the plaintiff. Without a statement of these facts and matters, it seems to me impossible that the defendants could be in a position to decide how to plead to the statement of claim.

Slesser LJ at 291 stated -

> In such a case as the present, the plaintiff, not being actually named in the libel, will have to prove an innuendo identifying her in the minds of some people reasonably reading the libel with the person defamed, for there is no

> cause of action unless the plaintiff can prove a publication of and concerning her of the libellous matter. …… And such innuendo being essential to the plaintiff's case, seems to me to fall with RSC Ord. XIX, r.4, as being a statement of the material facts on which the party pleading relies, without which no cause of action is disclosed.

Scott LJ at 294 said -

> The cardinal provision in r. 4 is that the statement of claim must state the material facts. The word "material" means necessary for the purpose of formulating a complete cause of action; and if any one "material" fact is omitted, the statement of claim is bad; it is "demurrable" in the old phraseology, and in the new is liable to be "struck out" under Order XXV, r. 4: see *Philipps v. Philipps* 4 QBD 127.

The weight of authority in this matter leads me inevitably to only one conclusion. The plaint fails to disclose a cause of action against the first defendant as no innuendo is set out in the plaint to connect the plaintiff with the article allegedly published in the *Nation* newspaper.

There is no allegation of wrongdoing made against the second defendant. There is no cause of action against the second defendant on the amended or original plaint.

This plaint is struck out with costs for failing to state a cause of action either in libel or slander. In light of this finding it is not necessary to consider whether or not the first defendant enjoyed immunity from civil action under section 7 of the National Drugs Enforcement Agency Act.

VEL v BENJEE

Karunakaran J
25 July 2012 Supreme Court Civ 84/2004

Medical negligence – Evidential burden

The plaintiff claimed R 300,000 for loss and damages suffered as a result of a fault by the first defendant, a medical doctor, who was employed by the Government at the Victoria Central Hospital. The plaintiff argued there was medical negligence by the doctor in failing to properly diagnose and treat the plaintiff with the required standard of professional care, particularly when performing surgery for an injury to the plaintiff's knee.

JUDGMENT Claim dismissed.

HELD

1 Negligence under art 1382 of the Civil Code has 3 elements –
   a. A legal duty to exercise due care on the part of the party complained of towards the party complaining;
   b. Breach of the said duty; and
   c. Consequential damage.
2 The conduct of a defendant is judged against that of the ordinary or reasonable person. In the case of a professional, that person knows the special conventions, forms of politeness, and skills associated with the profession.
3 The evidential burden is on the plaintiff to establish the doctor failed or omitted or neglected to perform as a skilled person in the medical profession.

Legislation
Civil Code, art 1382

Foreign Cases
Bolam v Friern Hospital Management Committee [1957] 2 All ER 118

Frank Ally for the plaintiff
D Esparon for the defendants

Judgment delivered on 25 July 2012 by

KARUNAKARAN J:

The plaintiff in this action claims the total sum of R300,000 from both defendants jointly and severally for loss and damage which the plaintiff suffered as a result of a fault, allegedly committed by the first defendant, a medical doctor, who had been employed as surgeon by the second defendant, the Government of Seychelles, at the Victoria Central Hospital.

The fault alleged emanates from medical negligence on the part of the surgeon in that he failed to properly diagnose and treat the plaintiff with the required standard of

professional care, particularly when the surgeon treated and performed surgery on the plaintiff, a Legamentoplasty for an injury the plaintiff had sustained to the anterior cruciate ligament (ACL) of his left knee.

The second defendant is being sued herein on vicarious liability since the first defendant has allegedly committed the fault in the course of his employment with the second defendant. It is the case of the plaintiff that due to the first defendant's fault - rather medical negligence - he lost ligament in his left knee. This resulted in partial and permanent disability to the plaintiff. Consequently, the plaintiff claims that he sustained extensive loss and damage and suffered in all walks of his life. Hence, the plaintiff seeks compensation in the total sum of R300,000 from the defendants for his loss and damage as detailed below:

(i)	Permanent disability and aesthetic loss	R75,000
(ii)	Loss of amenities of life	R75,000
(iii)	For pain, suffering, discomfort, inconvenience and anxiety	R75,000
(iv)	Moral damage	R75,000
	Total	R300,000

The defendant denied liability. It is not in dispute that in August 2002 the medical officers of the second defendant treated the plaintiff for an injury to his left knee. However, it is the case of the defendants that they never committed any fault or any act of medical negligence in treating the plaintiff or in performing the surgery. They did make a correct diagnosis and gave correct medical treatment to the plaintiff in a professional, diligent and efficient manner and gave the necessary and appropriate treatment to the plaintiff.

The plaintiff in this matter is a young man, aged 25. He is presently employed as a generator-operator at Coetivy Island. In 2002, he was 20, young and energetic. He was then working in Mahé. He was a good basketball player. He had also been qualified as a cadet to represent a basketball team at the national level. He had a big dream of becoming a world renowned basketball player. In August 2002, he used to play and practice basketball almost every day. On a particular day in August 2002, while he was playing basketball and jumping to catch the ball, he landed on the floor on a crooked angle. As a result he sustained some internal injury to his left knee. It was swollen and painful. He put some ice on the injured spot and went to the Emergency Department at the Victoria Hospital. A Cuban doctor, who was in charge, took x-rays and told the plaintiff that everything was alright. The doctor also gave him some tablets for relief from pain. The pain, however, did not subside. After a couple of days, the plaintiff went to see Dr Sherwyn, a specialist doctor for sportsmen. This doctor, having seen the plaintiff, told him that there was an interior ligament damage and advised the plaintiff to see the specialist doctor - Dr Benjee - who was a visiting surgeon from Reunion. The plaintiff subsequently saw Dr Benjee, who on the following day performed an operation. The same night the plaintiff had fever, which persisted for 20 days. Puss started coming out of the wound. The plaintiff stayed in hospital for about 6 months. His knee was not getting better after the operation. It got worse. Subsequently, he was sent to Reunion for further treatment. Dr Benjee performed another operation on the same knee and fixed a plastic knee and put two small screws inside the knee. Although the wound is healed and the plaintiff can walk, he cannot completely bend his knee. If he forces it to bend completely it is

painful. In cold weather it is painful. Now the plaintiff cannot do all the jobs which he could do before. However, he stated that he could swim and run but not as fast he used to before. According to the plaintiff, he can now do only light duties at his place of work. The Court also observed two linear scars, each about 6 inches long, on the plaintiffs left knee. Also the Court observed the plaintiff could bend his knee 90 degrees backwards.

The plaintiff testified all this happened due to medical negligence on the part of the defendants. In cross-examination, the plaintiff admitted that all his medical expenses were borne by the Government of Seychelles. Further the plaintiff admitted that the doctor, although explained the risks involved in the operation, he preferred the operation to the other alternative of rest for 9 months, since he thought it was a minor operation.

PW2, Mr Alex Jimmy, Sports Officer from National Sports Council testified that he knew the plaintiff as a good basketball player, a very talented and disciplined potential player. He had a bright future as basketball player but because of his present knee condition, he lost his future in the field of sports. PW3, the father of the plaintiff also corroborated the testimony of the plaintiff as to how he sustained the injury, his sufferings, the nature of the treatment given to him for the injury and post-operative complications.

In view of all the above, Mr Ally, counsel for the plaintiff submitted that because of the fault, the medical negligence on the part of the doctors who treated the plaintiff, the latter suffered loss and damage in the sum of R300,000 for which the defendants are jointly and severally liable in law to make good. Hence, he urged the Court to enter judgment accordingly for the plaintiff.

On the defence side, no evidence was called. However, Mr Esparon, counsel for the defendants submitted that the plaintiff has not adduced positive evidence to prove on a balance of probabilities that the defendants committed any fault or acted negligently in giving medical treatment or performing surgery on the plaintiff. The plaintiff as a lay person cannot give expert opinion as to any medical negligence in the given nature of the case. In the circumstances, Mr Esparon sought dismissal of the case.

I carefully perused the pleadings, the evidence on record and the submissions made by counsel in this matter.

Obviously, in cases of this nature negligence by doctors has to be determined by judges who are not trained in medical science. They rely on experts' opinions and decide on the basis of basic principles of reasonableness and prudence. This brings a lot of subjectivity into the decision and the effort is to reduce it and have certain objective criteria. This may sound simple but is tremendously difficult as the medical profession evolves and experimentation helps in its evolution. Thus, there is a constant tussle between the established procedures and the ever changing innovative methods in the medical field including the surgical side. But, innovation simply for the sake of being different, without any reason, is not acceptable. For instance, in the case on hand, the professional expertise in the innovative field of "Legamentoplasty" is being challenged by the plaintiff on the ground of medical

negligence. And, these issues involving medical speciality make it extremely challenging to decide on negligence by doctors. The concept of negligence in the medical profession based on the idea of the ‘reasonable man’ is somewhat complex. Be that as it may.

Negligence

It is very difficult to define negligence; however, the concept has been accepted in our jurisprudence under fault in terms of article 1382 of the Civil Code. Negligence is the breach of a duty caused by the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affair would do, or doing something which a prudent and reasonable man would not do. Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff has suffered injury to his or her person or property. The definition involves three constituents of negligence:

(1) A legal duty to exercise due care on the part of the party complained of towards the party complaining the former's conduct within the scope of the duty;
(2) Breach of the said duty; and
(3) Consequential damage.

As rightly submitted by Mr Esparon, cause of action for negligence arises only when damage occurs, for damage is a necessary ingredient of this tort. Thus, the essential components of negligence are three: 'duty', 'breach' and 'resulting damage'.

In the case of *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118, it was held that:

> In the ordinary case which does not involve any special skill, negligence in law means a failure to do some act which a reasonable man in the circumstances would do, or the doing of some act which a reasonable man in the circumstances would not do; and if that failure or the doing of that act results in injury, then there is a cause of action. Thus, the understanding of negligence hinges on the ‘reasonable man’. Let us try to understand who this ‘reasonable man’ is.

The Reasonable Man

It has been held by the courts that the test of reasonableness is that of the ‘ordinary man’, also called the ‘reasonable man’. In the *Bolam* case, it was discussed that:

> In an ordinary case it is generally said you judge it by the action of the man in the street. He is the ordinary man. In one case it has been said you judge it by the conduct of the man on the Clapham omnibus. He is the ordinary man.

Why the mention of ‘Clapham omnibus’? The *Bolam* judgment was pronounced in 1957 and Clapham, at that time, was a nondescript south London suburb. It represented “ordinary” London. Omnibuses were used at that time for the public

transport. Thus, “the man on the Clapham omnibus” was a hypothetical person, who was reasonably educated and intelligent but was a non-specialist.

The courts used to judge the conduct of any defendant by comparing it with that of the hypothetical ordinary man. In the case of a professional, he is a person doing or practising something as a full-time occupation or for payment or to a make a living, and that person knows the special conventions, forms of politeness, skills etc associated with a certain profession. Professional is contrasted with amateur – a person who does something for pleasure and not for payment.

Negligence by professionals

In the law of negligence, professionals such as lawyers, doctors, architects and others are included in the category of persons professing some special skill or skilled persons. In light of all the above, in the instant case the evidential burden lies on the plaintiff to establish that the doctors who were treating him at the material time for the injury failed or omitted or neglected in the performance of their duty as a skilled person in the medical profession. Having carefully examined the evidence on record, I find that the plaintiff has not adduced even one iota of evidence to establish any act of medical negligence on the part of the doctors who treated him for the his knee injury or while they performed operations for the said injury. There is no evidence on record to show any actionable negligence that consists in the neglect of the use of ordinary care or skill towards the plaintiff to whom the defendants owed the duty of observing ordinary care and skill. Besides, there is no evidence to show that by the said neglect the plaintiff has suffered injury to his person. Indeed, there is no medical evidence or any expert opinion at all on the alleged medical negligence. For these reasons, I conclude that the plaintiff has failed to prove his claim on a preponderance of probabilities in this matter. The suit is accordingly dismissed. I make no orders as to costs.

GEORGES v ELECTORAL COMMISSION

Karunakaran J
30 July 2012 Supreme Court Civ 58/2012

Elections Act section 97(2) - Judicial review - Reasonableness - Interpretation

The petitioner was one of three candidates to stand in a by-election for a vacant seat in the National Assembly. He stood as an independent candidate and the other two candidates were from political parties. The petitioner argued that the allocation of additional free broadcasting time to the political parties by the Electoral Commission was illegal, ultra vires, harsh, irrational and unreasonable.

JUDGMENT Petition dismissed.

HELD

1 In interpreting statutes, the court should apply the "literal rule". Words should be given their natural or ordinary meaning. When the words of a statute are clear, plain and unambiguous, the courts are bound to give effect to that meaning, irrespective of any consequences (ie unfairness and a lack of generosity).
2 Under s 97(2) of the Elections Act, the Electoral Commission is under a legal duty to allocate free broadcasting time separately to (i) political parties and (ii) the candidates.
3 There is no distinction between a by-election and a general or national election. The same rules apply for conduct of the elections and the privileges, rights and liabilities of the political parties and the candidates.
4 In judicial review cases, the court is concerned only with the legality, rationality (reasonableness) and propriety of the decision in question. The court does not consider the merits of the decision.
5 The test for unreasonableness is a subjective test where the court will ask whether an act is of such a nature that no reasonable person would entertain acting in such a way.

Legislation

Constitution, arts 24(1)(c),(1)(d),(2), 125(1)(c)
Elections Act, ss 95, 96, 97, 97(1),(2)

Cases

Cousine Island Company Ltd v Herminie (unreported) SSC Civ 248/2000

Foreign Cases

Associated Provincial Picture Houses v Wednessbury Corporation [1948] 1 KB 223
Council of Civil Service Union v Minister for the Civil Service [1985] AC 374
Cumming v Danson [1942] 2 All ER 653
Re Amin [1983] AC 818; [1983] 2 All ER 864
Whitley v Chappel (1868) LR 4 QB 147

A G Derjacques for the petitioner
S Aglae for the respondent

Judgment delivered on 30 July 2012 by

KARUNAKARAN J:

The petitioner, Lucas Meinard Wallis Georges, aged 44 is a citizen of Seychelles. He is a resident of Anse Aux Pins District, Mahé. Needless to say, the petitioner has a constitutional right - like any other citizen of Seychelles who has attained the age of 18 years - to take part in the conduct of public affairs either directly or through freely chosen representatives. Obviously, the petitioner as a citizen has a right to be elected to public office and to participate, on general terms of equality, in Government or in public service as guaranteed by article 24(1)(c) and (d) of the Constitution of Seychelles. However, the exercise of these rights, though guaranteed by the Constitution, is not absolute by virtue of article 24(2) of the Constitution, which reads thus: "the exercise of the rights under clause (1) may be regulated by a law necessary in a democratic society".

The Elections Act 1995 (hereinafter called the Act) as it exists today is a law contemplated under article 24(2) of the Constitution, which regulates the petitioner's right to be elected to public office and to participate in Government. Be that as it may, a few weeks ago, a directly elected member of the current National Assembly, who had been nominated for election by a particular political party and had been elected from the Anse Aux Pins constituency, resigned from his office. He ceased to be a member of the National Assembly. Following his resignation, the seat he had been occupying became vacant. Consequently, a by-election for the electoral area of Anse Aux Pins was announced by the respondent. The Electoral Commission accordingly appointed and announced the dates of election; that is, 8 and 10 August 2012. The petitioner accordingly submitted his nomination to the Electoral Commission on 17 July 2012 to stand for the said by-election. He registered himself as an independent candidate. Pursuant to the Elections Act, his nomination and candidature was accepted by the Electoral Commission on 20 July 2012. Besides, two other candidates from two registered political parties had also submitted their nominations to stand for the said election on their respective party tickets. They too were accepted by the Electoral Commission.

In pursuance of the intended by-election and in terms of section 97(2) of the Act, the Electoral Commission after having meetings with all three candidates and in consultation with the Seychelles Broadcasting Corporation, decided upon the allocations of free broadcasting time to each political party and to each candidate as follows -

a) 13 minutes of airtime to each political party taking part in the by-election to launch their campaign as opening political broadcast on 27 July 2012.
b) Each candidate contesting in the by-election 5 minutes of airtime on both radio and television as political broadcast on the 31 July 2012.
c) 13 minutes of airtime to each political party taking part in the by-election to close their campaign as closing political broadcast on 4 August 2012.

According to the petitioner, as an independent candidate, he has not been allocated airtime on the Seychelles Broadcasting Television either on 27 July 2012 or on 4 August 2012, the two slots which were allocated to the registered political parties. It is the contention of the petitioner that the Electoral Commission has misconstrued

the law under section 97(2) of the Elections Act and has illegally allotted additional free broadcasting time on 27 July and 4 August 2012 for the political parties of the other two candidates namely: Meggy Sodie Marie of Parti Lepep and Jane Georgette Carpin of the Popular Democratic Movement.

It is the submission of Mr Derjacques, counsel for the petitioner that the political parties are not participating as political parties in the by-election in one district as it is not a national or general election. This election will, further, not include or involve the obtaining of a proportional seat in the National Assembly of Seychelles, which is allocated to participating political parties in proportion to their percentages in votes obtained. It is the contention of Mr Derjacques that the law under section 97(2) of the Act must be interpreted to mean that free broadcasting airtime shall be allocated solely and only to candidates, and not to political parties, in a by-election, in one district. The interpretation given to section 97 must be fair and generous to all the candidates and must not discriminate against the other candidate.

It is therefore the case of the petitioner that the decision of the Electoral Commission contained in its letter dated 20 July 2012 addressed to the petitioner, maintaining the said allocation of free broadcasting time to the political parties, is illegal, ultra vires, harsh, irrational and unreasonable. The letter read –

> We advise that the airtime, allocated to all three candidates, has been done in accordance with section 97(2) of the Act. We take note of your concerns and advise that these issues will be taken up in the electoral reform.

Being aggrieved by the said decision of the respondent, the petitioner has now come before this Court for a judicial review of the said decision, invoking the supervisory jurisdiction of this Court over adjudicating authorities, conferred by article 125(1)(c) of the Constitution. The petitioner in essence seeks herein a declaration from the Court that the decision of the respondent allocating free broadcasting time to political parties is unlawful, illegal, irrational, unreasonable, and so presumably, null and void; and consequently, the petitioner prays this Court for a writ of certiorari to quash the said decision and a writ of mandamus ordering the respondent to allocate more free broadcasting time on SBC Television to the petitioner, as has been allocated to the political parties of the other two candidates.

On the other hand, the respondent denied all the allegations made by the petitioner in this matter. Mrs Aglae, counsel for the respondent, contended in essence that the respondent did not misconstrue or misinterpret the law under section 97(2) of the Act. It is lawful or legal for the respondent to allocate additional free broadcasting time on 27 July and 4 August 2012 for the political parties of the other two candidates namely: Meggy Sodie Marie of Parti Lepep and Jane Georgette Carpin of the Popular Democratic Movement.

According to Mrs S Aglae, the decision of the Electoral Commission is neither illegal nor unreasonable. The respondent is under a statutory obligation to allocate free broadcasting time to the registered political parties in terms of section 97(1) as it reads “the Electoral Commission shall ..... allocate to each political parties”, which according to her is “mandatory”. Also it is her contention that any political party contesting in the election has a statutory right in terms of section 95 of the Elections

Act to campaign in the election in favour of its candidate. This statutory right conferred on the registered political parties ought to be respected by the Electoral Commission. In the circumstances, Mrs Aglae submitted that the Electoral Commission has reached a reasonable decision within its powers and in accordance with law, which any other reasonable tribunal could have reached in the given matrix of facts and circumstances surrounding the case on hand. Hence, the respondent seeks dismissal of the instant petition.

I meticulously perused the records received from the Electoral Commission in this matter. I gave careful thought to the arguments advanced by both counsel touching on points of law as well as on facts including the authorities cited by Mr Derjacques. Although both counsel argued at length on a number of peripheral issues, it all boils down to three fundamental questions that arise for determination in this case. They are:

(i) Did the Electoral Commission misconstrue or misinterpret or misapply the law under section 97(2) of the Elections Act in arriving at its decision dated 20 July 2012?
(ii) Is the decision of the Electoral Commission in allocating free broadcasting time on SBC Television to the registered political parties of the other two candidates in this matter unlawful or illegal or ultra vires? and
(iii) Did the Electoral Commission act unreasonably or irrationally in its decision in allocating free broadcasting time on SBC Television to the political parties of the other two candidates, while it refused similar allocation of airtime to the petitioner, having regard to all the circumstances of the case?

Obviously, the crux of the issue in this matter relates to the interpretation of section 97(2) of the Elections Act. Before interpreting a sub-section in a statute, it is important that one should peruse the entire section of law and other provisions found in the same statute as far as they are relevant to the subject under interpretation. The entire provision reads –

> (1) For the exercise of the right to broadcast under section 96(ii), the Electoral Commission shall, in consultation with the Seychelles Broadcasting Corporation established by the Seychelles Broadcasting Corporation Act (hereafter referred to as the "Corporation"), allocate free broadcasting time *to each registered political party and each candidate.* [emphasis mine]
> (2) In allocating free broadcasting time under subsection (1), the Electoral Commission shall allocate –
> (i) to each registered political party equal broadcasting time; *and*
> (ii) to each candidate equal broadcasting time.
> (3) The Electoral Commission shall decide by draw of lots the order in which
> (i) each registered political party shall utilize the broadcasting time; and
> (ii) each candidate shall utilize the broadcasting time.
> (4) The Electoral Commission shall inform each registered political party and each candidate the broadcasting time allocated to each such political party and candidate and the order in which such time is to be utilized.

(5) Any registered political party or candidate which or who fails to utilize the broadcasting time allocated under subsection (1) shall forfeit the right to broadcast.

Literal Rule

It is a fundamental principle of interpretation of statutes that while interpreting any provision of law in a statute the court ought to apply the "literal rule" as the first rule; the "golden rule" is to give effect to the meaning the legislature intended to convey, unless such meaning leads to utter absurdity. Under the literal rule, the words of the statute are given their natural or ordinary meaning and applied without the court seeking to put a twist or gloss on the words or seek to make sense of the statute. In other words, the words of a statute must prima facie be given their ordinary meaning. When the words of the statute are clear, plain and unambiguous, then the courts are bound to give effect to that meaning, irrespective of the consequences. Even if such consequences appear to be unfair and ungenerous as Mr Derjaques attempts to portray in the instant case. It is said that the words themselves best declare the intention of the law-giver.

Applying this rule in the present case, it is evident on a plain reading of section 97(2) of the Act that:

(1) The two paragraphs 97(2)(i) and 97(2)(ii) undoubtedly refer to two distinct and separate categories of entities: (a) the registered political parties and (b) the candidates themselves who are contesting in the election. There is no ambiguity in law in this respect. A registered political party is a separate legal persona, a legal entity which is distinct and different from a natural person, the candidate, namely the individuals. The meaning is plain, simple, clear and unequivocal under paragraphs 97(2)(i) and 97(2)(ii). The Electoral Commission should therefore, allocate each entity free broadcasting time as it clearly reads thus: *"*shall … allocate free broadcasting time *to each registered political party and each candidate*". This the Election Commission has done in accordance with law in this matter and so the Court finds.
(2) The word "shall" used in the section, unequivocally implies that the Electoral Commission is under a statutory duty to allocate free broadcasting time separately to each of both categories of entities: (i) the legal entity namely, the registered political parties which have fielded their candidates in the by-election and (ii) the natural persons, the candidates, who are contesting in the by-election. Indeed, 'shall' in the normal sense imports command. However, it is well settled that the use of the word 'shall' does not always mean that the enactment is obligatory or mandatory. It depends upon the context in which the word 'shall' appears and the other circumstances. Unless an interpretation leads to some absurd or inconvenient consequences or contradicts with the intent of the legislature the court shall interpret the word 'shall' in the mandatory sense and so I do herein, upholding the submission of Mrs Aglae that the Election Commission is under a legal duty to allocate free airtime separately to the registered political parties in this respect.
(3) Moreover, it is to be gathered the usage of word "and", which appears between the two sub-sections 97(2)(i) and 97(2)(ii), clearly differentiate to indicate the separate existence and identity of each category enumerated

under sub-section 97(2). Each category on its own is statutorily entitled to free broadcasting time, in any election whether general or by-election for that matter.

(4) The attempt by Mr Derjaques to distinguish a by-election from a general or national election does not appeal to me in the least as law does not make such distinction under section 95, 96 or 97 of the Act. The same rules apply as far as the conduct of the elections, and in respect of the privileges, right and liabilities of the political parties and the candidates, who contest in the elections for the National assembly.

In view of all the above, it is evident that the Electoral Commission has correctly interpreted the law. The Commission did not misconstrue or misinterpret or misapply the law under section 97(2) of the Elections Act in arriving at its decision dated 20 July 2012 and so the Court finds. This answers question no 1 formulated hereinbefore.

Having said that, I note Mr Derjacques also submitted that since the literal interpretation does not accord with fairness and justice to the petitioner, he invited the Court to consider a farfetched interpretation of section 97(2) in order to meet fairness and justice in this matter. With due respect, were I to accept Mr Derjacques' submission in this respect, I would have to import additional words into section 97(2) of the Elections Act. This I am not empowered to do as this Court thereby would legislate rather than interpret the law.

On the issue of consequences, I too, as a man of the world share the concern of Mr Derjacques. However, as a judge I have no doubt that this Court should apply the law as it stands today in the Elections Act until such time the Act is repealed or amended accordingly to meet the changing needs of time and the socio-political dynamics.

In the case of *Whitely v Chappel* (1868) LR 4 QB 147, the defendant was prosecuted for the offence of "impersonation" involved in an election. The statute made it an offence 'to impersonate any person entitled to vote'. The defendant, in fact, used the vote of a dead man. The statute relating to voting rights required a person to be living in order to be entitled to vote. The Court had to apply the literal rule to interpret the plain and ordinary words used in the statute. There was no other possible interpretation as has happened in the present case. The defendant impersonated a person not entitled to vote. The Court therefore acquitted the defendant. As I observed supra, when the words of the statute are clear, plain and unambiguous, then the courts are bound to give effect to that meaning, irrespective of the consequences.

In view of all the reasons stated above, the Court finds that the decision of the Electoral Commission in allocating free broadcasting time on SBC Television to the registered political parties of the other two candidates in this matter is lawful, legal and valid in the eye of law. This answers question no 2 above.

I shall now proceed to examine question no 3 supra, which touches the fundamental principles governing the matters of judicial review. At the outset, I would like to restate herein what I have stated in *Cousine Island Company Ltd v Mr William*

Herminie, Minister for Employment and Social Affairs and Others Civil Side No 248 of 2000. Whatever the issue, factual or legal, that may arise for determination following the arguments advanced by counsel, the fact remains that in matters of judicial review, the court is not sitting on appeal to examine the facts and the merits of the case heard by the administrative or adjudicating authority. Indeed, the system of judicial review is radically different from the system of appeals. When hearing an appeal the court is concerned with the merits of the case under appeal. However, when subjecting some administrative decision or act or order to judicial review, the court is concerned only with the "legality", "rationality" (reasonableness) and "propriety" of the decision in question vide the landmark dictum of Lord Diplock in *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 374.

On an appeal the question is "right or wrong?" Whereas on a judicial review the question is "lawful or unlawful?" – Legal or illegal? "Reasonable or unreasonable?" - Rational or irrational?

On the issue of legality, I note, the entity of law is always defined, certain, identifiable and directly applicable to the facts of the case under adjudication. Therefore, the court may without much ado determine the issue of "legality" of any administrative decision, which indeed, includes the issue whether the decision-maker had correctly construed the law, applied and acted in accordance with law. This may be determined by using the litmus test, based on an objective assessment of the facts involved in the case. On the contrary, the entity of "reasonableness" cannot be defined, ascertained and brought within the parameters of law; there is no litmus test to be applied, for it requires a subjective assessment of the entire facts and circumstances of the case under consideration. Such assessment ought to be made applying the yardstick of human reasoning and rationale.

I will now turn to the issue as to "reasonableness" of the decision in question. What is the test the court should apply to determine the reasonableness of the impugned decision in matters of judicial review?

First of all, it is pertinent to note that in determining the reasonableness of a decision one has to invariably go into its merits, as formulated in *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223. Where judicial review is sought on the ground of unreasonableness, the court is required to make value judgments about the quality of the decision under review. The merits and legality of the decision in such cases are intertwined. Unreasonableness is a stringent test, which leaves the ultimate discretion with the judge hearing the review application. To be unreasonable, an act must be of such a nature that no reasonable person would entertain such a thing; it is one outside the limit of reason (Michael Molan *Administrative Law* (3rd ed, 2001)). Applying this test, as I see it, the court has to examine whether the decision of the Election Commission in allocating free broadcasting time on SBC Television to the political parties of the other two candidates, while it refused similar allocation of airtime to the petitioner, is unreasonable having regard to all the circumstances of the case.

At the same time, one should be cautious in that –

> judicial review is concerned not with the merits of a decision but with the manner in which the decision was made. Thus, the judicial review is made effective by the court quashing an administrative decision without substituting its own decision and is to be contrasted with an appeal where the appellate tribunal substitutes its own decision on the merits for that of the administrative officer.
> [Per Lord Fraser *Re Amin* [1983] AC 818 at 829, [1983] 2 All ER 864 at 868]

In determining the issue of reasonableness of the decision in the present case, the court has to make a subjective assessment of the entire facts and circumstances of the case and consider whether the impugned decision of the Election Commission is reasonable or not. In considering reasonableness, the duty of the decision-maker is to take into account all relevant circumstances as they exist at the date of the hearing that he must do, in what I venture to call, a broad common sense way as a person of the world, and come to his or her conclusion giving such weight, as he or she thinks right to the various factors in the situation. Some factors may have little or no weight, others may be decisive, but it is quite wrong for him to exclude from his consideration matter, which he ought to take into account per Lord Green in *Cumming v Danson* [1942] 2 All ER 653 at 656.

In my considered view, the Electoral Commission has taken into consideration all relevant factors including the intended electoral reform and had taken its decision only after having given opportunity to the petitioner to present his case or grievance to the Commission. Undoubtedly, the Electoral Commission had to apply the law as it is and has decided in accordance with section 97(2) of the Act. It has rightly refused the petitioner's request not to allocate free broadcasting time to the registered political parties over and above the time allocated to the respective candidates. Hence, I conclude that the Electoral Commission did decide so, for lawful and valid reasons as any other reasonable tribunal would and should do in identical circumstances.

In view of all the above, the Court concludes that the decision of the Electoral Commission in this matter is neither illegal nor unreasonable nor irrational. Therefore, I decline to grant the writ of certiorari or mandamus as sought by the petitioner in this regard.

In the final analysis, the Court finds that the instant petition for judicial review is devoid of merit. The petition is therefore dismissed. I make no order as to costs.

ROSE v CIVIL CONSTRUCTION COMPANY LTD

Egonda-Ntende CJ
30 July 2012 Supreme Court Civ 72/2011

Civil Code article 1382 – Fault – Nuisance - Causation – Damages – Ultra petita plea

The plaintiffs are a family that live on a property 200 metres away from the defendant's quarry. The plaintiffs claim the defendant's actions have caused loss and damage for which the defendant is liable. The plaintiffs argue there are cracks in their houses and excessive dust, noise, traffic and smell.

JUDGMENT Case dismissed.

HELD

1 Under art 1382 of the Civil Code the plaintiff must prove the damage that is suffered was caused by acts of the defendant, or its servants and agents. This must be proved by the plaintiff on the balance of probabilities. It is not enough for the plaintiff to show that the defendant's acts could be one of several possibilities that caused the damage.
2 For a claim of nuisance to succeed, the noise, dust or smell from the defendant's property must exceed what would be acceptable in the kind of neighbourhood that the plaintiffs are living in.
3 Where a person has claimed specific damage or loss this claim must be specifically proved. If the plaintiff brings evidence for a sum greater than the claim set out in the pleadings it will be ultra petita.

Legislation
Civil Code, art 1382

Cases
De Silva v United Concrete Products (Sey) Ltd (unreported) SSC Civ 273/1993
Desaubin v United Concrete Products Ltd (1977) SLR 164
Isnard v China Senyang Corporation (Seychelles) (unreported) SSC Civ 325/2002

Anthony Derjacques for the plaintiffs
Francis Chang-Sam SC for the defendant

Judgment delivered on 30 July 2012 by

EGONDA-NTENDE J:

Plaintiffs no 1 and no 2 are husband and wife while plaintiffs no 3, 4 and 5 are their children. The plaintiffs live on land parcels PR2005, PR3460 and PR3461, situated at La Hauteur, Code D'or, Baie Ste Anne, Praslin. This land is owned by plaintiffs no 1 and 2. The defendant is engaged in quarry works known as Cap Samy Praslin Quarry on Praslin, a short distance away from the plaintiffs' residence and property.

Plaintiffs no 1 and 2 purchased the said property on 29 November 2002 and built two houses thereon including one that they occupy together with their children, plaintiffs no 3,4 and 5.

It is contended for the plaintiffs that the defendant during the years 2007 and 2008 started removing granite boulders from land at close proximity to the plaintiffs' residence. In 2009 the defendant commenced a complete and full quarry project, including the extraction of granite boulders, the crushing of the said boulders, and mass transportation, in and out of the said project area. The defendant is alleged to be utilising heavy machinery, heavy equipment, blasting material and intense usage of transportation and manpower. This project was commenced without an environment impact assessment plan.

The plaintiffs contend that the defendant's actions, through its employees, servants and agents, constitute a faute in law for which the defendant is vicariously liable to the plaintiffs. The particulars of the faute are stated to be:

> (i) Failing to carry out an environmental impact assessment plan prior to the commencement of the Quarry project.
> (ii) Blasting the terrain and granite surface areas in proximity to plaintiffs' properties.
> (iii) Extracting and crushing granite boulders in proximity to the said properties.
> (iv) Causing dust and noise pollution on plaintiffs' property.
> (v) Causing pollution through activity including personal, transportation and habitation.
> (vi) Causing fright and alarm upon use of explosives.
> (vii) Causing pollution through fuel and heavy machinery emissions.
> (viii) Causing shock waves and vibrations upon the usage of explosives, heavy equipment and machinery.
> (ix) Causing cracks to plaintiffs houses.

By reason of the foregoing acts of the defendant, the plaintiffs contend that they have suffered loss and damage which was particularised as follows:

(i) Labour and materials to repair cracked walls	R13,000
(ii) Loss of value of property	R1,000,000
(iii) Moral damages for stress, inconvenience, anxiety, psychological harm, distress, fright, [R50,000.00 for each plaintiff]	R250,000
(iv) Special damages for constant colds, flues, coughs and ill health of plaintiffs	R100,000
Total	R1,363,000

The plaintiffs seek judgment for the said sum with interest at 4% per annum, a mandatory order of injunction to the defendant to cease from operating Cap Samy Praslin Quarry Project and costs of the suit.

The defendant opposes this action. It denied all the contents of the plaint save for paragraph 2. It contends that the site of its quarry activities belongs to the Government which granted it consent to carry out a quarry project since August 2000. It commenced its quarrying activities in June 2002 prior to plaintiffs no 1 and 2

acquiring PR2005, PR3460 and PR3461 at the end of September 2002. The defendant contends that it commenced its quarrying activities in June 2002 but intensified its activities in 2009 with increased demand. The defendant took additional precautionary measures by bringing in and installing additional equipment in order to reduce to the minimum any possible impact resulting from its increased activities.

The defendant further avers that it began its operations with full knowledge and consent of the Government and at no time was it required to do an environmental impact assessment prior to commencement of its activities. When the plaintiffs bought and chose to develop the lands aforesaid they knew about the quarrying activities and of the risk involved in purchasing land in close proximity to quarrying activities. The plaintiffs knowingly and deliberately placed themselves at risk and defendant contends it is in no way at fault. The defendant denies any liability to the plaintiffs.

At the trial plaintiffs no 1 and 2 testified as well as three other witness, Nigel Valentin, a Quantity Surveyor, Jean Savy and Nobert Leon, who are neighbours to the plaintiffs. For the defendant there was a total of 7 witnesses including the Managing Director of the defendant, Sani Khan, Mr Youmbu, the Director of Lands in the Ministry of Land Use, Louis Barbe, the environmental specialist, Thomas Marie, the Master Blaster, Anel Erikson Marie and Pierre Philoe, neighbours to the quarry site and the plaintiffs, and Martin Fredrick Lewis the General Manager of the defendant's Praslin Quarry operations.

What emerges from the testimonies of the parties is that the defendant acquired an old quarry site from the Government by way of lease in 2000. It was put in occupation of the property as the formalities were being worked upon. There were two families on the land. The defendant was required to relocate them and build houses for them elsewhere which it did.

It began operations in 2001 with blasting and supplying rock to the Government with regard to the renovation of the port area on Praslin. It was supplying red soil and rock to its customers. In 2008 it embarked upon expanding its operations into a full quarry operation by importing a crusher and other related equipment which were assembled and installed by September 2009. The quarry started operations in January 2010.

An environmental impact assessment was done by Louis Barbe which was submitted to the Department of Environment in October 2009 and received approval towards the end of the year or early 2010.

Plaintiffs no 1 and no 2 own land purchased from the Government of Seychelles 200 metres away from the defendant's quarry. This land was purchased in 2003 though they had occupied it as early as 1998 with the consent of the Government. There are two houses on this land. The plaintiffs live in one of the houses and the other is rented out to tenants. In their testimony plaintiffs no 1 and 2 state that dust from the quarry gets to their house. The dust is smelly. This comes when there is blasting and the wind blows in their direction. It has caused itching and sickness to family

members. Dust is a nuisance as they have to clean up. There are cracks all over both houses.

Mr Nigel Valentin, a Quantity Surveyor in a report made after examining the plaintiffs properties in 2011 found that there were cavity cracks in both houses but when examined on the sizes of the cavities he failed to provide the information claiming it was in his office. He opined that the cost of remedying the defects would be R167,500. He admitted that he had not investigated the cause of the cracks.

There was conflicting testimony from the neighbours of the plaintiffs and defendant, with those called by the defendant asserting that the quarry operations had not adversely affected them in anyway including on their activities, while those called by the plaintiff asserted that the blasting and quarry operations had affected them adversely with regard to the safety of their houses. The defendant's witnesses testified that the house that the defendant found on the land had remained there and is unaffected by both the blasting and quarrying operations of the defendant. It had no cracks at all.

The defendant's master blast testified to the effect that the blasting techniques and material used by the defendant were such that ground vibrations were minimised and would not cause damage to properties 50 metres away. He admitted though that they had never measured the ground vibrations caused by blasting. The defendant's Managing Director testified that they were purchasing the equipment to do so and had retained an expert who would come to do so.

The key issue in this case is what is the cause of cracks on plaintiff no 1 and 2's houses? Mr Anthony Derjacques, counsel for the plaintiff, pressed upon me to find that the cause of the cracks was the operations of the defendant on the adjacent land. He referred me to the cases of *Joseph Isnard and Others v China Senyang Corporation (Seychelles)* Civil Side No 325 of 2002 and *Mrs Micheline De Silva and Others v United Concrete Products (Sey) Ltd* Civil Side No 273 of 1993 in support of the case for the plaintiff.

On the other hand Mr Chang-Sam, counsel for the defendant, submitted that the plaintiff had failed to establish the cause of the cracks. And therefore ought not to succeed. He submitted that an often cited case in such cases as this was *Desaubin v United Concrete Products Ltd* (1977) SLR 164. This case he submitted was not applicable to the facts of this case and is distinguishable in so far as the plaintiffs had failed to prove the cause of the cracks in their house.

This claim is brought under article 1382 of the Civil Code of Seychelles. The plaintiff must be able to prove that the damage it has suffered has been caused by the acts of the defendant, or its servants and agents. Causation is a key element in determining liability. This must be proved on a balance of probabilities. It is not enough for the plaintiff to show that the defendant's acts could be one of several possibilities that could have caused the damage he or she has suffered. The defendant's acts must be the cause of the damage.

I accept that the law is correctly stated in all the cases referred to me by both counsel. These are *Joseph Isnard and Others v China Senyang Corporation*

(Seychelles) Civil Side No 325 of 2002, *Mrs Micheline De Silva and Others v United Concrete Products (Sey) Ltd* Civil Side No 273 of 1993, and *Desaubin v United Concrete Products Ltd* (1977) SLR 164. These cases are in agreement with the application of article 1382 of the Civil Code of Seychelles. In all those cases the defendant was shown to have been the cause or contributed to the damage suffered by the plaintiffs.

None of the plaintiff's witnesses including plaintiffs no 1 and no 2, can be said to have established in their testimony, singly or taken as a whole, the cause of the cracks or cavities in the houses of the plaintiffs. No investigations were made in relation to the ground conditions surrounding the houses or upon which the houses were built. No investigation was made in relation to the materials used in the construction of the houses or workmanship thereof. No doubt it is possible that ground vibrations arising from blasting, heavy traffic, or the running of heavy machinery could cause or contribute to the cracks in the plaintiffs' houses. But so could faulty workmanship, faulty or inferior materials, or ground conditions upon which the houses were built that could cause uneven settlement. It was the duty of the plaintiffs to establish what was the actual cause of the cracks in their houses on a balance of probability. They have failed to do so.

With regard to the claim for dust emissions to the plaintiffs' house it has been shown that the defendant has in place sufficient dust suppression measures to minimize the dust emitted from the quarry. Secondly the defendant has shown that plaintiff no 1 manufactures charcoal on his land and also sells it from there. This generates smoke as it does dust at different stages of the manufacture through to packing. In fact when the Martin Fredrick Lewis visited the plaintiffs' home what was observed was dark dust consistent with dust from charcoal rather than red dust which would be emitted from the red stone of the quarry. If dust is a problem to the plaintiffs it appears to be a home grown problem.

With regard to noise, the defendant have put forth evidence to show that there are in place noise suppression measures that are effective both at blasting stage and crushing stage. As for traffic to and from the quarry I would not found any liability on this as this is largely daytime traffic and is not unreasonable in any case per se.

With regard to smell, exhibit D1 notes that the premises were affected by smell from the nearby chicken farm. No other source of smell was observed by PW3, the Quantity Surveyor, when he inspected the premises on 11 February 2010. I do not find credible evidence in relation to the claims that a nuisance from the defendant's quarry by way of noise, dust, or smell existed or exceeded what would be acceptable in the kind of neighbourhood that the plaintiffs are living in. See *Desaubin v United Concrete Products Ltd* (1977) SLR 164.

Assuming though that I was wrong and the plaintiffs had proved liability would they be entitled to the damage claimed? The plaint claims R13,000 for labour and materials to repair the cracks in the houses. There was no evidence brought to prove this claim. On the contrary PW3, the Quantity Surveyor put the cost at R167,500, a sum that was not claimed at all in the plaint. This is *ultra petita*. Where a person has claimed specific damage or loss this claim must be specifically proved. One cannot

claim one sum and then purport to prove another. One cannot be allowed to go outside the claim set out on one's pleadings.

The plaintiffs claimed loss of value of property R1,000,000 only. In exhibit D1, PW3 had valued the negative effect of being affected by 'noise from the quarry and bad smell from the nearby chicken farm' as about R50,425 only. The land was valued at R1,065,967.50. The houses were valued at slightly over one million rupees. This was in February 2010. I do not accept, in light of the foregoing, that the plaintiffs' property could have lost value of R1,000,000 on account of the activities of the defendant. There was less blasting operations in 2011 than in the preceding years. I am satisfied that on the evidence before me there is no scintilla of evidence to support this head of claim.

There is a claim for moral damages for stress, inconvenience, anxiety, psychological harm, distress, and fright of R50,000 for each plaintiff. Plaintiffs no 3, no 4 and no 5 did not testify at all. Neither did anyone present their cases on their behalf. There was no representative action in that regard. Their claim remains unproven. I would award plaintiffs no 1 and no 2 R10,000 each for inconvenience.

There is a claim for special damages for constant colds, flues, coughs and ill health of the plaintiffs of R100,000. A claim for special damages must be specifically proved. There is no evidence before this court to establish this claim at all. There is no evidence to show how this sum was arrived at. Or if it was spent at all. Or was it intended to be a claim for moral damages under that heading? Is it a material damage or moral damage claim? Going by the language of the claim it is a material damage claim. Proof is lacking both in terms of showing that colds, flues, coughs and ill health was suffered on account of the defendant's fault and that the sum claimed was incurred thereby to deal with the said conditions.

For the foregoing reasons I find that the plaintiffs have failed to prove their case. I dismiss the case with costs.

SULLIVAN v ATTORNEY-GENERAL

Egonda-Ntende CJ, Gaswaga and Burhan JJ
31 July 2012 Constitutional Court 13/2011

Constitution – Libel – Right to freedom of expression

The petitioner was arrested and detained in a police cell overnight. He was subsequently charged with the offence of libel. The petitioner argued the arrest and detention was unconstitutional and that s 184 of the Penal Code is unconstitutional as it breaches art 22 of the Constitution.

JUDGMENT Petition dismissed.

HELD

1 Article 22 of the Constitution guarantees the right to freedom of expression, but it is not an absolute right and is subject to such restrictions as may be prescribed by law and necessary in a democratic society for protecting the reputation, rights and freedoms or private lives of persons. Section 184 of the Penal Code (the criminal offence of libel) falls within the restrictions in art 22(2) of the Constitution.
2 The law in ss 184 - 191 of the Penal Code has been formulated with sufficient precision to enable citizens to regulate their conduct and clearly foresee the consequences their acts may entail and therefore contain all the requirements of a prescribed law.
3 The reach of criminal libel as contained in the Penal Code has been limited by the available defences to such an extent that it is no threat to freedom of expression.
4 Repealing the criminal law on defamation is a matter to be decided by the legislature, not the court.

Legislation
Constitution, art 22
Penal Code, ss 35, 184, 185, 186, 187, 188, 189, 190, 191

Foreign Cases
Dissanayake v Sri Jayawardenapura University [1986] 2 Sri LR 254
Jang Bahadur v Principal Mohindra College AIR (1951) SC 59
Lingens v Austria (1986) Series A, No 103.8 EHRR 407
New York Times Co v Sullivan 376 US 254 (1964)
Silver v United Kingdom [1983] 5 EHRR 347 (ECHR)

Foreign Legislation
Constitution of India, art 19
European Convention on Human Rights
International Covenant on Civil and Political Rights

A Derjacques for the petitioner
D Esparon Principal State Counsel for the first and second respondents

Judgment delivered on 31 July 2012

Before Egonda-Ntende CJ, Gaswaga and Burhan JJ

The petitioner is moving this court for the following prayers:

> (a) Declaring that the arrest and detention of the petitioner on 30 October was unconstitutional.
> (b) Declaring that the proceedings and charge in Criminal Side No 852 of 2010 are unconstitutional and violate the petitioner's rights under article 22 of the Constitution.
> (c) Declaring that the Penal Code of Seychelles, Chapter 158, sections 184 to 191, are unconstitutional and breach article 22 of the Constitution.
> (d) Order the first and second respondent to pay the petitioner the sum of R100,000 with interest and costs.

The material facts of the case are that the petitioner was arrested on 30 October 2010 at 13:38 at Beau Vallon by police officers while at his home and placed in the police cell until 31 October 2010 at 14:33 hours when he was released. Subsequently, on 23 December 2010 the petitioner was charged in the Magistrate's Court (Criminal Side No 852 of 2010) with the criminal offence of libel contrary to section 184 as read with section 35 of the Penal Code Cap 158. The particulars of offence, referring to events that had happened on 30 October 2010, and 16 and 19 November 2010, allege that the petitioner published a defamatory matter concerning one Mr Joel Morgan in the form of a print which contained the picture/ image of the said Mr Joel Morgan with the word "Traitor" and that his intention was to defame Mr Joel Morgan, who serves as a Cabinet Minister in the Seychelles Government.

The petitioner seeks to challenge the constitutionality of section 184 of the Penal Code Cap 158 on the grounds it is contrary to article 22 (1) of the Constitution of the Republic of Seychelles and further contends that the civil laws in respect of defamation in the Republic of Seychelles are sufficient and therefore the criminal law as contained in section 184 of the Penal Code should be struck down by this court on the ground of unconstitutionality.

Section 184 of the Penal Code reads –

> Any person who by print, writing, painting, effigy, or by any means otherwise than solely by gestures, spoken words or other sounds, unlawfully publishes any defamatory matter concerning another person, with intent to defame that other person, is guilty of a misdemeanor termed "libel".

It is the contention of the respondents that the said law falls within the framework of the Constitution and within the ambit of article 22(2) of the Constitution of the Republic of Seychelles.

Article 22(1) of the Constitution of the Republic of Seychelles reads –

> Every person has a right to freedom of expression and for the purpose of this article this right includes the freedom to hold opinions and to seek, receive and impart ideas and information without interference.

Article 22(2)(b) states that –

> the right under clause (1) may be subject to such restrictions as may be prescribed by a law and necessary in a democratic society -
> (a) ……
> (b) for protecting the reputation, rights and freedoms or private lives of persons.

While article 22(1) of the Constitution of the Republic of Seychelles guarantees the right to freedom of expression, a reading of article 22(2) together with this article clearly establishes the fact that the right to freedom of expression is not an absolute right. It is apparent on a reading of article 22(1) and article 22(2)(b) of the Constitution that the right to freedom of expression is subject to such restrictions as may be prescribed by law and necessary in a democratic society for protecting the reputation, rights and freedoms or private lives of persons.

In the case of *Silver and Ors v United Kingdom A 61* 1983 at 32-33 it was held that the requirements of a prescribed law are –

> The law must be adequately accessible: the citizen must be able to have an indication that it is adequate in the circumstances, of the legal rules applicable to a given case" and, "a norm cannot be regarded as "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct; he must be able if need be with appropriate advice to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.

When one considers the prescribed law as set out in section 184 of the Penal Code and all the relevant sections coming within the scope of Chapter XVIII ie sections 184 to 191 pertaining to the law of defamation, we observe that the law on defamation gives a clear indication of the legal rules applicable to the offence of libel and the said laws specifically set out not only the nature of the offence but the defences available to an individual charged with the said offence, namely privilege both absolute and conditional privilege based on "good faith".

Section 187 reads –

> Any publication of defamatory matter concerning a person is within the meaning of this chapter, unless (a) the matter is true and it was for the public benefit that it should be published or (b) it is privileged on one of the grounds hereafter mentioned in this chapter.

The law as contained in section 188 of the Penal Code deals with absolute privilege and sets out instances where publication of defamatory matters is absolutely privileged. Section 189 of the Penal Code refers to a publication of a defamatory matter being privileged on condition inter-alia that it was published in good faith and the publication does not exceed either in extent or matter what is reasonably sufficient for the occasion. The section further sets out several instances where such publication within the above mentioned limits does not amount to libel and are conditionally privileged.

Section 190 (a) and (b) of the Penal Code makes specific reference to the term "good faith" and gives instances where publications shall not be deemed to have been made in "good faith" by a person, namely where the defamatory publication was untrue and that the person did not believe it to be true or did not take reasonable care to ascertain whether it was true or false. Section 191 of the Penal Code extends the limits of good faith and states if the defamatory material was published under such circumstances that the publication would have been justified if made in good faith, then good faith could be presumed and the burden to prove the contrary rests on the prosecution.

In the case of *Lingens v Austria* (1986) Series A, No 103.8 EHRR 407 the Court drew a distinction between criticism of public figures and private individuals and stated that public figures were subject to closer scrutiny by way of comment in the public interest than private individuals, and as the truth of the facts on which Lingen had founded his value judgments were undisputed and so was his good faith, the European Court held that Lingen's freedom of expression had been violated.

In the United States special rules apply in the case of statements made in the press concerning public figures, which can be used as a defence. A series of court rulings starting with *New York Times Co v Sullivan* 376 US 254 (1964) established that for a public official or other legitimate public figure to win a libel case, the statement said to be defamatory should have been published knowing it to be false or with reckless disregard to its truth, also known as actual malice. If malice can be shown, qualified privilege is not a protection against defamation.

In our law too, section 189 of the Penal Code refers to a publication of a defamatory matter being privileged on condition inter-alia that it was published in good faith and the publication does not exceed either in extent or matter what is reasonably sufficient for the occasion.

Specific reference may be made to section 189 (c) and (d) which provide that –

> A publication of defamatory matter is privileged, on condition that it was published in good faith, if the relation between the parties by and to whom the publication is made is such that the person publishing the matter is under some legal, moral or social duty to publish it to the person to whom the publication is made or has a legitimate personal interest in so publishing it, provided that the publication does not exceed either in extent or matter what is reasonably sufficient for the occasion and in any of the following cases ,namely -
> (a)……
> (b)……
> (c) if the matter is an expression of opinion in good faith as to the conduct of a person in a judicial, official or other public capacity or as to his personal character so far as it appears in such conduct; or
> (d) If the matter is an expression of opinion in good faith as to the conduct of a person in relation to any public question or matter, or as to his personal character so far as it appears in such conduct; or …….

From a reading of the above it appears to us that "privilege" as contained within the precincts of our Penal Code provides a complete bar and answer to criminal libel,

though conditions may have to be met before this protection is granted. In our criminal law the defence of privilege recognizes societal and individual interest in the expression of opinions against public officials. This stems from an interest of social and political importance and that society wants to protect such interests by not punishing those who pursue them. Privilege can be argued whenever an accused can show that he acted from a justifiable motive.

Therefore, on the above analysis we are satisfied that the said law as contained in Chapter XVIII of the Penal Code has been formulated with sufficient precision to enable a citizen to regulate his conduct and clearly foresee the consequences his act may entail and therefore contains all the requirements of a prescribed law as set out in the case of *Silver and Ors v United Kingdom* (supra). Secondly the reach of criminal libel as contained in the Penal Code has been substantially whittled down by the available defences to such an extent that it is no threat to the freedom of expression. In reality, the area that may be covered by criminal libel is very narrow, posing no risk to social or political discourse in society.

Article 17 of the United Nations International Covenant on Civil and Political Rights (ICCPR) 1966 states –

> (1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation,
> (2) Everyone has the right to the protection of the law against such interference or attacks.

Article 10 of the European Convention on Human Rights (ECHR) 1950 permits restrictions on freedom of speech when necessary to protect the reputation or rights of others.

In the case of *Jang Bhadur v Principal Mohindra College* AIR (1951) SC 59 it was held by the Supreme Court of India that the right to freedom of speech and expression as contained in article 19(1) of the Constitution of India in addition to the qualifications laid down in article 19(2) had a further qualification in that the said right should not violate the rights of others and further that the said right did not entitle a person to defame others. While in the case of *Dissanayake v Sri Jayawardenapura University* [1986] 2 Sri LR 254 it was held by the Sri Lankan Supreme Court that:

> A student may also exceed his constitutional rights of speech and expression by adopting methods of expression that materially and substantially interferes with the Vice Chancellor's right to his reputation.

On consideration of the aforementioned articles of our Constitution, it is our view that the said law is necessary in a democratic society as the need for such laws exists in order to ensure that the freedom of expression does not include a licence to defame and vilify innocent individuals and therefore the freedom of expression is subject to the said restriction contained in article 22(b) ie a restriction prescribed by a law and necessary in a democratic society for the protection of the reputation of individuals.

We are aware that there is a broader consensus against laws that criminalize defamation. Human rights organizations and other organizations such as the Council

of Europe and Organization for Security and Co-operation in Europe have campaigned against strict defamation laws that criminalize defamation. The European Court of Human Rights has placed restrictions on criminal libel laws because of the freedom of expression provisions of the European Convention on Human Rights as in the case of *Lingens v Austria* (supra).

However, we are of the view that the matter of repealing the criminal law on defamation is not within the purview of this court but is a matter to be decided by the legislature of the country.

In light of the above constitutional provisions, it cannot be said that the arrest and subsequent institution of criminal charges against the petitioner was an infringement of his rights. Rather, it was an exercise executed in line with the subsisting law and procedures, and within the restrictions so permitted by the Constitution. The respondent's worries of the trial resulting in a conviction and sentence of imprisonment or fine (vide paragraph 14 of the affidavit) are immaterial to this court as long as the whole process is lawful. It could even result in an acquittal. Besides, the trial is still ongoing in the Magistrate's Court. In addition, those fears alone cannot be a ground for the court to declare the questioned provisions of the Penal Code and or the criminal proceedings in Criminal Side No 852 of 2010 as being unconstitutional.

For the aforementioned reasons on consideration of the existing provisions in our Constitution we see no unconstitutionality in the existing law. We therefore find no merit in the grounds urged by counsel for the petitioner and proceed to dismiss the petition. No order is made in respect of costs.

COOPOOSAMY v DUBOIL

MacGregor P, Twomey and Msoffe JJ
31 August 2012 Court of Appeal 1/2011

Civil Code article 1341 – Admissibility of oral evidence

The appellant brought an action claiming that the respondent had not repaid US $20,000 she lent him to purchase a truck. The respondent argued the money was not a loan as it was to reimburse him for expenditure by him for the refurbishment of the appellant's home. In cross-examination of the appellant at the hearing of the action, counsel for the respondent raised an objection under art 1341 of the Civil Code that there was no written loan agreement. The Chief Justice upheld this and rejected the appellant's oral testimony.

JUDGMENT Case remitted to the Supreme Court for continuation.

HELD

1 Article 1341 precludes the admissibility of proof by oral evidence in all matters where the value is above R 5000. There are exceptions to this general rule.
2 There are two rules contained in art 1341, with different procedures when an objection is made:
    a. The first relates to the act itself, such as a loan and repayment of the money, where there is an oral agreement that is not evidenced in writing. The objection to the evidence must take place before the material oral evidence on which the plaintiff is relying as proof of the obligation is adduced. If no objection is made at this time, this can be taken as waiving the right to objection and the oral evidence will be admissible. An objection cannot be made when the plaintiff is being cross-examined as the right to objection will already have been waived.
    b. The second relates to the circumstances where a document is produced and the party tries to bring evidence "against and beyond" the written agreement. Oral evidence may be heard but if an objection is made at any time during the trial the judge should hear all the evidence and at the end decide whether the oral evidence is "against and beyond" the agreement.
3 Article 1348 of the Civil Code and jurisprudence also provide exceptions to art 1341 of the Civil Code. Oral evidence may be admissible where it is not possible to obtain written proof, for example, where there is a moral impossibility to obtain written proof because of the relationship between the parties. There is no exhaustive list of situations where it is not possible to obtain written evidence and the court has a wide discretion to consider whether this situation exists on the facts of the case.

Legislation
Civil Code, arts 1315, 1341, 1348, 1374

Cases
Corgat v Maree (1976) SLR 109
Esparon v Esparon (1991) SLR 59

Michaud v Cuinfrini SCA 26/2005, LC 302
Port Glaud Development v Larue (1983-1987) 3 SCAR II 152
Renaud v Dogley (1983-1987) 3 SCAR II 202
Victor v The Estate of André Edmond (1983) SLR 203
Vidot v Padayachy (1990) SLR 279

Foreign cases
Cass 17 déc 1982, Pas 1983 I P 478
R W 1982 -1983 col 2451
Cass 6 déc 1988.
Civ 1re, 28 févr. 1995, Defrénois 1995. 1043

B Hoareau for the appellant
F Bonté for the respondent

Judgment delivered on 31 August 2012 by Twomey J

Before MacGregor P, Twomey and Msoffe JJ

The appellant in this case brought an action claiming that in 2006 she lent the respondent the sum of US$20,000 to purchase a pickup truck, which money was to be repaid by the end of 2006. At the time of the contract, the respondent was the common law husband of the appellant's sister.

In his statement of defence, the respondent agreed that the plaintiff, now appellant, had indeed given him the money. He stated however that this money was not be refunded as it would reimburse him for expenses by him for the refurbishment of the appellant's family home.

At the hearing of the action, the appellant deponed in chief and gave evidence of the statements contained in her plaint. She was then cross-examined by counsel for the respondent. It was during the course of this cross-examination that the following exchange took place:

> Q Madam to put an end to all this, where is your agreement, your loan agreement?
> A He was staying with my sister.
> Q The law does not say that when someone is staying with your sister-
> A But this has nothing to do-
> Q No, no the agreement of the loan because the law says that when you lend someone a sum of more than R 5000 you must have writing. Where is the writing?
> A But we have the proof that I sent him the money
> Court: Mr Bonte, the claim is not based on a written agreement. She has not alleged there is a written agreement for her to produce it.
> Mr Bonte: Your lordship, but the Seychelles Civil Code says that if you are claiming money, a sum which is superior to R 5,000 there must be writing.
> Court: That I understand, then you will address that as an issue of law. Here we are just gathering evidence. At the appropriate stage you will address that as an issue of law.
> Mr Bonte: I want to raise it now your Lordship.

> Court: Finish cross examination of this witness so that we excuse the witness. (verbatim)

The respondent's counsel, Mr Bonte then continued with his cross-examination of the appellant. At the end of the cross-examination Mr Bonte again raised his "plea." Mr Hoareau, the appellant's attorney, contended that Mr Bonte had raised an objection under article 1341 of the Civil Code tardily. The Chief Justice then proceeded to hear the "plea."

In his ruling of 31 January 2011 he relied on the case of *Michaud v Lucia Cuinfrini* SCA 26/2005, more specifically on the following statement:

> If a party does not object to oral evidence when it is given, that evidence is assumed admissible.
>
> If a party objects to oral evidence on the grounds of non-compliance with article 1341, then the Judge must hear the evidence and arguments from the parties to determine whether an exception under article 1374 or 1348 applies. The Judge must give a ruling on the admissibility or otherwise of the evidence before the proceedings are resumed.

In the circumstances the Chief Justice found that the present case was on all fours with the cited authority and that the objection of Mr Bonte was well founded and the appellant's oral testimony rejected. It is not clear if the case was dismissed but the respondent was granted costs.

It is from that decision that the appellant has now appealed. She has raised four grounds of appeal which invite the following issues to be decided:

(1) At which stage of a trial should an objection under article 1341 of the Seychelles Civil Code be made?
(2) What is the procedure for an objection under article 1341 to be taken?
(3) Should the oral evidence of the appellant have been admitted in the circumstances of this case?

Raising an objection under article 1341

It follows from the provisions of article 1315 of the Civil Code of Seychelles that the plaintiff in an action must support his claim by proof. Article 1341 precludes the admissibility of such proof by oral evidence in all matters, the value of which is above 5000 rupees. There are however several exceptions to this general rule, some are provided by the Code itself and some by jurisprudence. An objection under article 1341 of the Civil Code of Seychelles stems for the fact that French law from which we have inherited the Code insists on contracts being proven in writing unless of course the significance of the matter at issue is small, hence the stipulated value of R5000 in our Code. The purpose of article 1341 however, is not to restrict oral evidence in a contract but rather to restrict evidence that a written document, if it exists does not faithfully reproduce all that has been agreed by the parties and to exclude what is known in the common law of contract as parole evidence (see René David *English law and French Law – A Comparison in Substance*). Hence the court

has the option under several exceptions in the Code and jurisprudence to permit oral evidence for proving contracts.

There are however two rules contained in article 1341: the first relates to an objection relating to the juridical act itself - in this case the loan and repayment of the money ie an oral agreement not evidenced in writing; the second relates to the circumstances where a document is available and produced and a party tries to bring evidence "against and beyond" the terms of the agreement itself. The present case only concerns the first rule as there is no document produced relating to the agreement.

It is this distinction between the two rules that caused the confusion in this present case. In the case of *Michaud v Cuinfrini* (supra) it was the second rule that was involved as there was a document produced. In such cases oral evidence may be heard but if an objection is made at any time during the trial relating to the agreement produced, the trial judge hears all the evidence and at the end of the case decides whether the oral evidence is "against and beyond" the agreement.

Procedure at trial when an objection is made under article 1341

In the present case the situation is different. There is no written agreement and hence it should be obvious that the objection to the evidence in such cases ought to take place before the material oral evidence on which the plaintiff is relying as proof of the obligation is adduced. Hence, when the appellant's counsel started leading evidence on the alleged agreement, the respondent's counsel should have objected to the oral evidence on the grounds of article 1341. But in this case the whole of the examination-in-chief of the appellant had taken place and it was only in the final stages of the cross-examination that counsel made the objection. The oral evidence was therefore already on record. Counsel for the respondent was cross-examining the appellant on the issue of the existence of the written agreement when he decided to make the objection. Hence as pointed out by counsel for the respondent he had missed the boat as he had already waived his right to the objection. Further, as Sauzier J put it in *Corgat v Maree* (1976) SLR 109 at 114 -

> The provisions contained in article 1341 are not absolute. They are subject to many exceptions one of which being that they do not apply where a party either expressly or impliedly waives them. [Dalloz, *Encyclopédie, Droit Civil, Verbo preuve*, nos 65, 66, 84.]

As the respondent's counsel had not objected to the evidence he must therefore be taken to have tacitly waived the application of article 1341 and such oral evidence was therefore admissible. Having allowed the evidence onto the record the respondent is now limited either by cross-examination of the plaintiff or by leading contradictory evidence to show that such an obligation did not exist. The trial will then proceed as normal with the trial judge weighing the evidence to decide if the burden and standard of proof have been discharged.

Mr Bonté for the respondent has argued that when an objection is made under article 1341 at trial a voir dire should be held. We do not subscribe to this view. As we have pointed out, there are two possible objections that can be made under article 1341

and the procedure differs depending on which particular objection is being made. Neither requires a voir dire as in any case in Seychelles there are no jury trials for civil cases. We have outlined the alternatives above and do not need to repeat them. In the present case, as there is no written agreement it suffices for either party to raise an objection when the oral evidence is being led and for the judge to give a ruling either ex tempore or in a reserved written ruling on the matter. The case then proceeds in the absence of the oral testimony of the agreement.

Admissibility of oral evidence

We have already decided that the oral evidence was admissible as counsel for the respondent had waived the application of the provisions of article 1341. However we feel it necessary to point out that even if the respondent had objected to the oral evidence it may still have been admissible under the provisions of article 1348 of the Civil Code which states:

> [The provisions of article 1341] shall also be inapplicable whenever it is not possible for the creditor to obtain written proof of an obligation undertaken towards him.

Four instances of where this exception applies are then given in the Code. To further temper the strict applicability of article 1341 and its unjust consequences to certain parties in some circumstances, jurisprudence has provided further exceptions. Further, the Court of Cassation of France has stated that the exceptions provided in article 1348 of the Code are not exhaustive and that where it is impossible to secure written proof it is certainly possible to bring proof of an obligation either by oral evidence or by presumptions. *(Cass 17 déc 1982, Pas 1983 I P 478; R W 1982 - 1983 col 2451; Cass 6 déc 1988. See also De Page t III 3e ed no 904).* One of these exceptions has been the moral impossibility to provide such proof arising from the relationship between the parties. Not all relationships even between close family members give rise to his exception. There must also exist close ties as a result of the family relationship *(lien de famille)*, friendship or trust. In this respect the court is vested with immense power and discretion to appreciate each case on its own facts to determine whether there is such a moral impossibility in any particular relationship to bring written proof (see *Civ 1re, 28 févr. 1995, Defrénois 1995. 1043, obs . Mazeaud).* In Seychelles we have followed this approach and it has also become our law (*Victor v The Estate of André Edmond* (1983) SLR 203, *Renaud v Dogley* (1983-1987) SCAR II 202, *Aniella Vidot v Jerome Padyachy* (1991) SLR 279, *Esparon v Esparon* (1991) SLR 59, *Port Glaud Development v Larue* (1983-1987) SCAR II 152).

In the case of the appellant there was certainly a lien de famille with the respondent as he was her putative brother-in-law for over 20 years and at the time of the alleged loan he was living in the appellant's family home implying closeness between them. It may well be, therefore, that this would have met the requirements to allow the oral evidence under the provision of article 1348. It would have been the only possibility under which the oral evidence would have been allowed if the objection had been made at the right time since the provisions of article 1347 would not have been applicable. The defendant has clearly admitted in his statement of defence and counterclaim that the payment by the plaintiff was indeed made but that it was a set-

off from a debt owed to the defendant for repairs he had carried out to the family home. Since this is not a simple denial but rather a qualified denial his statement of defence could not have been used as “evidence providing initial proof.”

For the reasons given above therefore, this appeal is allowed. It must be emphasized, however, that although the oral evidence of the appellant is admissible, the trial judge still has to appreciate at the end of the case if she has proven her case.

The case is therefore remitted to the Supreme Court for continuation. The costs of this appeal are awarded to the appellant.

HACKL v FINANCIAL INTELLIGENCE UNIT

MacGregor P, Twomey, Msoffe JJ
31 August 2012 Court of Appeal 10/2011

Constitution – Anti-Money Laundering Act – Proceeds of Crime (Civil Confiscation) Act – Separation of powers – Sovereignty – Right to equal protection before the law – Double jeopardy – Retrospective – Right to property – International law

The Constitutional Court unanimously dismissed the appellant's petition that the Anti-Money Laundering Acts of 2006 and 2008 and the Proceeds of Crime (Civil Confiscation) Act 2008 were unconstitutional. Orders were made in the Supreme Court prohibiting the appellant from dealing with property, as it was the benefit of criminal conduct or proceeds of crime. The appellant appealed.

JUDGMENT Appeal dismissed.

HELD

1 The Attorney-General's powers under s 3(9)(c) of the Anti-Money Laundering Act are not legislative powers that would breach the principle of separation of powers. They are the same powers as conferred by art 76(4) of the Constitution.
2 The Anti-Money Laundering Act and Proceeds of Crime (Civil Confiscation) Act do not target the criminal offence, but the assets derived from the conduct. This distinction means it will not be a breach of the principle of sovereignty if the criminal offence is not a criminal offence in Seychelles.
3 In some cases the interpretation of s 3(9)(c) of the Anti-Money Laundering Act might result in a breach of the principle of sovereignty. However, the rule of law and international human rights law may in some situations override a state's claim to sovereignty.
4 If the Attorney-General exercises the discretion under s 3(9)(c) of the Anti-Money Laundering Act it does not constitute a breach of the right to equal protection before the law.
5 The Proceeds of Crime (Civil Confiscation) Act does not attract the protection of the double jeopardy provision in art 19(5) of the Constitution, as its provisions are essentially civil in nature.
6 Article 19(4) of the Constitution, which provides that offences cannot be created retrospectively, does not apply to s 3(9) of the Anti-Money Laundering Act, as the proceedings are civil not criminal. In addition, the Anti-Money Laundering Act is prospective and not retrospective, as it is only the possession or control of property after the coming into force of the Act which attracts consequence under the Act.
7 Orders made under the Proceeds of Crime (Civil Confiscation) Act are a necessary and proportionate limitation on the right to property under s 26(2) of the Constitution to serve the public interest.

Legislation
Constitution, arts 19, 19(4),(5), 26, 26(1),(2)(a), (2)(d), 27(1), 47(b), 48, 76(4), 85, 89
Anti-Money Laundering Act, ss 2, 3(4),(9),(9)(c)
Proceeds of Crime (Civil Confiscation) Act, ss 3, 3(1), 4

Cases
Financial Intelligence Unit v Mares Corp (2011) SLR 404
Finesse v Banane (1981) SLR 103
Kim Koon and Co Ltd v R (1969) SCAR 60
Re s 342(a) of the Criminal Procedure Code SCA 6/2009, LC 340

Foreign Cases
Ali and Rasool v State of Mauritius [1992] 2 AC 937
Arcuri v Italy (2001) 54024/99 ECHR 219
Attorney-General v Blake [2001] 1 AC 268
Bennis v Michigan (94-8729) 517 US 1163 (1996)
Bholah v State of Mauritius SCJ 432/2009
Gilligan v Criminal Assets Bureau [1998] 3 IR 185
Kokkinaskis v Greece [1993] 17 EHRR 397
Mistretta v United States 488 USS 361 (1989)
Murphy v GM [2001] 4 IR 113, [2001] IESC 82
Phillips v United Kingdom (2000) 64509/01 ECHR 702
Prophet v National Director of Public Prosecutions CCT 56/05
Rao v Union Territory of Pondicherry (1967) SCR(2) 650
Silver and ors v United Kingdom [1983] 5 EHRR 347 (ECHR)
State v Dougall 89 Wn.2d 118 (1977)
Sunday Times v United Kingdom (1979) 2 EHRR 245
United States v Ursery (95-345) 518 US 267 (1996)
Ut-Tahrir v Germany (2012) 31098/08 EHRR 55

Foreign Legislation
Constitution (Ireland), art 40.3.2
European Convention of Human Rights, art 1
Mutual Assistance in Criminal Matters Act (Australia)
Proceeds of Crime Act (Australia)
Proceeds of Crime Act (Ireland)
Treaty on the Non-Proliferation of Nuclear Weapons
United Nations Human Rights Charter, art 1

B Hoareau and Frank Ally for the appellant
B Galvin and D Esparon, Senior State Counsel and Principal State Counsel for the respondents

Judgment delivered on 31 August 2012

Before MacGregor P, Twomey, Msoffe JJ

TWOMEY J:

This case is without doubt one of the most comprehensive attacks on the constitutionality of laws, specifically the provisions of the Anti-Money Laundering Acts of 2006 and 2008 (hereinafter AMLA) and the Proceeds of Crime (Civil Confiscation) Act 2008 (hereinafter POCCCA), as against the right to property guaranteed in the Constitution of Seychelles.

It arises out of orders made by then Acting Chief Justice, Bernadin Renaud on 17 June 2009 against the appellant, prohibiting him from the disposal or dealings with several parcels of land and properties at Anse Kerlan Praslin and Mare Anglaise, Mahé; the sale of or dealings with motor vessels catamaran *Storm* and *Monsun* and motor vehicles bearing licence plates S18826 and S18827 all belonging or registered in the name of the appellant. The order also applied to monies in several accounts in Barclays Bank amounting to US$1,188235 in the name of the appellant.

These orders had been made as a result of ex-parte proceedings based on the affidavit of Declan Barber, director of the first respondent. He had averred inter alia that the properties seized and frozen were the benefits of criminal conduct or proceeds of crime, specifically the earnings obtained from inter alia -

> the unauthorised supply of heavy duty graphite into Iran for the purposes of medium and long range ballistic missiles and the nuclear weapons programme in that country...[and] the said Hans Joseph Hackl ha[d] pleaded guilty to certain charges of the said criminal conduct and ha[d] been sentenced to 6 years imprisonment by a court in Germany.

The appellant petitioned the Constitutional Court for a number of declarations. These included a declaration that article 26(1) (the right to property) had been contravened by the orders and that section 3(1) of POCCCA (interim orders in relation to property derived from criminal conduct) was repugnant to and not envisaged by the provision relating to limitations to the right of property as "necessary in a democratic society." He also prayed for a declaration that the provisions of AMLA and POCCCA insofar as they contain provisions with retrospective application to conduct or acts before the coming into force of AMLA and POCCCA are unconstitutional. He further prayed for a declaration that the provisions of POCCCA and AMLA which import criminal conduct of offences arising from acts outside the jurisdiction of Seychelles which are of themselves not criminal offences in Seychelles are unconstitutional.

The Constitutional Court delivered unanimous judgments dismissing the petition in its entirety. It is against this decision that the appellant has now appealed and submitted 8 grounds on which he relies For the sake of clarity, we shall succinctly state the appellant's contention as follows:

(1) The definitions of "benefit from criminal conduct" and "criminal conduct" in AMLA and POCCCA
    (i) are repugnant to the principle of separation of powers as contained in the Constitution
    (ii) breach the principle of sovereignty
    (iii) are repugnant to the right of equal protection of the law as contained in article 27(1) of the Constitution.
(2) The provisions of AMLA are repugnant to the constitution in that they breach the right to a fair hearing, namely
    (i) section 3(9)(c) of AMLA breaches the rule against double jeopardy as contained in article 19(5) of the Constitution.

(ii) section 3(9) of AMLA allows the creation of offences retrospectively and hence breaches article (19)(4)of the Constitution

(3) The Constitutional Court by its decision extended the limitations permissible by the Constitution to the right to property.

In the context of the present case it is worth noting that legislation using civil procedures to deal with “criminal assets” is an emerging global trend in the battle against crime. There are many models: the US model which provides for the confiscation of any property constituting, derived from, or traceable to, any proceeds obtained directly or indirectly from an offense; the UK model which provides that such property must have been obtained ‘by or in return for unlawful conduct'; the Irish model which defines proceeds of crime as “any property obtained or received by, or as a result of, or in connection with the commission of an offence”; the Commonwealth model which defines proceeds of unlawful activity as any property or economic advantage derived or realized, directly or indirectly, as a result of or in connection with, an unlawful activity, irrespective of the identity of the offender; the Australian model which defines property as "proceeds" of an offence if it is wholly or partly derived or realised, whether directly or indirectly, from the commission of the offence; the South African model with perhaps the widest definition, defining "proceeds of unlawful activities" as: . . . any property or any service, advantage, benefit or reward which was derived, received or retained, directly or indirectly . . . in connection with or as a result of any unlawful activity carried on by any person.” Seychelles has adopted the Irish model in both AMLA and POCCCA. It is the provisions of those laws that are now under scrutiny.

The separation of powers

The appellant contends that the principle of separation of powers contained in articles 85 and 89 of the Constitution has been breached by section 3(9)(c) of AMLA insomuch as it leaves wide discretion in the hands of the Attorney-General amounting to an abdication of power by the Legislature. The specific provision in 3(9)(c) complained of relates to the definition of criminal conduct which -

> shall also include any act or omission against any law of another country or territory punishable by imprisonment for life or a term of imprisonment exceeding 3 years, or by a fine exceeding the monetary equivalent of R50, 000 whether committed in that other country or territory or elsewhere and whether before or after the commencement of this Act, *unless the Attorney General shall certify in writing that it would not be in the public interest to take action in the Republic in relation to an act or omission as defined in this sub-section.* [our emphasis]

This, the appellant contends, confers an unfettered discretion on the Attorney-General to decide whether an act or omission in another country and in any particular case constitutes criminal conduct justifying the institution of an action in Seychelles. As there is no delegation of power to the Attorney-General who is a member of the Executive branch of Government in the provision, the principle of separation of powers has been breached. Whilst they could not find an authority on all fours with the present matter they rely on the case of *Ali and Rasool v State of Mauritius* [1992] 2 AC 937 in which the transgression complained of was between the executive and the judiciary**.**

Ali is clearly distinguishable from the present case for other reasons. In *Ali* the principle of separation of powers was breached as the Director of Public Prosecutions, who was an officer of the executive branch of government, was vested with the power to choose whether to prosecute an accused person in an Intermediate Court or a District Court (neither of which had power to impose the death penalty) or before a judge in the Supreme Court without a jury which would result in the imposition of a death sentence in the event of a conviction for drug trafficking. This amounted to the selection of the penalty to be imposed and hence infringed the principle of separation of legislative, executive and judicial powers implicit in the Constitution. In effect the executive was encroaching on the domain of the judiciary by being allowed to preselect the penalty to be imposed on conviction. In *Ali* a judicial power was appropriated by the executive.

Ali is a far cry from the present case. No legislative power is given to or appropriated by the Attorney-General under AMLA. He is accorded those same powers as are conferred by article 76(4) of the Constitution – the discretion to institute criminal actions viz "in any case in which the Attorney-General considers it desirable so to do." The Attorney-General of Seychelles ultimately exercises his discretion in every criminal case he institutes. AMLA only specifies that in the exercise of that constitutional discretion he has to certify in writing whether it is in the public interest not to bring such action. It does not create further discretion. It is the safety valve as suggested by Mr Galvin against the abuse of the delegated power to the Attorney-General.

The appellant has also relied on the cases of *B Sham Rao v The Union Territory of Pondicherry* (1967) SCR(2) 650, *State v Dougall* 89 Wn.2d 118 (1977), *Bholah AZ and Anor v State of Mauritius* SCJ 432/2009, and the Seychelles cases of *Finesse v Banane* (1981) SLR 103 and *Kim Koon and Co Ltd v R* (1969) SCAR 60. The respondent has relied on *Mistretta v United States* 488 USS 361 (1989). The appellant's submission based upon his authorities is that the only laws enforceable in Seychelles are those passed by the Legislature and that since the delegation to the Attorney-General is not qualified in any way it amounts to an abdication of the legislative power of the Assembly. This would be a very persuasive argument if one was to ignore the point made in *Mistretta* (supra) that there is no unconstitutional delegation of power because of an alleged absence of any ascertainable standards for guidance of the function accorded in the delegation. In any case the proviso in section 3(9)(c) contains the standard by which the Attorney-General is so guided – that of "public interest."

Abdication of sovereignty

It was also suggested that Seychelles is the only country in which the definition of criminal conduct has been expanded to include offences committed outside the state which are themselves not criminal offences in Seychelles. That is not the case. For instance, the Australian Proceeds of Crime Act 2002 refers to the Mutual Assistance in Criminal Matters Act 1987 for definitions of terms used in that Act in the same way as POCCCA in Seychelles refers to AMLA for definitions of criminal conduct. In the Australian Act the following definitions are set out:

> "criminal matter" includes:
> a ...
> b ...
> c a matter relating to the forfeiture or confiscation of property in respect of an offence
> d ...
> e a matter relating to the restraining of dealings in property, or the freezing of assets, that may be forfeited or confiscated, or that may be needed to satisfy a pecuniary penalty imposed in respect of an offence; whether arising under Australian law or a law of a foreign country.

In any case the appellant's argument also misses the point that it is not the criminal offence which is being targeted by POCCCA or AMLA. True there is an undeniable connection between the "criminal conduct' as defined, but it is the assets derived from any such conduct that is being aimed at. The distinction is important especially in terms of the argument that the provision breaches fundamental principles relating to the sovereignty of Seychelles. All that is necessary to trigger the provisions of POCCCA is a predicate crime and not a criminal offence per se. This is the reason why it need not matter whether the conduct is a criminal offence in Seychelles or not. If the appellant himself was being charged with a "serious offence" or "criminal conduct" which was not itself a criminal offence in Seychelles he may well have had a point. POCCCA does not seek to make the offence of exporting graphite which is a criminal offence in Europe a criminal offence in Seychelles as well. It only seeks to ensure that benefits from that activity and other criminal conduct cannot be enjoyed by a person in Seychelles. Is the provision a bold departure from previous enacted laws? Undoubtedly it is; but desperate times require desperate measures.

Jurisdictions around the world have had to create laws to fight money laundering and organised criminal and terrorist financing. Seychelles has to meet commitments under UN Conventions and satisfy other international standards concerning such activities. Our laws contain provisions that are no more and no less of these requisite standards. The safety valve provided in AMLA requiring a consideration of the public interest protects against the unqualified abdication of our sovereignty.

We have also had to consider in this context whether there are permissible limitations to the principle of sovereignty. We find that there are. In this context we state that the rule of law and international human rights law may well override a state's claim to sovereignty. Each case must be decided on its own facts and we cannot state conclusively that there might not be cases where the interpretation of section 3(9)(c) might result in a breach of the principle of sovereignty. However, we are of the view that in the case before us, the discretion of the Attorney-General was rightly exercised in allowing action to be taken against the appellant's property. The present case concerns the export of components for nuclear warheads and the public, national and international interest far outweighs the principle of sovereignty.

We note that article 48 of the Constitution of Seychelles in relation to the Chapter III – Seychellois Charter of Fundamental Human Rights states:

> This Chapter shall be interpreted in such a way so as not to be inconsistent with any with any international obligations of Seychelles relating to human

> rights and freedoms and a court shall, when interpreting the provision of this Chapter, take judicial notice of –
> (a) the international instruments containing these obligations;
> (b) the reports and expression of views of bodies administering or enforcing these instruments;
> (c) the reports, decisions or opinions of international and regional institutions administering or enforcing Conventions on human rights and freedoms;
> (d) the Constitutions of other democratic States or nations and decisions of the courts of the States or nations in respect of their Constitutions.

We also note that Seychelles has acceded to the Treaty on the Non-Proliferation of Nuclear Weapons since 1985. It is also a signatory to the United Nations Human Right Charter, of which the purpose set out at article 1 of its Chapter 1 is of note:

> To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace...

In a parallel context, we note the decision of the European Court of Human Rights (ECtHR) in the interpretation of the European Convention of Human Rights in the case of *Hizb Ut-Tahrir v Germany* (2012) 31098/08 EHRR 55. The facts of the case are not dissimilar to the case before us. In *Hizb Ut-Tahrir* the applicant, whose name means “Liberation Party” and which describes itself as a “global Islamic political party and/or religious society” and which was established in Jerusalem in 1953 advocating the overthrow of governments throughout the Muslim world had its assets in Germany seized. The applicant complained that the confiscation of its assets in Germany violated its right to the peaceful enjoyment of its possessions under art 1 of Protocol No 1 of the Convention, which provides:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Whilst ultimately it had not exhausted domestic avenues in relation to its right to property, the ECtHR found that the applicant’s complaint did not disclose any appearance of a violation of the right he claimed had been breached. In the same way we find that the applicant’s use of the Seychelles Charter of Human Rights is an attempt to deflect from its aims and purposes and are clearly contrary to the values of the Charter. This ground is therefore not sustainable.

Equal protection to the law

The appellant argues that insofar as section 3(9)(c) of AMLA bestows a discretion on the Attorney-General not to institute an action in certain cases and does not set out factors or guidelines in which he can exercise the said discretion, this constitutes a breach of the right to equal protection before the law. There are obvious locus standi issues with this ground. The appellant has not demonstrated how he has been treated any differently to another person or the ground upon which he is alleging he was treated differently. In any case, there is no issue of discrimination against the appellant arising from the proceedings, since the Attorney-General has not exercised his discretion under the provision. However, even if we were to find that the appellant had standing on this issue we fail to follow his line of argument that there would be discrimination if the Attorney-General exercised his discretion. That discretion is not exercised haphazardly, spontaneously or absolutely – it is exercised in the "public interest". This ground of appeal also has no merit.

Right to a fair hearing

The right to a fair hearing is contained in article 19 of the Constitution:

> Every person charged with an offence has the right, unless the charge is withdrawn, to a fair hearing within a reasonable time by an independent an impartial court.

The appellant contends that his right to a fair hearing has been contravened in two main ways.

Double jeopardy

First he contends that section 3(9)(c) of AMLA insofar as it permits a person to be "twice criminally responsible for the same act or omission" is in breach of article 19(5) of the Constitution which provides:

> A person who shows that the person has been tried by a competent court for an offence and either convicted or acquitted shall not be tried again for that offence or for any other offence of which the person could have been convicted at the trail for that offence, save upon the order of a superior court in the course of an appeal or review proceedings relating to the conviction or acquittal.

The thrust of the appellant's argument is that since he has already been penalised for the offence in Germany (he has been convicted and is serving a six years sentence in Germany in relation to the exportation of heavy graphite to Iran), he cannot again be penalised in Seychelles. The double penalisation argument has been deliberated on in jurisdictions all over the world in countries whose laws have similar provisions to that of Seychelles.

In *United States v Ursery (95-345)* 518 US 267 (1996) the Supreme Court of the United States of America after reviewing a long list of similar precedents found that in contrast to the *in personam* nature of criminal actions, *in rem* forfeitures are neither "punishment" nor criminal for purposes of the double jeopardy clause of the

American Constitution. In the case of *Bennis v Michigan (94-8729)* 517 U.S. 1163 (1996) the forfeiture was found constitutionally permissible even in the case of a joint owner of property as the court found that -

> historically, consideration was not given to the innocence of an owner because the property subject to forfeiture was the evil sought to be remedied.

Similarly in the South African case of *Simon Prophet v National Director of Public Prosecutions* CCT 56/05 the Constitutional Court in effect traces the origins of modern forfeiture laws to the common law of the *deodand* (the guilt of inanimate objects) of the Middle Ages :

> Civil forfeiture provides a unique remedy used as a measure to combat organised crime. It rests on the legal fiction that the property and not the owner has contravened the law. It does not require a conviction or even a criminal charge against the owner.

In *Gilligan v Criminal Assets Bureau and Others and Murphy v GM, PB and Ors* [2001] IESC 82 the Supreme Court of Ireland found:

> The court is satisfied that the United States authorities lend considerable weight to the view that in rem proceedings for the forfeiture of property, even when accompanied by parallel procedures for the prosecution of criminal offences arising out of the same events are civil in nature and that this principle is deeply rooted in the Anglo-American legal system.

Another analogy is the equitable doctrine of disgorgement intended to prevent unjust enrichment. In the application of disgorgement to “literary proceeds of crime” cases (see for example *Attorney-General v Blake (Jonathan Cape Ltd Third Party)* [2001] 1 AC 268) it was argued and upheld that the Attorney-General in his capacity as guardian of the public interest had a public claim to seek the aid of the civil court in support of the criminal law in such cases. There was no distinction explicitly made in the case which would suggest that convictions abroad would be treated differently from convictions in Britain. A further example of this concept is the transnational holocaust litigation in the United States. It is acknowledged that this appeal is not the forum for a discussion about how one deals with the manufacturers and exporters of poison gas, landmines and nuclear weapons and their components knowing that the profit they make from their activities aids and abets the commission of mass crime nor is this decision a salve for the moral revulsion society in general feels over criminals profiting from their activities but the point nevertheless has to be borne in mind.

Mr Hoareau also pointed out that POCCCA provides for civil proceedings procedures for the civil confiscation of property where the acquisition of such property is the result of “criminal conduct” or a “serious crime.” This does not help the appellant’s argument. In the instant there has been no indictment or conviction of the appellant on any criminal offence in Seychelles. The forfeiture of several properties both immoveable and moveable in Seychelles belonging to the appellant is a civil matter. As we have pointed out recently (*Financial Intelligence Unit v Mares Corp* SCA 48/2011) POCCCA sits uncomfortably between civil and criminal law and while it

deals with the proceeds of criminal conduct its provisions are essentially civil in nature. As such they do not attract the protection of article 19(5) of the Constitution.

Retrospective effect of AMLA

The appellant raises a second constitutional challenge in relation to the breach of his right to a fair hearing. He argues that section 3(9) of AMLA allows the creation of offences retrospectively and hence breaches article (19)(4) of the Constitution. In this respect he states that the order which provided for the forfeiture of properties belonging to the appellant were unconstitutional inasmuch as they applied to properties that had been acquired before the enactment of the legislation under which the orders were made. Article 19(4) of the constitution provides:

> Except for the offence of genocide or offence against humanity, a person shall not be held to be guilty of an offence on account of any act or omission that did not, at the time it took place, constitute an offence, and a penalty shall not be imposed for any offence that is more severe in degree or description than the maximum penalty that might have been imposed for the offence at the time it was committed.

This argument cannot succeed for the same reason articulated above in respect of the fact that the proceedings against the appellant were not criminal but civil in nature. The appellant has not been charged with any offence. In any case as was articulated by McGuinness J in the Irish High Court case of *Gilligan v Criminal Assets Bureau and Ors* (supra) the acquisition of assets which derive from crime was not a legal activity before the passing of the legislation complained of and did not become an illegal activity because of the act. Similarly in *Murphy v GM PB and Ors* (supra) 0'Higgins J held that what has to be borne in mind in such cases is that -

> In any event, the act is prospective and not retrospective. The action upon which the act focusses is a possession or control of the proceeds of crime. It is only the possession or control after [the coming into force of the Act] to which the act attaches consequences. It does not affect the possession or control of anything prior to the coming into force of the Act. While the Act looks at events that predate the coming into force of the Act, it cannot be said to have a retrospective operation. At page 387 of Craies on Statute Law (7th edition) it is stated that "a statute is not properly called a retrospective statute because part of the requisites for its action is drawn from a time antecedent to its passing.

Limitations to the right to property

The appellant further argues that the Constitutional Court allowed limitations to the right to property not permissible under article 26(2) (a) or (d) of the Constitution when read with article 47(b) of the Constitution. This arises from orders made under sections 3 and 4 of POCCCA in relation to properties derived from criminal conduct. POCCCA adopts the definition of criminal conduct as laid out in AMLA. These are all matters of interpretation and construction and it is important to bring into view the relevant provisions.

Section 47(b) of the Constitution provides -

> Where a right or freedom contained in this Charter is subject to any limitation or qualification, that limitation, restriction or qualification -
> (a)…
> (b) shall not be applied for any purpose other than that for which it has been prescribed

Article 26 of the Constitution provides -

> (1) Every person has a right to property and for the purpose of this article this right includes the right to acquire, own, peacefully enjoy and dispose of property either individually or in association with others.
> (2) The exercise of the right under clause (1) may be subject to such limitations as may be prescribed by law and necessary in a democratic society-
> (a) in the public interest;
> …
> (d) in the case of property reasonably suspected of being acquired by the proceeds of drug trafficking or *serious crime*;
> [my emphasis]

Serious crime is not defined in the Constitution but it is in section 2 of AMLA (as amended):

> "Serious crime" means any act or omission against any law of the Republic punishable by a term of imprisonment exceeding 3 years and/or by a fine exceeding R50, 000, whether committed in the Republic or *elsewhere*, and where the conduct occurs outside the Republic, would constitute such an offence if it occurred within the Republic and also constitutes an offence under the law of the country or territorial unit in which it occurs…" [my emphasis]

Section 3(4) of AMLA states – "(a) a person guilty of money laundering is liable on conviction to a fine not exceeding R5,000,000 or to imprisonment for a term not exceeding 15 years or both".

The appellant contends that the sale of embargoed goods to prohibited countries, namely heavy duty graphite to Iran, whilst it may constitute a serious crime and criminal conduct in Germany or indeed the European Union, is not a serious crime or criminal conduct Seychelles. He argues that in this respect the grounds of the criminal conduct relied on by the respondents in terms of section 3(9)(c) of AMLA cannot be read into that provision and are not within the limitations intended by the Constitution. Section (9)(c) of AMLA provides -

> "In this Act, "criminal conduct" means conduct which-
> a ….
> b ….
> c shall also include any act or omission *against any law of another country* or territory punishable by imprisonment for life or a term of imprisonment exceeding 3 years, or by a fine exceeding the monetary equivalent of R50, 000 whether committed in that other country or territory or elsewhere and whether before or after the commencement of this Act, unless the Attorney

> General shall certify in writing that it would not be in the public interest to take action in the Republic in relation to an act or omission as defined in this sub-section; and… [my emphasis]

Hence, he contends that the orders made by Renaud, Acting Chief Justice under section 3(1) of POCCCA on June 17 2009, which relied on the definition of criminal conduct as laid out in AMLA, are unconstitutional. We have already ruled on several aspects of this argument but add that the appellant has not been charged with any serious crime or criminal offence. The appellant's submission amounts to a disingenuous reading of AMLA and the permissible limitations to the right to property. The Constitution recognises that there is no absolute right to property and limitations as are necessary in a democratic society are permissible in circumstances involving both "serious crime" and in the "public interest." There is obviously no right to property illegally obtained even if the illegality arises in a different jurisdiction. One can dress this up in any way but it is certainly not the intent of either the Constitution or legislation to permit those who have derived money from criminal or illegal activity outside the jurisdiction of Seychelles to profit from their activities.

A similar argument was raised in relation to the right to privacy in the case of *Reference by Attorney-General under Section 342(a) of the Criminal Procedure Code* SCA 6/2009. That case concerned the disclosure of documents relating to the corporate nature of two offshore companies. One of their arguments in resisting disclosure was the right to privacy. The Court of Appeal, on this issue, had this to say:

> As a rule the right to privacy does not override the public interest in the fight against crime. The Constitution of Seychelles is fairly clear on the principle that fundamental rights and freedoms of any individual which are protected by the Constitution are subject to the rights of others and the public interest and also that restrictions and limitations are permissible to the extent that must be reasonably justifiable in a democratic society. It is for the court to decide in any given case whether the public interest in the fight against crime justifies a restriction of the privacy of the individual.

It is our view that those principles articulated by the court apply to all rights contained in the Charter.

The appellant has relied on three European Court of Human Rights cases for this submission: *Silver and Ors v United Kingom* (1983) 5 EHRR 347 (ECHR), *Kokkinakis v Greece* [1993] 17 EHRR 397, and *Sunday Times v United Kingdom* (1979) 2 EHRR 245 (ECHR)*. Silve*r relates to breaches of the right to respect for private life and the right to freedom of expression. *Kokkinakis* concerned a conviction for proselytism and the limitation to the right of religious freedom. *Sunday Times* concerned the publication of articles by the newspaper on the thalidomide case and relates to the freedom of expression. All the cases are proposition for the principle that for limitations to be necessary in a democratic society they must correspond to a "pressing social need" and be proportionate to the legitimate aim pursued. The *Silver* case is perhaps the most useful in this respect. In that case the applicants, prisoners and their correspondents, complained of the interception of their mail by the prison authorities. The Court held that censorship of prisoners' letters solely on the grounds that that they had been addressed to journalists, legal advisers, human rights

organisations, or that the letters discussed maltreatment or attempted to stimulate public agitation or petition could not be considered as "necessary." It set down some guiding principles in relation to the definition of “necessary in a democratic society.” It found inter alia that -

> (a) the adjective "necessary" is not synonymous with indispensable", neither has it the flexibility of such expressions as "admissible", “ordinary", "useful", "reasonable" or "desirable";
> (b) the Contracting States enjoy a certain but not unlimited margin of appreciation in the matter of the imposition of restrictions, but it is for the Court to give the final ruling on whether they are compatible with the Convention;
> (c) the phrase "necessary in a democratic society" means that, to be compatible with the Convention, the interference must, inter alia, correspond to a "pressing social need" and be "proportionate to the legitimate aim pursued"…

In short, the court found that a balance must be struck between public safety on one hand and the interests of the prisoners on the other.

As concerns the right to property, it is undeniable that limitations to the right to property must be proportionate even within the limitations aimed by the provision “public interest.” We are conscious of the balancing exercise that must be carried out to ensure on the one hand that rights enshrined in the Constitution are not taken away by subsequent legislation. In a similar context, in the Irish case of *Gilligan v Criminal Assets Bureau* [1998] 3 IR 185, McGuinness J accepted that while the Irish Proceeds of Crime Act 1996 might affect the property rights of the citizen, its provisions did not constitute an “unjust attack” (comparable to the Seychelles constitutional terminology of “limitations necessary in a democratic society”) on the right to property as per article 40.3.2 of the Irish Constitution, given that a court must be satisfied before making a forfeiture order that the property in question represented the proceeds of crime. Further, as she pointed out, the exigencies of the “common good” (which may be compared to our “public interest”) include measures to prevent the accumulation and use of assets which directly or indirectly derive from criminal activities: “the right to private ownership cannot hold a place so high in the hierarchy of rights that it protects the position of assets illegally required and held.” In this respect she was satisfied that curtailment of a person’s constitutional rights was proportionate to the objective of the legislation. McGuiness J also noted that she would be willing to hold that the common good requires measures to prevent accumulation of these assets derived from criminal and that the right to private property cannot protect assets illegally acquired and held. We endorse the view of McGuiness J as they relate to much the same circumstances and similar legislation as POCCCA drafted ten years after the Irish Proceeds of Crime Act and with near identical provisions.

Similarly in *Phillips v United Kingdom* (2000) 64509/01 ECHR 702, the European Court of Human Rights considered that a confiscation order issued after criminal conviction constituted a penalty within the meaning of article 1, Protocol 1 to the European Court of Human Rights and operated in the way of a deterrent to those considering engaging in drug trafficking and deprive a person of profits received from drug trafficking and given the importance of the aim pursued, the Court did not

consider the interference suffered by the applicant disproportionate. In *Arcuri and Others v Italy* (2001) 54924/99 ECHR 219*,* there were no criminal proceedings directly related to the confiscation order issued but the European Court of Human Rights still found that even though the measure in question led to a deprivation of property, this amounted to control of the use of property within the meaning of the second paragraph of article 1, Protocol 1, which gives the State the right to adopt such laws as it deems necessary to control the use of property in accordance with the general interest.

POCCCA provides for the confiscation of proceeds of crime. These are necessary and proportionate limitations to the right to property as permitted by our Constitution. The appellant has not disputed that the funds and properties forfeited in Seychelles are derived from his criminal conduct in Germany. It is not in the public interest that persons be allowed to transfer money and freely invest in, buy or enjoy property in Seychelles when such money derives from their nefarious activities. It does not serve the good name or reputation of Seychelles. The laws of civil forfeiture are modern and may well introduce novel concepts that are alien to the classic understanding of the boundaries between criminal and civil law but they are certainly necessary and a proportionate response to the exigencies of international crime. Civil forfeiture responds to the policy challenge of ensuring that wrongful proprietary gains are disgorged. Seychelles has an interest in suppressing the conditions likely to favour the reward of crime committed; removing the instruments and the assets derived from the commission of unlawful activity which might in turn permit the funding of further offences meets this objective. The argument by the appellant that the provisions of AMLA and POCCCA are repugnant to his constitutional right to property is therefore unsustainable.

In the circumstances this appeal is dismissed in its entirety. Costs are awarded to the respondents.

HOUAREAU v HOUAREAU

Fernando, Twomey, Msoffe JJ
31 August 2012 Court of Appeal 13/2011

Lesion – Civil Code articles 1675, 1677 and 1680

The Supreme Court declared a deed of transfer registered with the Land Registry, transferring the bare ownership in the land in favour of the appellant, a nullity and rescinded the transfer.

JUDGMENT Appeal dismissed.

HELD

1 (per Twomey and Msoffe JJ) Articles 1675 and 1680 of the Civil Code are mandatory and failure to comply precisely with the articles is fatal to a claim for rescission of a sale for lesion.
2 (per Fernando J, dissenting) Articles 1675, 1677 and 1680 of the Civil Code are guidelines to assist the court in determining whether the price paid by the buyer is less than one half of the value of the thing bought, but are not basic elements for lesion. The basic element is the disproportionality of the promises. The word "shall" in arts 1675, 1677 and 1680 of the Civil Code is directory only and three separate valuations which clearly show the disproportion satisfies article 1680.

Legislation
Constitution
Civil Code, arts 4, 1026, 1108, 1109, 1118(1)(2), 1648, 1658(1), 1674, 1675, 1677, 1678, 1679, 1680, 1682
Code of Civil Procedure
Interpretation and General Provisions Act, ss 9, 21

Cases
Adrienne v Adrienne (1978) SLR 8
Bonte v Seychelles Petroleum Company Ltd (unreported) SCA 9/2008
W & C French (Seychelles) Ltd v Oliaji (1978-1982) SCAR 448

Foreign Cases
Lever Brothers Ltd v Bell [1930] 1 KB 557
Re Vandeervell's Travels Trusts (No 2) [1974] 1 Ch 269
Singh v Singh (1890) ILR 12 All 510

Foreign Legislation
Code of Criminal Procedure (India), s 173(5)

D Sabino for the appellant
S Rouillon for the respondent

Judgment delivered on 31 August 2012

Before Fernando, Twomey, Msoffe JJ

TWOMEY J:

I have read my brother Fernando's judgment. I concur with his findings in respect of the lack of valid consent in respect of the impugned transfer of the bare-ownership of parcel J680 from Ralf Hoareau to the respondent. I am however unable to agree with his findings on *lésion* and although this appeal necessary fails because of our concurrence over the nullity of the contract of sale I feel duty bound to express my views on the issues relating to *lésion* raised in this appeal.

The trial judge found that the lack of a single report as required under article 1680 of the Civil Code of Seychelles was not fatal to the case of the respondent, the plaintiff in the case below. It is important to bring article 1680 and other related provisions into view:

> To satisfy the court that a prima facie case exists the plaintiff *must* submit a report by three experts who shall be bound to draw up a single report and to express an opinion by majority. [emphasis mine].

Section 9 of the Interpretation and General Provisions Act, Cap 33 of the Laws of Seychelles states:

> The Interpretation and General Provisions Act, shall subject to the provisions of this Act, apply in relation to the interpretation of this Act but shall not apply in relation to the Civil Code of Seychelles, which shall be read and construed for all purposes in accordance with the rules of interpretation set out therein.

Article 4 of the Civil Code of Seychelles states – "The source of the civil law shall be the Civil Code of Seychelles and other laws from time to time enacted".

Section 21 of the Interpretation and General Provisions Act, Cap 103 of the Laws of Seychelles stipulates – "(1) Where in an Act terms or expressions of French Law are used, they shall be interpreted in accordance with French Law".

Given the imperative "must" in article 1680 and the provisions contained in the instruments above, I am of the view that article 1680 is mandatory and failure to comply with it is fatal to a claim for rescission of a sale for *lésion.*

I am supported in my view by French authorities on the proof required for *lésion viz Dalloz Jurisprudence Générale Repertoire 1977* at [140]:

> Preuve
> 140. Expertise – Une fois que par un premier jugement, le tribunal a autorisé le demandeur à faire la preuve de lá lesion, la preuve de la lésion peut être faite. Aux termes de l'article 1678, la preuve de la lésion ne pourra se faire que par un rapport de trois experts qui seront tenus de dresser un seul procès verbal commun et de ne formuler qu'un seul avis à la pluralité des voix. Cette expertise est-elle obligatoire? Suivant la plupart des auteurs, le

> texte de l'article 1678 est impérative, les juges de fond avant de prononcer la rescission doivent nécessairement faire estimer l'immeuble par trois experts, quand bien même le fait de la lésion résulterait de preuves littérales (*Trib. Civ. Caen 18 avril 1921: D.P. 1922, 2, 85; Rev. Trim, dr. Civ. 1921, 794, observ. Japiot. – Aubry et Rau, op. cit., t. V, §358. – Mazeaud, op. Cit., t. III, n. 886.-Planiol et Ripert, op. cit., t. X, n. 245).*

The court therefore in cases of *lésion* has to adhere strictly to the rules set out in article 1648. I reject the finding by the trial judge, accepted by my brother Fernando that "the Court should look at the spirit of the law and intention of the makers of it" and that the provisions of article 1678 are only a procedural requirement that can be ignored. The Code is different to both statutes and the Constitution. Its interpretation is provided for in the provisions already mentioned. In any case as pointed out by Chloros in *Codification in a Mixed Jurisdiction* "... the Civil Code is subject to its own rules of interpretation".

In a case of *lésion* the procedure is that as set out by Sauzier J in *Adrienne v Adrienne* (1978) SLR 8: the plaintiff must satisfy the court that a prima facie case based on the single report generated by the three experts is made out. The case then proceeds as usual and the court assesses the evidence to establish if there are possible defences for the *lésion.*

I also find that the evaluation accepted by the Court breaches other provisions of the Civil Code of Seychelles inasmuch as it does not take into account article 1675 of the Civil Code that the property shall be calculated according to its condition at the time of the sale. In this case several factors were disregarded in the assessment of the value of the property namely: the fact that the transfer consisted only of the bare interest in the land and not the usufruct, the value at the time of the transfer and the fact that the valuers did not gain access to the house and could only value it from the outside.

I also do not find that the option was put to the appellant to pay the difference between the purchase price and the value as assessed by the experts. I cannot agree with my brother that the option put to the mother of the appellant sufficed to satisfy the provisions of article 1682. The option must be put to the buyer. The fact that the Court counselled the mother of the appellant in open court before evidence had been adduced is not what is envisaged by the provisions of article 1682. In any case the mother was not the representative of the appellant. She was a mere observer in court viz:

Court:	Where is the defendant?
Mr Sabino:	Her mother is present in Court.
Court:	Madam you are the mother of the defendant.
Answer:	Yes
Court:	Madam I will strongly advise you to settle the matter...

These were inappropriate statements and procedures by the Court which comprehensively breached the provisions of the Civil Code, hence the appellant's grounds on these issues succeed. However due to the fact that she has failed to disprove the deceased's case that there was no valid consent to the sale, the orders made by my brother Fernando stand.

FERNANDO J:

This is an appeal against the judgment of the Supreme Court dated 18 March 2011, which was in favour of Ralf France Roch Houareau, now deceased; declaring that the purported deed of transfer dated 6 December 2005 registered with the Land Registry, transferring the bare-ownership in respect of title J680 in favour of the appellant in this case, is a nullity and rescinding the transfer thereof; ordering Ralf France Roch Houareau to repay the sum of R25,000 to the appellant with interest on the said sum at 4% per annum as from 15 March 2006 until the sum is fully repaid and directing the Registrar of Lands to rectify the Land Register in respect of title J680 by removing the appellant namely, Emma Rachel Juliette Houareau as the proprietor of the bare-ownership thereof and registering the respondent namely, Ralph France Roch Hoareau as the only proprietor of all interests in the said title upon proof of payment of the sum as ordered, to the satisfaction of the Land Registrar.

Attorney Mr Rouillon, who appeared for Ralph France Roch Hoareau before the trial court, had informed this Court in his heads of arguments that Ralph France Roch Hoareau, the person named by the appellant as the –

> Respondent to this appeal has passed away prior to the filing of the appeal and it was incumbent on the appellant to amend the caption on his appeal to reflect the change of circumstances.

He had gone on to state:

> In fact in a letter written to the President of the Court of Appeal in response to an earlier motion filed by the appellant, the respondent's counsel alerted this Honourable Court of the change of circumstances. Since then the case was dormant while the appellant considered his strategy concerning the appeal in terms of whether to proceed or not. The case was relisted on the new cause list to the surprise of the respondent hence there was no motion to amend the caption by the respondent.

He had stated:

> I have taken the liberty to amend the caption subject to the approval of this honourable court; and counsel for the appellant for the appeal, to proceed and to save time and expense in view of the long list of outstanding cases waiting to be heard by this honourable court.

The order of the Supreme Court in case no 82 of 2011 appointing the executor of the estate of Ralph France Roch Hoareau under article 1026 of the Civil Code of Seychelles has been attached to the heads of arguments by Mr Rouillon. Accordingly, Ms Rebecca Mercia David of Roche Bois, Mont Buxton, Mahe, the daughter of Ralph France Roch Hoareau, has been appointed as executrix to the estate of Ralph France Roch Hoareau who died on 25 March 2010. The judge who made the appointment has stated:

> On the strength of the affidavit filed in support of the application and other documentary evidence adduced by the applicant in this matter, I am satisfied

> that the petitioner namely, Ms Rebecca Mercia David of Roche Bois, Mont Buxton, Mahe, is the daughter of one Ralph France Hoareau hereinafter called the "deceased" who died intestate in Seychelles on 25 March 2010. I am equally satisfied that it is just and necessary that the petitioner should be appointed as the executrix to the estate of the deceased.

Taking into consideration the delay by the Supreme Court by 1.3 years to deliver this judgment since conclusion of the proceedings, the failure by the appellant to have the executrix to the estate of Ralph France Roch Hoareau substituted up to the date of hearing of this appeal, and placing reliance on the case of *France Bonte v Seychelles Petroleum Company Limited* SCA No 9/2008, we decided to have the executrix Rebecca David substituted as the respondent to this appeal, and proceed with the appeal in the interests of justice.

As per the Transfer Of Land (Bare Ownership) document, in respect of Title No: J 680 registered with the Land Registry, Ralph France Roch Hoareau, hereinafter referred to as 'RFRH', had transferred "in consideration of Rupees twenty five thousand, (R25,000)……" to the appellant (his niece), "the bare-ownership in the land comprised in J680 reserving the usufructuary interest" to himself. The land as per the valuation reports is located at Mont Simpson estate, along the Mont Simpson road approximately 100 metres from the main road, in a very good residential area and is bounded by other residential properties on all sides. Its terrain has been described as fairly flat and very well landscaped. Water, electricity and telephone are available and serve the existing house.

The appellant has raised the following grounds of appeal:

(1) The Judge grants lesion despite the fact that the respondent (RFRH) failed to satisfy the basic elements for lesion in that (a) The surveyors reports did not value the property at the time of sale; and (b) The 3 surveyors did not submit a single report.
(2) The Judge did not make an order in terms of article 1682 of the Civil Code of Seychelles, which is the consequence in an action in lesion. The judgment of the Judge is accordingly ultra vires.
(3) The Judge has ordered for ownership rights in land to be removed from a party without their consent. This is ultra vires. The court has no such powers.
(4) The Judge has made an order against the Land Registrar when he is not a party to the suit.

She has prayed that the judgment of the Supreme Court be set aside.

One of the grounds upon which the trial judge had declared the transfer referred to in paragraph 1 above, a nullity, was on the basis that the respondent had signed the transfer deed upon a mistaken belief that the suit-property will revert back to him on his repaying the loan of R25,000 that he had received from the parents of the appellant.

In the plaint the respondent had averred at paragraph 4:

> The plaintiff (RFRH) avers that at the time he signed the transfer with the defendant [appellant, before us] he was not in good mental capacity and the

> price he received is completely disproportionate to the actual value of the property sold.

And at paragraph 5:

> The plaintiff avers that the above mentioned transfer is void and voidable due to the fact that the plaintiff was not in good mental health at the time of the transfer transaction.

In the statement of defence, the defendant, now appellant before us, in answer to paragraph 4 of the plaint referred to at paragraph 6 above had averred: "……The plaintiff was fully aware of and appreciated the nature and effect of the transaction."

At pages 26-30, 33 and 34, counsel for the appellant has cross-examined RFRH at length about his awareness and appreciation of the nature and effect of the transaction. The following dialogue between counsel for the appellant and RFRH (verbatim) in pages 26, 27, and 28 is to be noted:

> Q: Mr Hoareau, you claimed that you did not know what you were signing a transfer deed that day before Mr Valabjhi?
> A: Mr Valabhji was fooling me, he is tricky too. I told him that if I return back her loan my land will belong to me, he prepared the paper. He is tricky. When I went back to him to say that I am refunding back the money he said acha cha cha, He is tricky.
> Q: You are saying also that you were given a loan of R25,000.
> A: Yes, to refund back afterwards. It is my intention to refund back.
> Q: …did Mr Valabjhi not explain to you what you were signing?
> A: No….. I told him I am taking a loan with Mrs Hoareau and after that I am going to refund her back her R25,000.

And RFRH in answer to a question from counsel for the appellant had also said – "A: I did not realize that it was not a document pertaining to a loan agreement".

The above cross-examination was due to RFRH's evidence in his examination-in-chief that at the time he signed the transfer of land (bare ownership) document, in respect of Title No J 680 he was under the impression that he was signing it to have the loan of R25,000 and that it was a loan agreement.

Basing himself on the above averments referred to at paragraphs 6 and 7 above and the evidence referred to at paragraph 8 above, the trial judge in answering the question: "Did the plaintiff (RFRH) give consent to the impugned transfer?" had said:

> Obviously, the …….. question……. on the issue of consent is a question of fact……..In fact, there is only one version on record on this material issue. [The appellant in this case in the trial before the Supreme Court had at the close of the plaintiff's (RFRH's case) case opted not to call any evidence and make a submission of no case.] That is the only uncontradicted version of the plaintiff. ……On the question of credibility, I believe the plaintiff. I accept his evidence, in that he received the sum of R25,000 from the parents of the defendant [appellant] only as a loan. When the plaintiff visited the office of the notary Mr Valabhji, the latter confirmed to the former that when the loan is

> repaid the bare ownership transferred in favour of the defendant, would revert back to the plaintiff.

The trial judge had found that RFRH had signed the said deed "without consent so to say valid consent; as such consent was obtained by misrepresentation or misstatement of facts" and gone on to hold –

> Indeed, consent shall not be valid if it is given by a mistake vide article 1109 of the Civil Code of Seychelles(CCS). Validity of consent is an essential condition for the validity of any contract of sale vide article 1108 of the CCS. Hence, I conclude that the plaintiff did not give a valid consent to the impugned transfer. Evidentially the plaintiff in this respect has discharged his evidential burden and has established a prima facie case to the satisfaction of the Court showing that the impugned transfer is a nullity and is liable to be rescinded in law.

The appellant has not appealed against this finding nor had she placed any evidence before the trial court to contradict the evidence of RFRH. The suggestion made by the appellant's counsel to RFRH before the Supreme Court that he made up the story of the loan as an excuse, which was denied by RFRH, is not evidence. We therefore agree with the trial judge that there is only one version on record on this material issue and that is the only uncontradicted version of RFRH. We are also of the view that the issue of consent is a question of fact and the question of credibility of RFRH was one to be determined by the trial judge. There are no compelling reasons urged before us to disturb that finding.

When the attention of the appellant's counsel was drawn to the fact that he had not appealed against the rescinding of the contract on the ground of mistake by the trial judge, as itemized at paragraph 9 above, he tried to argue that mistake had not been pleaded by the respondent in his plaint. A perusal of the averments in paragraph 4 and 5 of the plaint, the averments in paragraph 4 of the statement of defence as averred at paragraphs 6 and 7 above, and the line of cross-examination adopted by counsel for the appellant, as referred to at paragraph 8 above, shows that this is not the case. Counsel for the appellant had not objected at any stage that mistake had not been pleaded by RFRH, but rather cross-examined him on the basis that there was no mistake. In *Re Vandeervell's Travels Trusts (No 2)* [1974] 1 Ch 269 at 321, cited in *W & C French (Seychelles) Limited v Oliaji and Others* (1978-1982) SCAR 448, Lord Denning MR had this to say –

> It is sufficient for the pleader to state the material facts. He need not state the legal result. If, for convenience, he does so, he is not bound by, or limited to, what he has stated. He can present, in argument, any legal consequences of which the facts permit.

In *Lever Brothers Ltd v Bell* [1930] 1 KB 557, Scrutton LJ said:

> In my opinion the practice of the courts has been to consider and deal with the legal result of pleaded facts, though the particular legal result alleged is not stated in the pleadings, except in cases where to ascertain the validity of the legal result claimed would require the investigation of new and disputed facts which have not been investigated at the trial.

In view of the failure of the appellant to appeal against this finding the appeal must necessarily fail. I have however decided to consider the four grounds of appeal.

As regards the first ground of appeal it is correct that all three surveyors had valued the property on "the current market value" and all three surveyors had carried out their respective valuations between the period 24 March 2009 and 20 April 2009. The disputed transfer had been made about 3.4 years before the valuations, namely on 6 December 2005. It should be noted that the appellant has not raised any objection to any of the matters referred to in ground 1 of the appeal, when the three valuation reports were sought to be produced at the trial, and acquiesced in the way the proceedings were conducted. However the question that arises for determination is, is this a basic element of the principle of lesion and a sufficient ground to set aside the judgment as prayed for? An answer to this question necessitates an examination of the relevant articles of the Civil Code of Seychelles Act dealing with 'Recission of Sales for Lesion' –

> 1674 – *If the price paid by the buyer is less than one half of the value of the thing bought, whether it be movable or immovable, the seller shall be entitled to a recission of the contract, even if he has expressly waived his right to do so, and even if he has declared his willingness to give up the surplus value of the property.* Subject to the provisions of this article and articles 1675 and 1676 the rule of article 1118 of this code shall have application.
> 1675 – *In order to establish whether there is lesion of more than one half, the value of the property shall be calculated according to its condition at the time of the sale….*
> 1677 – *To establish whether lesion occurred the Court shall take into account the condition of the value of the property at the time of the sale.*
> 1679 – The Court shall not admit any claims that a contract is vitiated by lesion unless the plaintiff is able to make out a prima facie case that the circumstances are sufficiently serious to warrant an investigation by the Court.
> 1680 – *To satisfy the Court that a prima facie case exists the plaintiff must submit a report by three experts who shall be bound to draw up a single report and to express an option by majority.* The experts shall be appointed by the Court unless both parties have jointly agreed to appoint the three experts.
> 1682 – If the buyer prefers to keep the thing and pay a supplement as provided in article 1118, he shall also pay interest on the supplement as from the day when the action for recission was brought.
> If he prefers to return the thing and recover the price, he must also surrender the income of the thing as from the day when the action was brought.
> If he has received no income he shall be entitled to interest on the price as from the day fixed for the supplement.
> 1118(1) – *If the contract reveals that the promise of one party is, in fact, out of all proportion to the promise of the other, the party who has a grievance may demand its recission; provided that the circumstances reveal that some unfair advantage has been taken by one of the*

> *contracting parties.* The loss to the party entitled to the action for lesion shall only be taken into account if it continues when the action is brought.
> 1118(2) – The defendant to an action for lesion as in the preceding paragraph shall be entitled to refuse recission if he is willing to make adequate contribution to the other party in such manner as to restore a more equitable balance between the contracting parties.
> 1658(1) – Apart from the grounds of nullity or recision 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.*
> [emphasis added]

An examination of the above mentioned articles show that the basic element of the principle of lesion is the disproportion between the promises of the two parties to the contract, which reveal that some unfair advantage has been taken by one of the contracting parties, necessitating a rescinding of the contract. The disparity should be such that the promise of one party is, in fact, out of all proportion to the promise of the other. The yardstick set by the Code for determining the disparity is based on the price paid under the contract and that where the price paid by the buyer is less than one half of the value of the thing bought. The provisions in articles 1675, 1677 and 1680 are there to assist the court in determining whether the price paid by the buyer is less than one half of the value of the thing bought and certainly not basic elements for lesion. Lesion is not about determining the exact price a party to litigation has to be awarded but to inquire into a seller's entitlement for rescission of the contract on the ground that the promise of one party is, in fact, out of all proportion to the promise of the other. Thus the valuation of property "according to its condition at the time of the sale" and the need to submit a single report by three experts expressing an option by majority are guidelines to satisfy the Court that a prima facie case to vitiate the contract by lesion has been made out. It will be nonsensical to think that merely because the three experts had not submitted a single report, the contract cannot be vitiated in a case like this, when the separate valuations of the property title J 680 by the three experts who testified in court, on average, is more than 34 times the sale price. It can be safely said that the three experts have 'expressed an option by majority' and that "the price paid by the buyer is less than one half of the value of the thing bought."

In this case three valuation reports based on the 'current market value' as at the date of the valuation had been submitted by RFRH in respect of property title J 680 before the trial court without objection by the appellant, namely:

> Report dated 24 March 2009 valuing the property at R910,000.
> Report dated 25 March 2009 valuing the property at R850,000.
> Report dated 20 April 2009 valuing the property at the total price of R832,000 (the land comprising parcel J680 at R532,000 and the house at R300,000).

When the surveyor who had valued the property at R910,000 was asked in cross-examination by the appellant's counsel why there was a difference between his valuation and that of the others, the answer had been to the effect that valuation is not an exact science and any differences within 5 to 10% "is acceptable for us in this

industry." It is therefore clear that all three valuations fall within this range and the three valuations on average comes to R864,000. It is clear from the cross-examination of the experts who testified before the trial court that there is no reason adduced by way of evidence or suggestion made, to indicate that the price of the property had dramatically increased over the past 3.4 years, namely from the date of the transfer up to the time of the valuations. The appellant in her skeleton heads of argument had stated:

> In between 2005 to 2009, the court may take judicial notice of the fact that the rupee was devalued twice sometime in 2007/2008 (fixed devaluation) and then floated in November 2008.

In the same way it is inconceivable to think that at the time of the transfer, namely on 6 December 2005 the value of the property J 680, with the house standing thereon and in the location where it is situated, was even less than R50,000 so as not to attract the provisions of article 1674. According to one of the experts, the value of a property largely depends on its location. The disparity in this case between the transfer price in December 2005 and the valuation price in April 2009 is so immense that a court would not be in doubt to conclude that the provisions of article 1674 do have application. I am in agreement with the trial judge when he states:

> However, each expert has individually submitted his or her valuation report to the court. They have been admitted in evidence. The Court can simply peruse all three reports and easily ascertain what the majority opinion is. This is a very simple exercise, which the Court can competently and effectively carry out in this respect. The statute in fact, does not prevent the court from ascertaining the majority opinion by examining the informed opinion expressed individually by all three experts in their respective reports….

I am in agreement with the trial judge and am of the view that justice should be administered in a common sense liberal way and be broad based rather than based on narrow and restricted considerations hedged round with hair-splitting technicalities.

It is necessary to attribute a meaning to the word "shall" in articles 1675, 1677 and 1680 referred to in paragraph 6 above in order to make a determination on the first ground of appeal. I have already come to the conclusion at paragraph 13 above that the matters set out in ground 1 of the appeal are not basic elements for lesion as argued by the appellant. The questions for determination are; are they mandatory conditions that should be fulfilled before a court could rescind a contract on the ground of lesion. The word "shall" in its ordinary signification is mandatory but not always. Whether the matter is mandatory or directory depends upon the real intention of the legislature which is ascertained by carefully attending to the whole scope of the Code, to be construed with reference to the context in which it is used. For ascertaining the real intention of the legislature, the court may consider, inter alia, the nature and the design of the Code, and the consequences which would follow from construing it the one way or the other, the impact of other provisions whereby the necessity of complying with the provisions in question is avoided, the circumstance, namely that the Code provides for a contingency of the non-compliance with the provisions, the fact that the non-compliance with the provisions is or is not visited by some penalty, the serious or trivial consequences that flow

therefrom, and above all, whether the object of the legislation will be defeated or furthered. In the Indian case of *Ramesh Singh v Sheodin Singh* (1890) ILR 12 All 510, it was held interpreting the word "shall" in s173(5) of the Criminal Procedure Code:

> There is a difference between a case which a court or an officer of a court omits to do something which by a statute it is enacted *shall be done*, and cases in which a court or an officer of a court does something which by a statute it is enacted *shall not be done.* In the one case the omission to do an act which by a statute it is enacted shall be done may not amount to more than an irregularity in procedure, whilst in the other case, in which the prohibition is enacted, the doing of the prohibited thing by the court or the official is ultra vires and illegal, and if ultra vires or illegal, it must follow that it was done without jurisdiction. [emphasis added]

I am firmly of the view that the word "shall" in articles 1675, 1677 and 1680 is to be interpreted as meaning directory. In view of the matters set out above I dismiss ground 1 of appeal.

The complaint under ground 2 is to the effect that the Judge did not make an order in terms of article 1682 of the Civil Code of Seychelles. Article 1682 referred to at paragraph 11 above has no relevance to this case. The need to make an order may arise only where the defendant to an action for lesion 'is willing' to make adequate contribution to the other party in such manner as to restore a more equitable balance between the contracting parties as stated in article 1118(2) of the Civil Code and referred to at paragraph 11 above. A perusal of the proceedings indicates that the appellant had not come up with any firm offer of an adequate contribution to the other party in such manner as to restore a more equitable balance between the contracting parties, despite every effort made by the Court to encourage a settlement of this case. To the question by Court whether the appellant has any offer to make, the answer from the appellant's counsel had been in the negative. The following dialogue (verbatim) between the Court and the mother of the appellant, who was looking after the interests of the appellant who was abroad, indicates the length to which the court had gone to encourage a settlement, which had not been taken up or evaded by the appellant –

> Q by Court: Madam I will strongly advise you to settle the matter. Make some offer and settle in your interest. If I proceed I think I would not be able to do justice to both sides, I want to balance the interest. I do not say you should pay R900,000 or whatever the valuation, at least because you are relative you should make an offer and he might accept, and you can also protect the interest of your daughter as well.
> A: We thought it was a gift to my daughter.
> Q by Court: It was not a gift….it is a sale. If you can make an offer maybe I will tell him to accept. Normally usufructuary is valued, according to the valuers one third of the total value. If the property is valued at R900,000 the value of the usufructuary is R300,000. Still the bare ownership should be around R600,000. You should make some offer. You agree on the amount then you can pay by installments but he has the right to stay in the house and do whatever he wants.
> A: He is renting the house but I do not know of the tenant are paying any rent. [verbatim]

It must be noted that when this dialogue took place the appellant according to her counsel was 23 years old and her uncle the RFRH, now deceased, was 57 years of age.

I therefore dismiss ground 2 of appeal.

We see no merit in ground 3 of appeal as the Court had acted under the provisions of the Civil Code of Seychelles Act. We see no merit in ground 4 of appeal as there was no need to make the Land Registrar a party to this suit under the Seychelles Code of Civil Procedure.

The appellant in his skeleton heads of arguments has made an attempt to challenge the valuations on the basis that the fact that the land had been "sold with the usufructuary kept by the respondent", that the valuation has been made without an inspection of the interior of the house, and that there was no evidence as regards "any developments close to the land, such as a supermarket" that could affect the value of the land. They were not grounds of appeal. I am of the view that the Court had been conscious of the fact that the land had been sold subject to a usufructuary interest. This is borne out in the questions by Court as referred to at paragraph 15 above. The disparity in this case between the sale price and the valuations is so great that the other matters would not be of any consequence.

We therefore dismiss this appeal with costs of this appeal to be paid to the respondent.

The orders made by the trial judge at page 12 of his judgment are amended and are to be read as follows, in view of the substitution of Rebeca David as executrix to the estate of the late Ralf Houareau:

(i) We declare that the purported deed of transfer – dated 6 December 2005 registered with the Land Registry on 15 March 2006 – transferring the bare ownership in respect of Title J 680 in favour of the appellant (defendant before the trial court), is a nullity and therefore, we hereby rescind the said transfer accordingly.
(ii) We order the respondent to pay the sum of R25,000 to the appellant with interest on the said sum at 4% per annum as from 15 March 2006 until the sum is fully paid.
(iii) We direct the Registrar of Lands to rectify the Land Register in respect of Title J680 by removing the appellant namely, Emma Rachel Juliette Houareau as the proprietor of the bare ownership thereof and registering the respondent as the only proprietor of all interests in the said Title upon proof of payment of the said sum as ordered in paragraph (ii) above, to the satisfaction of the Land Registrar.

MICHEL v DHANJEE

Fernando, Twomey, Msoffe JJ
31 August 2012 Court of Appeal 5 and 6/2012

Constitution - Judiciary - Recusal

The applicant is also the first respondent in an appeal against a Constitutional Court decision which found the reappointment of Domah J to the Court of Appeal was unconstitutional. The applicant seeks an order that Fernando, Twomey and Msoffe JJ recuse themselves from hearing the appeals.

JUDGMENT Application dismissed.

HELD

1 An application for a recusal in civil matters is based on the constitutional right to a fair trial in art 19(7) of the Constitution.
2 Judges make the decision on whether to recuse themselves.
3 A judge should not sit when that judge has a direct interest in the case or when there might be no actual bias but there might be perceived bias.
4 The test for recusal is objective and must be applied to determine if there exists a reasonable apprehension or suspicion on the part of a fair-minded and informed member of the public that the judge will not be impartial (*R v Bow Street Stipendiary Magistrate, Ex parte Pinochet Ugarte* [1999] 2 WLR 827).
5 The rule of necessity is that a judge is not disqualified if there is no other judge to decide the case. Where all are disqualified, none are disqualified.

Legislation
Constitution, arts 19(7), 131, 134

Cases
Bar Association of Seychelles v President of the Republic SCA 7/2004, LC 242
Charles v Charles SCA 1/2003, LC 248

Foreign Cases
Atkins v United States 214 Ct Cl 186 (1977)
Attorney-General of Kenya v Professor Anyang Nyongo [2010] eKLR
Council of Review, South African Defence Force v Mönnig (610/89) [1992] ZASCA 64; [1992] 4 All SA 691
Helow v Secretary of State for the Home Department [2008] UKHL 62
Ignacio v Judges of US Court of appeals for Ninth circuit 453F.3d 1160 (9th cir 2006)
Locabail (UK) Ltd v Bayfield Properties Ltd [2000] QB 451
Pilla v American Bar Association 542F.d 56, 59 (8th Cir 1976)
President of the Republic of South Africa v South African Rugby Football Union– Judgment on recusal application (CCT16/98) [1999] ZACC 9; 1999(4) SA 147; 1999(7) BCLR 725 (4 June 1999)
R v Bow Street Stipendiary Magistrate, Ex parte Pinochet Ugarte [1998] 3 WLR 1456
R v Bow Street Stipendiary Magistrate, Ex parte Pinochet Ugarte (No 2) [1999] 2 WLR 272
R v Bow Street Stipendiary Magistrate, Ex parte Pinochet Ugarte [1999] 2 WLR 827

R Govinden, Attorney-General for first, second and third appellants
K Shah SC for fourth appellant
A Amesbury for the first respondent
F Chang-Sam SC (watching brief) for second, third and fourth respondents

Ruling delivered on 31 August 2012

Before Fernando, Twomey, Msoffe JJ

TWOMEY J:

The background

The applicant is also the first respondent in an appeal against a decision given by the Constitutional Court in which it found that the reappointment of a judge of the Court of Appeal, Justice Domah, was unconstitutional. A week before the hearing of the appeals, the applicant, Viral Dhanjee filed a motion supported by affidavit in accordance with rule 25 of the Court of Appeal Rules, asking for an order that Justices Fernando, Twomey and Msoffe recuse themselves from the hearing of the appeals. On 20 August we heard the application and after rising to consider our decision we unanimously found against the applicant and reserved our reasons which we now give.

The alleged bias

The affidavit contained the following averments set out unabridged below:

(i) That in the letter addressed from the President of the Court of Appeal to the CAA which formed part of the record in the instant case, reference is made to Mr Domah in the following terms
"For the nearly four years he has worked with me and the court, he has proven to be more than a capable *team player* and with the *right team spirit*, a hard and efficient worker. [emphasis deponent's]
Our present esteem *of the Court of Appeal* in the country and public opinion bears this out." [sic, emphasis deponent's]

(ii) I aver that at the time that the reference was made to the "team" above, the members of the team being referred to consisted of Justice Domah, Justice Twomey, Justice Fernando and Justice MacGregor.

(iii) Furthermore, in his application for renewal of term of office as Judge of Appeal, Judge Domah stated that, "I pledge that my commitment and contribution will be no less if not more so that we may complete that part of the unfinished business which we, at the Court of Appeal, set out to do as a solid team for the Judiciary and people of Seychelles." [emphasis deponent's]

(iv) In view of the "unfinished business "which the "solid team" needs to complete, and the several references about being a team player and team spirit, I verily believe that there is real likelihood of bias by the justices who will hear my appeal.

(v) I have been advised and believe that according to decided cases that it is not necessary to establish that a judge or other person making a

decision was in fact biased, a real likelihood of bias or a reasonable suspicion of bias suffices.

(vi) As regards Justices Fernando and Twomey, in the judgment delivered by the Court of Appeal in SCA No 16 of 2011, the judgment delivered by Justice Twomey in which Justice Fernando concurred, together with Justice Domah, clearly shows their bias towards my counsel, in what can only be described as a personal attack against her professionalism and ethical standards.

(vii) As regards Justices Fernando and Msoffe, I aver that:

- Justice Fernando has been appointed as a Justice to the Court of Appeal pursuant to article 131 of the Constitution i.e. the same provision under which Justice Domah was re-appointed.
- He too, has been appointed under a contract for a fixed term which is liable to be renewed at the end of that term by the powers that be.
- Hence, Justice Fernando cannot be impartial in any decision taken as he will have a direct interest in the outcome of this case because in two years time his contract will expire and he too may find himself in the same position as Justice Domah, therefore any decision he takes may have a direct bearing on his eventual re-appointment and it is a fundamental principle of natural justice that no man may be a judge in his own case.
- I aver that Justice Msoffe is in a similar position to both Justices Fernando and Domah in that he too is a Justice of the Appeal Court on a fixed term contract with all that it implies, therefore his impartiality is compromised as he also has a direct interest in the outcome of this case.

  I verily believe that if the Justices do not recuse themselves, my constitutional rights will be breached and I therefore pray for the Justices of Appeal to recuse themselves from this case in the interests of justice and impartiality and as guardians of the upholding of our Constitution.

At the hearing of the motion the applicant was unable to support any of these averments. His counsel admitted that the details of both Fernando and Msoffe JJ's contracts and terms of employment were not known to the applicant personally. When Msoffe J revealed his age and pointed out that at the end of his contract he would be 69 years of age and not seeking a reappointment, the applicant conceded that in that case the allegation in respect of this aspect of the application would be withdrawn. It is noteworthy that this matter occurred on the very first occasion of Msoffe J's sitting on the Court of Appeal of Seychelles.

Fernando J queried whether the applicant was averring that for the sake of a potential reappointment in three and a half years time he would forsake his oath of allegiance to the Constitution and the judiciary and throw his integrity out of the window, to which the applicant's counsel conceded that that indeed was not the case.

Twomey J pointed out that the reprimand issued in the Constitutional Case SCA 16/2011 referred to "counsel" and it was a general comment and that no names were mentioned. The reprimand consisted of the following words:

> In the practice of law it is the tradition of the noble profession of the Bar to uphold the rule of law. It is a poor reflection of one's professional and ethical

> standards to slip into attitudes, tones, language and vocabulary that do not befit the Bar…This court is concerned with the constitutional and legal issues arising from the matter before it. It is neither interested in counsel's opinion of the court nor in the politics of the day..

Twomey J added that the applicant might in any case be confusing a reprimand with bias. Counsel conceded that Justices Fernando and Twomey had in the past shown no bias towards the applicant or herself. She admitted that she had indeed succeeded in cases before the two judges after the said reprimand was issued. She submitted, however that it would appear that on the occasion when she appeared as counsel for the applicant she did not succeed in her appeal.

When it was pointed out that the applicant had made serious allegations about the judges, none of which he had tried to substantiate at the hearing, Ms Amesbury abandoned substantially the assertions in the affidavit but nevertheless did not withdraw the application for recusal. We also remain in the dark about whether the application for recusal concerned an actual or an apparent bias. Despite questions being put to Mrs Amesbury on this issue no cogent answer was forthcoming. The Attorney-General and Mr Shah submitted that no actual or perceived bias had been substantiated. The Attorney-General submitted that the aim of the application was to paralyse the court as a quorum of the Court of Appeal would not be available in Seychelles to hear the case. Mr Shah relied on the cases of *Locabail (UK) Ltd v Bayfield Properties Ltd and Anor* [2000] QB 451, *Attorney-Genral of Kenya v Professor Anyang' Nyongo and Others* [2010] eKLR, and *Helow v Secretary of State for the Home Department and Anor* [2008] UKHL 62 for the proposition of the test to be allowed in such cases: whether a fair-minded and informed observer, having considered the relevant facts would concluded that there was a real possibility of bias.

The applicant's approach on this matter is singularly unimpressive. The date and composition of the panel for hearing of this appeal had been set since 26 June 2012; notice of this fact in the form of the cause list with the names of Justices Fernando and Twomey mentioned and Justice Msoffe referred to as the fourth Judge of Appeal as he had not been sworn in, was delivered to chambers of the applicant's counsel with receipt of the same signed by her secretary. If the applicant had any concerns about the appeal being heard by the three judges, that was the time to raise the issue. His failure to do so raises suspicion that this application was prompted by nothing more than a desire to postpone the appeal or to create a crisis necessitating the appointment of three foreign judges outside Seychelles to hear the case. It was a feeble attempt to emulate counsel in the *Bar Association of Seychelles and Anor v President of the Republic and Ors* (unreported) SCA 7/2004.

Further, the applicant in this case made no submission at the hearing nor did he produce any authorities, relying purely on the averments in his affidavit which averments were completely unsubstantiated. Some of these averments are tasteless and the less said about them the better.

The applicable law

An application for a recusal in civil matters is based on the constitutional right to a fair trial, specifically article 19(7) of the Constitution of Seychelles:

> Any court or other authority required or empowered by law to determine the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other authority the case shall be given a fair hearing within a reasonable time.

There are however no rules of procedure and few recusal guidelines in the laws of Seychelles. A judge is not obliged to recuse himself or herself simply because he or she is asked to. Judges are appointed to hear and decide cases; indeed they have a duty to do so. They sometimes have to make a decision whether or not to hear a case. The principles of natural justice require that a decision maker not sit when he or she has a direct interest in the case or when there might be no actual bias but that there might be perceived bias. In those cases judges recuse themselves *sua sponte.* In the case of *Charles v Charles* (unreported) SCA 1/2003, where the independence of the judiciary was challenged, Ramodibedi J felt it necessary "to rule on the point once and for all" and reminded counsel of constitutional provisions that ensure the impartiality and independence of judges. We join ourselves in this reminder to counsel. Judges do not take their constitutional oaths lightly; their tenure and salary are guaranteed despite their decisions. Any misbehaviour on their part is sanctioned by article 134 of the Constitution. An application for recusal based on bias against a litigant before them cannot be made lightly.

Such applications cannot in any case be grounded on suspicions. The fact that the applicant was not successful in a different case before this court does not give rise to an application for recusal of the judges of the Court of Appeal in every case that he may have before the court after that. As was stated in *Attorney-General of Kenya v Professor Anyang' Nyongo* (supra):

> It is indisputable that different minds are capable of perceiving different images from the same set of facts. This results from diverse factors. A 'suspicious" mind in the literal sense will suspect even where no cause of suspicion arises. Unfortunately this is a common phenomenon among unsuccessful litigants.

The law in relation to the disqualification/recusal of judges is set out in the *Pinochet* case. In the *Pinochet I* case (*R v Bow Street Stipendiary Magistrate, Ex parte Pinochet Ugarte* [1998] 3 WLR 1456), Lord Hoffmann was a member of the majority of the House of Lords that acceded to a request to extradite General Pinochet to Chile. In *Pinochet II* (*R v Bow Street Stipendiary Magistrate, Ex parte Pinochet Ugarte (No 2)* [1999] 2 WLR 272, a differently constituted panel of the House of Lords held that the fact that Lord Hoffmann's wife had worked for Amnesty International, which organization had campaigned against General Pinochet and which had been allowed to intervene at the first hearing, meant that although Lord Hoffmann could not be accused of bias in coming to his decision, nevertheless public confidence in the administration of justice would be affected if the decision in which he had participated was allowed to stand. In *Pinochet III* (*R v Bow Street Stipendiary*

Magistrate, Ex parte Pinochet Ugarte [1999] 2 WLR 827, the House of Lords again ordered the General's extradition. In *Pinochet II*, Lord Browne-Wilkinson in summing up English and Commonwealth cases on recusal stated that it is an objective test that must be applied to determine if – "there exists a reasonable apprehension or suspicion on the part of a fair-minded and informed member of the public that the judge was not impartial".

A landmark case on recusal is *President of the Republic of South Africa and Others v South African Rugby Football Union and Others - Judgment on recusal application* (CCT16/98) [1999] ZACC 9; 1999 (4) SA 147; 1999 (7) BCLR 725 (4 June 1999). In that case the judges of the Constitutional Court of South Africa were asked to recuse themselves from the hearing of a case instituted against Nelson Mandela, the then President of South Africa on the grounds that there was a reasonable apprehension that every member of the court would be biased against the applicant since they had been appointed by him to be judges and that they had political and personal links with him. Even in that case, the application for recusal was refused.

The Constitutional Court of South Africa reiterated the reasonable apprehension test:

> [48] The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial.

In *Council of Review, South African Defence Force, and Others v Mönnig and Others* (610/89) [1992] ZASCA 64; [1992] 4 All SA 691 Corbett CJ said:

> [45] The test for apprehended bias is objective and the onus of establishing it rests upon the applicant. An unfounded or unreasonable apprehension concerning a judicial officer is not a justifiable basis for such an application. The apprehension of the reasonable person must be assessed in the light of the true facts as they emerge at the hearing of the application. It follows that incorrect facts which were taken into account by an applicant must be ignored in applying the test.
>
> [48] The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension

> must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour, and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial.

In any case, Seychelles is a small jurisdiction. The exception of necessity in judicial disqualification cases is even more meaningful in these circumstances. In such a small community as ours, judges invariably are related to parties, friendly with one or both parties, know the parties or are perceived to have certain political and other affiliations whether these perceptions are accurate or not. The rule of necessity was recognized as early as the 15th century in English common law and has been followed in all common law countries. It is expressed as the rule "that a judge is not disqualified to try a case because of his personal interest in the matter at issue if there is no other judge available to hear and decide the case" (*Atkins v United States* 214 Ct Cl 186 (1977), and reaffirmed in *Ignacio v Judges of US Court of appeals for Ninth circuit* 453F.3d 1160 (9th cir. 2006)). The rule of necessity is crucial for the administration of justice, especially in a country like Seychelles with a small bench and a small population. As expressed by Trott J in *Pilla v American Bar Association* 542F.2d 56, 59 (8th Cir 1976) "the underlying maxim for the rule of necessity is that where all are disqualified, none are disqualified".

Decision

We have carefully considered the averments made by the applicant in his affidavit. A fair-minded and informed observer would not conclude that the judges assigned to hear this case, even challenged as they have been by the inaccurate and unfair allegations in the affidavit, would be biased towards the applicant. Our judicial oaths and conscience would not so permit us. In any case even if we had been shown to be biased, which is not the case, the rule of necessity would dictate that we hear the appeals.

For these reasons we dismiss this application with costs.

MICHEL v DHANJEE

Fernando, Twomey, Msoffe JJ
31 August 2012 Court of Appeal 5 and 6/2012

Constitution - Appointment of judges – Exceptional circumstances - Judicial review - Locus standi

This is an appeal against the unanimous judgment of the Constitutional Court, which found the appointment of Domah J to be ultra vires and unconstitutional and therefore null and void ab initio. Domah J applied to the Constitutional Appointments Authority for renewal of office. The President of the Court of Appeal wrote to the Constitutional Appointments Authority recommending the reappointment of Domah J on the basis of exceptional circumstances under art 131(4) of the Constitution. The Constitutional Appointments Authority then wrote to the President of Seychelles, recommending "for approval the extension of the contract of Justice S. B. Domah for an additional two year term". The President of Seychelles appointed Domah J for a further term of five years.

JUDGMENT Appeal allowed.

HELD

1 In judicial review cases, the court reviews the decision-making process of a decision-making body or person. It has to consider whether relevant considerations were taken into account, whether there was any evidence of deception or bad faith, and whether the body or person making the decision had the legal or constitutional power to make the decision it did. The court cannot substitute its opinion for that of the public authority.
2 The remedies available to the Supreme Court of Seychelles in judicial review cases are those available to the High Court of England (ss 4 and 5 Courts Act): Certiorari, mandamus, prohibition and injunction.
3 Under art 130 of the Constitution, before a case can proceed to a full hearing in the Constitutional Court, the petitioner must demonstrate there is a prima facie case by satisfying the test –
    a. There is a contravention or likely to be a contravention of the Constitution;
    b. The person has a personal interest that is being or likely to be affected by the contravention (ie has locus standi to seek redress);
    c. The person whose interest is likely to be affected by the contravention cannot obtain redress for the contravention under any other law; and
    d. The question raised by the petitioner is not frivolous or vexatious.
4 Locus standi should not be used to prevent a litigant from arguing the substance of the case. A liberal and generous approach can be adopted when the issues raised are of exceptional importance. Being a concerned citizen can be a sufficient interest for standing.
5 It does not matter when a seal is dated if the seal clearly provides the appointment is not to start until a date after the term of office has concluded.
6 A broad perspective is to be adopted in constitutional interpretation.
7 "Consecutive" under art 131(4) of the Constitution should not be given a literal and narrow meaning; it can mean nothing other than successive.

8 There is no prescribed form for the Constitutional Appointments Authority to follow in recommending a candidate for reappointment. As long as the Constitutional Appointments Authority's intention is clear, the constitutional provisions are met.
9 "Recommendation" in art 131(4) should be interpreted fairly and liberally and can encompass the words "recommends for approval the extension of the contract".
10 It is the President and not the Constitutional Appointments Authority who appoints and decides on the length of the term of appointment. The Constitutional Appointment Authority's duties are to recommend in exceptional circumstances the reappointment of a non-Seychellois judge, not to dictate to the President how long the term should be.
11 The exceptional circumstances contemplated under art 131(4) should be given a liberal interpretation so as to encompass all circumstances which are reasonable and relevant to the appointment in question.
12 The construction of "exceptional circumstances" under art 131(4) can only be done by analysis of the consideration of existing facts in each individual case and should not be given a precise meaning.
13 (per Fernando JA, dissenting) An appointment under art 131(4) of the Constitution for a second term of office can be made only when there has been a clear recommendation from the Constitutional Appointment Authority to the President under art 131(4). A recommendation for 'an extension of the contract for an additional 2 year term under art 131(3)' cannot be treated as a recommendation under art 131(4).

Legislation

Constitution, arts 1, 40, 46(1), 119(2), 122, 123, 130(1),(2),(4),(7), 131, 131(1)(d),(1)(e),(3),(4), 132(3), 134(1), 135, 139, sch 2 (s 8)
Civil Code, arts 1156, 1157
Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules, r 9
Court of Appeal Rules 1978 (repealed), r 54(5)
Court of Appeal Rules 2005
Courts Act, ss 4, 5

Cases

Bar Association of Seychelles v President of the Republic SCA 7/2004, LC 242
Cable and Wireless v Minister of Finance SCA 1/1998, LC 134
Chow v Gappy SCA 10/2007, LC 294
Gappy v Dhanjee (2011) SLR 294
Jouanneau v Seychelles International Business Authority (2011) SLR 262

Foreign Cases

Australian National Airways Pty Ltd v Commonwealth (No 1) (1945) 71 CLR 29
Awa v Independent News Auckland [1996] 2 NZLR 184
Breen v Amalgamated Engineering Union [1971] 2 QB 175
Chief Constable of the North Wales Police v Evans [1982] 3 All ER 141
Council of Civil Service Unions v Minister for Civil Service [1985] AC 374
Ho v Professional Services Review Committee No 295 [2007] FCA 388
Khawaja v Secretary of State for Home Department [1983] 1 All ER 765
Kumar v State of Bihar and Ors [1991] SCR (1) 5

Mwamba v Attorney-General of Zambia (1993) 3 LRC 166
R v Buckland [2000] EWCA Crim 1; [2000] 1 WLR 1262; [2000] 1 All ER 907
R v IRC ex parte National Federation of Self-Employed and Small Businesses [1982] AC 617
R v Kelly (Edward) [2000] 1 QB 198
R v Monopolies and Merger Commission [1993] 1 WLR 23
R(A) v Croydon London Borough Council [2009] 1 WLR 2567
Ransley v Soobratty (1952) MR 206
Re S [2009] 2 All ER 700
San v Rumble (No 2) (2007) NSWCA 259
Seecharan v R (1934) MR 4
Solamalay v R (1910) MR 36

R Govinden, Attorney-General for first, second and third appellants
K Shah SC for fourth appellant
A Amesbury for the first respondent
F Chang-Sam SC (watching brief) for second, third and fourth respondents

Judgment delivered on 31 August 2012

Before Fernando, Twomey, Msoffe JJ

TWOMEY J:

Judges in Seychelles are recruited from all over the world. This is a result of our history, of a citizenry composed of non-indigenous peoples, the progeny of our European colonisation masters, African slaves and other races and their descendants. It is also inextricably linked to our micro - and mixed jurisdiction. In our early legal history as a dependency of Mauritius we only had a juge de paix and our cases were generally heard in Mauritius. Even a century after the first settlement on these islands, our legal cases were still being decided in Mauritius, East Africa and ultimately, the Privy Council of England. After independence in 1976 the Court of Appeal consisting of a majority of non-Seychellois judges continued to “travel” to Seychelles for their sessional sittings. Without doubt it was with great pride that Seychellois eventually saw some of its countrymen become judges. Even then it was only in 2004 that the Court of Appeal for the first time became almost wholly localized. It continues, however, to sit for only three sessions a year, with some of its members travelling from abroad to complete the quorum for the sittings.

This brief look at judicial history illustrates the background to foreign judges in Seychelles and our special links with Mauritian judges. Other factors to bear in mind are the small pool of lawyers from which recruitment to the judiciary can be made and the remuneration of judges set out in the Judiciary Act. The Constitution of Seychelles embraces these facts and provides for the appointment of judges to the Court of Appeal, differentiating however, between those judges who are citizens of Seychelles and those who are not. Its provisions seek to ensure not only the independence and impartiality of all judges but also the security of tenure of their appointments.

The body charged by the Constitution to discharge this function is the Constitutional Appointments Authority (CAA) whose membership is composed of an appointee by the President of the Republic of Seychelles, and an appointee by the leader of the Opposition and a Chairman agreed by the two members (vide article 139 *et seq* of the Constitution of Seychelles). The CAA proposes candidates to the President for appointment as judges to the Supreme Court and the Court of Appeal. Subject to the inability to perform the functions of office (vide *a*rticle 134(1)), if the judges appointed are citizens of Seychelles, their tenure in the post is up to the age of 70 (article 131(1)(d)). In the case of a non-citizen, the appointment is "for only one term of office of not more than seven years" (article 131(3)). However, "the President may, on the recommendation of the Constitutional Appointments Authority in exceptional circumstances, appoint a person who is not a citizen of Seychelles and who has already completed one term of office as Justice of Appeal or Judge for a second term of office, whether consecutive or not, of not more than seven years" (article 131(4) of the Constitution).

These provisions present the backdrop to this case, the challenge to the reappointment of a Mauritian national, Justice Satyabhooshun Gupt Domah, the fourth appellant to the Court of Appeal of Seychelles. There has only been one other instance of a similar challenge in the history of Seychelles, that in the case of the *Bar Association of Seychelles and Anor v President of the Republic and Ors* (unreported) SCA 7/2004*.* But more of this later.

In a letter dated 16 April 2011, Justice Domah wrote to the CAA applying for a second term of office. In a letter dated 19 April 2011, the President of the Court of Appeal, Justice Francis MacGregor recommended the reappointment of Justice Domah, enumerating the exceptional circumstances which he perceived as warranting the reappointment. Two months later, on 17 June 2011, the CAA wrote to the President of the Republic of Seychelles recommending the reappointment of Justice Domah for a further term of two years. There has been much speculation about whether this was a request for reappointment, for approval of reappointment or for extension of a contract, but again, more of this later.

On 5 September 2011, the President of the Republic of Seychelles appointed Justice Domah for a further term of five years. On 4 October 2011, Viral Dhanjee, a citizen of Seychelles and the first respondent in this present appeal, filed a petition to the Constitutional Court praying for a declaration that the recommendation of the CAA and the reappointment of Justice Domah be declared null and void as it contravened the Constitution. He also prayed for the vacation of office by Justice Domah. The petition was extensively amended but the prayers remained the same.

The particulars of the contravention of the Constitution as canvassed before the Constitutional Court hearing can be summarised as follows:

(1) At the time of his reappointment Justice Domah was still serving a term of office and was not entitled to be appointed for a second term.
(2) There were no cogent, compelling, persuasive and exceptional circumstances warranting or justifying the recommendation of the CAA for the reappointment of Justice Domah for a second term of office.

(3) The members of the CAA acted irrationally in coming to a decision that there were exceptional circumstances for the reappointment of Justice Domah.
(4) The exceptional circumstances relied on by the CAA in making their recommendation are not those envisaged by the provisions of the Constitution; they should not be exceptional to Justice Domah but to the circumstances of the Judiciary of the Republic of Seychelles.
(5) The President of the Republic of Seychelles was wrong to rely on the recommendations of the CAA as the exceptional circumstances relied on by the CAA did not amount to exceptional circumstances but rather related to the personal circumstances of Justice Domah.
(6) The appointment of Justice Domah was in breach of articles 1 and 119(2) of the Constitution safeguarding the democratic state of Seychelles and protecting the independence of the judiciary.
(7) The reappointment of Justice Domah follows the decision of the Court of Appeal in the case of *Gappy & Ors v Dhanjee* (2011) SLR 294 and hence is evidence that he did not act impartially in order to attract his reappointment.
(8) The reappointment of Justice Domah is likely to affect the appellant's rights as a party to any judicial or legal proceedings to be heard in an independent, impartial or properly constituted Court.

The respondents for their part contended that the reappointment was to take effect after the completion of Justice Domah's first term of office, that there was enough relevant material before the members of the CAA that amounted to exceptional circumstances to warrant a recommendation to the President of the Republic of Seychelles for the reappointment of Justice Domah, and that in any case those circumstances are not exclusive to the ones outlined in the letter of recommendation. Further, they argued, the construction of exceptional circumstances is wide enough to include the attributes of a person, his contribution to the judiciary and jurisprudence and the national context under which the reappointment is recommended. In any case, they contended, Justice Domah's participation in the Court of Appeal in the case of *Gappy* (supra), concurring to a unanimous decision of a full bench of five judges was not evidence that he did not act impartially and independently or in a manner to attract a reappointment. In the circumstances, they continued, the averment that Justice Domah's reappointment is likely to affect the respondent's interest as a party in judicial or legal proceedings is unsubstantiated as there has never been an allegation of bias or impropriety against Justice Domah during his tenure of office. They also argued that the petition was full of speculation and surmises and consequently was frivolous and vexatious and that no prima facie case of a contravention or risk of contravention to the Constitution was made out by the respondent to result in shifting the burden of proving such a contravention on the State.

The Constitutional Court ruled that a prima facie case had been made out and in its judgment opined that most of the factors raised by the parties were peripheral and redundant "'save for the core issue which relates to the constitutional validity of the appointment in question." It identified the three main issues arising from this case: (1) the CAA's exercise of its constitutional duties, (2) the interpretation of article 131 and (3) the definition of exceptional circumstances.

Musing on how the CAA deliberates, the Court was of the view that some of the selections made by the CAA were questionable and "worse still, [could] lend itself to perceived arbitrariness." It went on to state that it viewed the recommendation for an "extension" of the term of office of Justice Domah "alien to the Constitution of Seychelles and inconsistent with article 131 (3) and (4) of the Constitution; such recommendation being unconstitutional, cannot be relied and acted upon."

From this decision, four of the respondents at the Constitutional Court have appealed to the Court of Appeal. The members of the CAA have filed no appeal to the decision of the CAA but they were represented by counsel solely for observation of the appeal trial. No adverse inference is drawn from the position they adopted and no weight is attached to the exercise of their privilege.

The grounds of appeal of the appellants are consolidated and are reproduced below:

> (1) The petitioner had no locus standi to file a petition under article 130(1) challenging the reappointment of a Justice of Appeal in his capacity as a former and future litigant before the Court of Appeal as averred in paragraph 13 of the amended petition and contend that "his interest is being or is likely to be affected" by such appointment, since such interest would only be a vested or a perverse interest and not a legitimate or lawful interest which alone would be justiciable in a Constitutional challenge.
> (2) The Judges erred in law in holding that an appointment with reservation, for it to take effect in the future is unconstitutional and contrary to the provisions of article 131(4) of the Constitution of Seychelles since a reappointment to be "consecutive" should necessarily be made before the expiry of the term.
> (3) The Judges erred in law in not considering and reading together the wording "whether consecutive or not" for an appointment of a person who has already completed on term of office as a Justice of Appeal as per the provision of article 131(4) of the Constitution of Seychelles.
> (4) The Judges failed to consider that the President may, on the recommendation of the Constitutional Appointments Authority in exceptional circumstances, appoint as per the proviso of article 131(4) of the Constitution of the Republic of Seychelles.
> (5) The Judges failed to consider what constitutes "exceptional circumstances" under article 131(4) of the Constitution and in particular whether the Constitutional Appointments Authority's recommendation based on exceptional circumstances was reasonable in the absence of a definition, and that the President had acted reasonably and in accordance with the Constitution in reappointing the appellant as a Justice of Appeal with effect from 4 October 2011 for 5 years.
> (6) The Judges misconstrued the letter dated 17 June 2011 from the Constitutional Appointments Authority in failing to appreciate that it was a recommendation based on exceptional circumstance to the President to appoint the fourth appellant of a second term, even if the Constitutional Appointments Authority might have been under the mistaken belief that it had to be a two year extension in order to add up to seven years under article 131(3). The period of the second term

is the prerogative of the President subject to a maximum of seven years.

(7) The Judges erred in giving part of the letter dated 17 June 2011 a strained and inappropriate meaning to the word "extension" and in disregarding the recommendation based on exceptional circumstances failed to adjudicate properly on the true meaning and intention to be accorded to this letter and coupled with the fact that there is no prescribed form of a letter of recommendation.

(8) The Judges failed to appreciate and take into account the following factors:

(a) That the Seychelles Court of Appeal sits in session and not permanently;

(b) The appellant like all non-resident Justices of Appeal came to Seychelles for the sessions, and is remunerated for the sessions that he sits on (and not monthly) as particularized in the Judiciary Act;

(c) When the President appointed the appellant on 5 September 2011 for a second term with effect from 4 October 2011, he had effectively completed one term of office (the next session was in November 2011) and this consecutive appointment did not violate article 131(4) of the Constitution.

Before we proceed to deal specifically with the issues raised we think it is important to contextualise constitutionalism or the concept of limited government in relation to the case before us and other similar cases. This is especially important due to the increase of both constitutional and judicial review cases before the Constitutional Court and the Court of Appeal of Seychelles. There are inherent tensions in democratic government and these are exacerbated in judicial review cases. This is not peculiar to Seychelles. It is a fundamental difficulty in all democracies where constitutionalism is safeguarded through the process of judicial review. In cases such as the present one, an unelected body (the judiciary) tells an elected body – either the legislative (the National Assembly) or the executive (The President), who are elected by the people, that their will is incompatible with the fundamental aspirations of the people as formulated in the Constitution of the Seychelles. It is for this reason that the law has developed procedural and substantive safeguards to control the boundaries of judicial authority (and to prevent what Sedley J in his contribution to *Administrative Law and Government Action: The Courts and Alternative Mechanisms of Review* (1994), edited by Genn and Richardson, 38 called "the direct withering fire on the executive"). Hence this Court is minded in such cases to follow strictly the rules and procedures laid down in our laws. With this in mind we turn to the issues raised in this appeal.

The petitioner in this case alleged a contravention of the Constitution by the CAA and the President of the Republic of Seychelles in the exercise of their constitutional powers. This is therefore a judicial review case where the Constitutional Court is reviewing the decision making process of a decision making body or person. It can only review how the decision was made, declare on its fairness and ultimately on its constitutionality. In this respect therefore it has to consider whether relevant considerations were taken into account, whether there was any evidence of deception or bad faith, and whether the body or person making the decision had the legal or constitutional power to make the decision it did. The Court cannot substitute its opinion for that of the public authority. Article 130(4) of the Constitution of

Seychelles empowers the Constitutional Court in such cases to make a declaration that the act is in contravention to the Constitution and to grant remedies "available to the Supreme Court" in such cases - not just any remedy.

The remedies available to the Supreme Court of Seychelles would be those available to the High Court of England in such cases (viz sections 4 and 5 of the Courts Act, Cap 42, Laws of Seychelles). When the Supreme Court is exercising a judicial review function the only remedies available to it are certiorari, mandamus, prohibition and injunctory relief. In fact Renaud J correctly and admirably summarized the powers of the court in such circumstances in the recent case of *Agnes Jouanneau v Seychelles International Business* Authority (2011) SLR 262. He correctly stated the rules in such cases and supported his findings by quoting from the great English cases of administrative review namely *Breen v Amalgamated Engineering Union* [1971] 2 QB 175, *Chief Constable of the North Wales Police v Evans* [1982] 3 All ER 141*:*

> Administrative law is not about judicial control of Executive power. It is not Government by Judges. It is simply about Judges controlling the manner in which the Executive chooses to exercise the power which Parliament has vested in them. It is about the exercise of Executive power within the parameters of the law and the Constitution. Such exercise of power should be judicious. It should not be arbitrary, nor capricious, nor in bad faith, nor abusive, nor taking into consideration extraneous matters.

and *Khawaja v Secretary of State for Home Department* [1983] 1 All ER 765:

> Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made.

With this in mind we now turn to the grounds of appeal.

Locus standi
Ground 1

The Constitution of Seychelles states in article 130(1) -

> A person who alleges that any provisions of this Constitution, other than a provision of Chapter III, has been contravened and that the person's interest is being or is likely to be affected by the contravention may, subject to this article, apply to the Constitutional Court for redress.

Chapter III contains the Charter of Fundamental Human Rights and Freedoms and breaches of these rights and freedoms are actionable per se by the person whose rights or freedoms are violated. This is clearly not the case for breaches of other provisions of the Constitution as article 130(2) goes on to state -

> The Constitutional Court may decline to entertain an application under clause (1) where the Court is satisfied that the applicant has obtained redress for the contravention under any law…

Further, article 130(7) provides -

> Where in an application under clause(1) he person alleging the contravention or risk of contravention establishes a prima facie case, the burden of proving that there has not been a contravention or risk of contravention shall, where the allegation is against the State, be on the State.

It is clear from the above provisions that in matters raised by the present case certain conditions have to be met before the Constitutional Court could proceed to full hearing. Similarly in England from where we have inherited our laws relating to judicial review, leave (now called permission) of the Court must be sought before initiating proceedings.

The only purpose of these provisions is to weed out unmeritorious claims. This indeed was the point made by senior counsel, Mr Chang-Sam for the CAA when invoking rule 9 of the Rules of the Constitutional Court ("The respondent may before filing a defence to the petition raise any preliminary objection to the petition and the Constitutional Court shall hear the parties before making an order on the objection") and unfortunately ignored by the Constitutional Court in its ruling. It would seem to us that in all cases of this nature the petitioner must in his petition demonstrate that his interest is likely to be affected in some way. The clear and concise test to be applied to decide if a prima facie case is made out as contained in the provisions stated above may be summarised thus:

(a) there is a contravention or likely to be a contravention of the Constitution
(b) the person has a personal interest that is being or likely to be affected by the contravention (in other words he has locus standi in judicio to seek redress)
(c) the person whose interest is likely to be affected by the contravention cannot obtain redress for the contravention under any other law
(d) the question raised by the petitioner is not frivolous or vexatious.

Then and only then can the case proceed to hearing. This test is of significant importance with the purpose of establishing if the petitioner has a bona fide argument for relief. The appellants contend that the reasons given by the appellant, namely that he is a past, present and future litigant and that the appointment of the fourth appellant as a judge is likely to affect his interests, are perverse and are neither legitimate nor lawful. There is some merit in this submission. If the respondent had been able to show clear bias in the past by the fourth appellant we would have had no difficulty in understanding this proposition. The case given as an example of Justice Domah's bias concerns a unanimous decision by a full court of five judges of appeal. Is the respondent intimating that all the judges of the Court of Appeal are somehow prejudiced against him or that the court is biased against anyone who loses a case? Such a preposterous proposition cannot be upheld and fails entirely. Further the averment is a serious and unfounded slur on the unblemished character of an admirable officer of this court who has served Seychelles to the best of his ability and who has thus far contributed immensely to the jurisprudence of Seychelles. It is reprehensible that affidavits of this nature are affirmed or sworn and yet in no way substantiated. Further, as submitted by the

Attorney-General quoting *Subhash Kumar v State of Bihar and Ors* [1991] SCR (1) 5 -

> A person invoking the jurisdiction of this Court [under provisions of the Constitution] must approach this Court for the vindication of the fundamental rights of affected persons and not for the purpose of vindication of his personal grudge or enmity. It is the duty of this Court to discourage such petitions and to ensure that the course of justice is not obstructed or polluted by unscrupulous litigants by invoking the extraordinary jurisdiction of this court for personal matters under the garb of public interest litigation.

Despite these findings, we find that the modern rule as to standing is expressed in *R v Inland Revenue Commissioners ex parte National Federation Of Self-Employed And Small Businesses* [1982] AC 617 by Lord Diplock when he said there would be a grave lacuna in public law if "outdated technical rules of locus standi" prevented a person bringing executive illegality to the attention of the courts. Locus standi should therefore not be used to prevent a litigant from arguing the substance of his case. The respondent has also averred that he is a citizen of Seychelles, domiciled and resident in Seychelles. Whilst judicial review is not a tool for busy bodies or opportunist litigants to challenge the decisions of decision making bodies simply because one does not agree with the decision, it must be possible for genuinely concerned citizens of breaches of democratic rights to bring actions. This is a balancing exercise that must be performed by the court in each individual case. Cloete J in the *Bar Association* case quoting the Supreme Court of Zambia in *Mwamba and Anor v Attorney-General of Zambia* (1993) 3 LRC 166 stated -

> ...we have to balance two aspects of the public interest, namely the desirability of encouraging individual citizens to participate actively in the enforcement of the law, and the undesirability of encouraging meddlesome private "Attorney-Generals" to move the courts in matters that do not concern them...

Similarly in the case of *Chow v Gappy and Ors* (unreported) SCA 10/2007 the Court of Appeal warned against too restrictive an approach in relation to standing:

> The Constitution enshrines the freedoms of the people. Freedom is different from licence. A freedom to "*ester en justice"* is different from a licence to *"ester en justice."* At the same time while checking the licence to *"ester en justice,"* a court should not demarcate the line so far that it basically restricts the freedom by a stroke of a pen.

In the *Bar Association* case, the first petitioner was the Bar Association of Seychelles and the second petitioner was a member of the said Bar Association and a legal practitioner. They both clearly had a personal interest in the matter. In the present case the petitioner is a citizen of Seychelles. While it would normally not be sufficient to claim standing and "sufficient interest" by stating that one is a citizen and resident of Seychelles, we have decided to adopt a liberal and generous approach in this case given the exceptional importance of the issues raised. In the circumstances we are prepared to accept that the first respondent truly brings this case as a concerned citizen.

The seal of office
Grounds 2 and 8

These grounds of appeal relate to the seal of office of Justice Domah. The Constitutional Court found that as the seal of office is dated 5 September 2011, the reappointment took place before the term of office had concluded and that it was therefore unconstitutional. It is important at this stage to set out in extenso the contents of the seal of office:

> WHEREAS you, SATYABHOOSHUN GUPT DOMAH, have been appointed as a JUSTICE OF APPEAL of the Seychelles Court of Appeal under Article 123 of the Constitution, and the said appointment will expire on the 3rd October 2011,
> AND WHEREAS you are not a citizen of Seychelles,
> AND WHEREAS further the Constitutional Appointments Authority has recommended to me that there are exceptional circumstances to appoint you as JUSTICE OF APPEAL for a second term of office,
> NOW THEREFORE, in exercise of the powers conferred to the President under article 131(4) of the Constitution, I, JAMES ALIX MICHEL, PRESIDENT, appoint you
> SATYABHOOSHUN GUPT DOMAH
> To be a JUSTICE OF APPEAL for a period of five years commencing on *4th October 2011.*
> GIVEN under my hand and the Public Seal of Seychelles at State House on this 5th day of September 2011.
> [our emphasis]

The seal of office clearly states that the reappointment does not start until 4 October 2011. Hence it would appear clearly that the Constitutional Court either completely misdirected itself on this salient fact or by literal interpretation came to the conclusion that the appointment was unconstitutional since it was an appointment made on 5 September 2011 "with reservation for it to take place in the future." In our view it does not matter when the seal was dated as contained therein is the clear provision that the appointment was not to start until 4 October 2011. We have stated before and we state again that judges need to adopt a broad perspective in constitutional interpretation. We can only echo the words of the famous Australian constitutional judge Dixon, who stated in *Australian National Airways Pty Ltd v Commonwealth (No 1)* (1945) 71 CLR 29 at 81:

> We should avoid pedantic and narrow construction in dealing with an instrument of government and I do not see why we should be fearful of making implications…

In any case those who practice law should be well acquainted with contracts, deeds and documents dated on one day to take effect on another.

Further, as pointed out by counsel it is a well-known fact that the Court of Appeal is sessional, sitting in April, August and November of each year. Hence when Justice Domah had sat in August 2011, he would not have sat again until the following November. Hence by no stretch of the imagination can one conclude that this consecutive appointment violates the Constitution. We do not unduly concern ourselves with the literal and narrow interpretation of the word "consecutive" used by

the Constitutional Court and are satisfied that it can mean nothing else than successive and as the August session of appeal was completed and Justice Domah was not to sit until the next session in November his new term of office would indeed have been consecutive.

The letter of recommendation from the CAA to the President of Seychelles Grounds 3, 4, 6, 7.

These grounds concern the letter of 17 June 2011 from the CAA to the President of Seychelles. It is important to quote it in full:

> Dear Mr. President,
> In accordance with the powers conferred upon the Constitutional Appointments Authority by the Constitution of the Republic of Seychelles, the Constitutional Appointments Authority hereby *recommends per approval the extension of the contract of Justice S.B. Domah for an additional two year term as permitted by the Constitution (Article 131(3) in view of the exceptional circumstances related to Justice Domah.*
> Justice Domah's contribution to the good performance of the Seychelles Court of Appeal is very much appreciated by his colleagues and the public in general.
> Apart from his extensive qualifications and experience he is among the few to be familiar with the French Civil Law/Code Napoléon which largely serves as the basis of our Civil Code.
> *Copies of Justice Domah's letter referring to above and that of the president of the Court of Appeal's recommendations are enclosed.*
>
> Yours faithfully,
> Jérémie Bonnelame, Chairman CAA, Marlene Lionnet, Member CAA, Patrick Berlouis, Member CAA.
> [our emphasis]

The respondents in their pleadings did not raise the issue of the wording of the letter at all. It would appear that this point was raised for the first time by the Court during the address of the first respondents' counsel – "Court (JD): Mr Ally, is there a distinction between and extension of the contract and a reappointment?"

It may well be, therefore, that this point was in any case ultra petita. However, the Constitutional Court interpreted article 131(4) and came to the conclusion that the words "recommends per approval the extension of the contract" were "per se alien to the Constitution, unconstitutional, cannot be relied and acted upon." We respectfully cannot follow the logic of this finding. There is no prescribed form to follow in the circumstances where the CAA wants to recommend a candidate for reappointment. As long as the CAA's intention in the letter is clear to the President, then the constitutional provisions are met. No one else is privy to the letter so the construction or interpretation of its contents by a third party is in any case academic. Both the CAA and the President in this case have through the submissions of their counsel and in their pleadings and affidavits reiterated that this was a letter of recommendation for reappointment and not extension. The proof that it was so understood is the fact that Justice Domah was indeed reappointed.

In any case even if one were to resort to rules of interpretation one must look at those laid out at section 8 of Schedule 2 to the Constitution:

> For the purposes of interpretation -
> (a) The provisions of this Constitution shall be given their fair and liberal meaning;
> (b) This Constitution shall be read as a whole; and
> (c) This Constitution shall be treated as speaking from time to time.

It is therefore not open to the Constitutional Court to construe the meaning of "recommendation" in article 131(4) in a restrictive, literal or even pedantic manner. Bound by the interpretative rules of the Constitution, a fair and liberal construction of "recommendation" would encompass even the particular wording used in the letter of recommendation by the CAA. True it is that there are ambiguities in the letter or as put by Mr Chang-Sam during his arguments before the Constitutional Court, that it contains "infelicitous words". It is also true that the pleadings of the CAA do not remove this ambiguity. However, any objective or common sense reading of the letter shows that the CAA was recommending the reappointment of Justice Domah. The use of the word "recommend" and the enunciation of the "exceptional circumstances" grounding the appointment in the letter puts paid to any doubt in our minds that this indeed was a letter for recommendation of a reappointment. Further, the extension of a contract where a judge has to complete work outside his term of office does not necessitate the intervention of the CAA (viz article 132(3) of the Constitution). The fact that the CAA involved itself is further proof that this indeed was a letter of recommendation for reappointment.

Further confirmation that a purposive interpretation must be given to the letter is provided by analogy to the Civil Code of Seychelles which in relation to contracts provides in its article 1156 that – "In the interpretation of contracts, the common intention of the contracting parties shall be sought rather than the literal meaning of the words".

And article 1157 – "When a term can bear two meanings, the meaning which may render it effective shall be referred rather than the meaning which would render it without effect".

In the case of *Cable and Wireless v Minister of Finance and Anor* (unreported) SCA 1998 the Court held that -

> When several documents constitute one transaction, they must be construed together. Thus where a document contains a reference to another, the wording of the reference is to be read into the former document.

As the letter of the CAA contained the following words: "Copies of Justice Domah's letter referring to above and that of the president of the Court of Appeal's recommendations are enclosed" and those enclosures both go to supporting the proposition that indeed it was a reappointment that was sought, we come to the irresistible conclusion that the letter of the CAA to the President was indeed a letter of recommendation for the reappointment of Justice Domah.

It is worth noting at this juncture that much was made of the letters sent to the CAA by Justice Domah and the President of the Court of Appeal Justice MacGregor. Mr Ally for the first respondent at the Constitutional Court hearing called it lobbying and submitted that the CAA should have put "the President of the Court of Appeal in his place and should have put Justice Domah in his place..." How, may we ask, can the CAA ascertain if a judge is suitable for recommendation for the post unless they seek or are given information about his performance? Surely the best person to assess the suitability of a candidate for a post on the Court of Appeal is the President of the Court of Appeal. And what was wrong with Justice Domah applying for reappointment?

Another argument raised in the grounds of appeal relates to the fact that the Constitutional Court found that the reappointment of Justice Domah for five years was not based on the recommendation of the CAA and was therefore unconstitutional. According to the Court, the CAA had only recommended a term of two years and not five. This finding by the Court is a clear misreading of the pertinent provisions of the Constitution. The whole of article 131 of the Constitution deals with the appointment and reappointment of judges. The context for reappointment can only be gleaned by a reading of all the provisions of article 131. It is therefore disingenuous to read one provision in isolation from the others especially when the other provisions inform the interpretation as a whole. Article131(3) states:

> *Subject to clause (4),* a person who is not a citizen of Seychelles may be appointed to the office of Justice of Appeal or Judge for only one term of not more than seven years. [our emphasis]

It is a trite principle of interpretation that the words "subject to" clearly conveys the idea of a provision yielding to another. It is clear that the provisos of clause 4 must be taken into account in the reading of clause 3. Clause 4 states:

> The President may, on the recommendation of the Constitutional Appointments Authority in exceptional circumstances, appoint a person who is not a citizen of Seychelles and who has already completed on term of office as a Justice of Appeal or Judge for a second term of office, whether consecutive or not, of not more than seven years.

A careful and fair reading of the above leads to only one construction: it is the President and not the CAA who appoints and decides on the length of the term of appointment. The CAA's duties are to recommend in exceptional circumstances for reappointment the non-Seychellois judge. It is not their prerogative to dictate to the President how long the term should be. Hence there was no breach of the Constitution by the President in appointing Justice Domah for a term of five years.

The definition of exceptional circumstances
Grounds 4 and 5

Whilst the Constitutional Court stated that it would be purely academic to address the issue of "exceptional circumstances" it would appear that in fact much of their decision was taken up with the appointment of judges and the circumstances in which the appointments are made. In their exposé of "objective criteria" to be taken

into account when making of judicial appointments generally, they stated at p 19 of their judgment:

> In the making of judicial appointments, the CAA ought to take account of public sensitivities, which may manifest themselves in two ways: (i) a desire to see suitably qualified citizens of Seychelles being appointed to superior judicial positions; and (ii) a desire to have transparency in the appointment process. Sometimes, it is difficult to reconcile the desire of the appointment of a local person to a judicial position, with the necessity to appoint someone with impartiality or perceived impartiality when one is drawing from a very limited resource pool, such as ours. If that exceptional candidate does emerge locally then he/she must be the favoured candidate. It is vital however, that only the best candidates are recruited for judicial positions irrespective of the costs involved and economic situation of the country…

The Constitutional Court went on to define the term "exceptional circumstances" contained in article 131(4):

> The exceptional circumstances, contemplated under article 131(4) of our Constitution, in our considered view, should be given a liberal interpretation so as to encompass all circumstances, which are reasonable and relevant to the appointment in question…
>
> The duty of the CAA, is to take into account all relevant circumstances as they exist, at the time when such judicial vacancy arises, including the sensitivity of the public at large …

We cannot fault the Court on this assessment but it may not be enough to provide guidance should similar circumstances arise. In attempting to further define exceptional circumstances, the Attorney-General cited the case of *R v Kelly (Edward)* [2000] 1 QB 198 at 208:

> We must construe 'exceptional' as an ordinary, familiar English adjective, and not as a term of art ... To be exceptional a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly, or routinely, or normally encountered.

In the New South Wales Court of Appeal decision of *San v Rumble (No 2)* (2007) NSWCA 259 at [59]-[69], Campbell JA summarised cases where the expression has been defined:

> (a) Exceptional circumstances are out of the ordinary course or unusual, or special, or uncommon. *R v Kelly (Edward)* [2000] 1 QB 198 (at 208).
> (b) Exceptional circumstances can exist not only by reference to quantitative matters concerning relative frequency of occurrence, but also by reference to qualitative factors: *R v Buckland* [2000] EWCA Crim 1; [2000] 1 WLR 1262; [2000] 1 All ER 907 (at 1268; 912-913).
> (c) Exceptional circumstances can include a single exceptional matter, a combination of exceptional factors, or a combination of ordinary factors which, although individually of no particular significance, when taken together are seen as exceptional: *Ho v Professional Services Review Committee No 295* [2007] FCA 388 (at [26]).

> (d) In deciding whether circumstances are exceptional within the meaning of a particular statutory provision, one must keep in mind the rationale of that particular statutory provision: *R v Buckland* (at 1268; 912-913).
> (e) Beyond these general guidelines, whether exceptional circumstances exist depends upon a careful consideration of the facts of the individual case: *Awa v Independent News Auckland* [1996] 2 NZLR 184 (at 186).

In the more recent case of *Re S* [2009] 2 All ER 700 at 709 Laws LJ stated that:

> the categories of what is exceptional are not closed... Indeed they could not be: to formulate a definition of exceptional circumstances, whether inclusive or exclusive, would be to transform a broad principle into a hard-edged rule. But hard-edged rules are made if at all by the statute, not by the courts.

We are also of the opinion that the construction of "exceptional circumstances" can only be done by analysis of the consideration of existing facts in each individual case. Mr Shah quoting *R v Monopolies Commission and Anor, Ex parte South Yorkshire Transport Ltd and Anor* [1993] 1 WLR 23 at 29 stated:

> The courts have repeatedly warned against the dangers of taking an inherently imprecise word and redefining it, thrusting on it a spurious degree of precision.

He also submitted that the test in assessing the CAA's exercise of its power should be an evaluative judgment and a "reasonableness review" *(R(A) v Croydon London Borough Council* [2009] 1 WLR 2567) and that -

> Within the limits of fair process and *Wednesbury* reasonableness, there are no clear cut right or wrong answers.

We agree that it is dangerous to take a word that is itself inherently imprecise and impose one's own precise meaning upon it. We do not intend to venture in that realm. The rules of interpretation forbid it. Further given the restrictive powers of review no court has the power to stipulate criteria to be used by the CAA in exercising its functions nor do we have the jurisdiction to substitute our decision for that of the CAA. If it did it would be usurping the role of the CAA and would be applying its subjective criteria to that of the CAA (see *Bar Association of Seychelles and Anor v President of the Republic and Ors* SCA 7/2004 at 36). The only power the court has is to review the decision of the CAA and decide whether the criteria it used for deciding whether there were exceptional circumstances were not tainted with, to quote Lord Diplock in *Council of Civil Service Unions v Minister for Civil Service* [1985] AC 374 at 410, "illegality… irrationality… and procedural impropriety."

It would seem to us that the arguments advanced by the first respondent are not that exceptional circumstances did not exist but rather that they were not exceptional enough.

The facts before us extracted from all the affidavits and letter of recommendation are that at the time of Justice Domah's appointment:

a. he had contributed to the good performance of the Court of Appeal
b. he was appreciated and esteemed by his colleagues and public in general

c. he was a capable team player and a hard and efficient worker
d. he was a citizen of Mauritius with which country Seychelles had historic and legal ties
e. he had extensive qualifications, experience and exceptional familiarity with the Civil Code of France and Seychelles unlike many other judges and practitioners in Seychelles
f. he had judicial training and education qualifications
g. he had experience in judicial administration
h. there had been difficulty some four months previously in obtaining suitable candidates despite advertisement of a similar post.

None of these factors would on their own amount to "exceptional circumstances" but taken together it is reasonable to conclude that the CAA could have come to the decision that they did constitute "exceptional circumstances." Seychelles is an extraordinary place in terms of its legal tradition. It is a mixed jurisdiction combining both common law and civil law. Most of its practitioners are trained in only one of the traditions. In any case the members of the CAA have deponed, and we have no reason to disbelieve them, that their last attempt to recruit judges to the judiciary has been difficult. We also take judicial notice that at the time of this recommendation Justice Hodoul had just resigned and the Court of Appeal was already understaffed. We have no doubt that excellent candidates exist locally but the most able and trained practitioners are happy to practise their profession and earn their livelihood without wishing to serve on the judiciary. The responsibilities of the judge and the remuneration are definitely a factor. The Court of Appeal is the court of final resort of this Republic. It needs to have the expertise of exceptional judges to nurture and develop its legal tradition. Its intensive schedule and extensive jurisprudence is testimony to the work it does. The composition of the Court of Appeal with common law and civil law experts is essential for the continuity of this legal tradition. We have no doubt that the CAA and President had addressed their minds to all these facts when they concluded that exceptional circumstances indeed existed to warrant the appointment of Justice Domah for a second term. In any case no evidence to the contrary was adduced.

For all these reasons we allow this appeal with costs.

FERNANDO J DISSENTING:

This is an appeal filed by the first, second and third appellants and a separate appeal by the fourth appellant, against the unanimous judgment of the Constitutional Court which annulled the appointment of the fourth appellant as a Justice of Appeal made by the first appellant under article 123 of the Constitution and made the declarations, findings and orders set out below. Since both appeals were in relation to the same issue, they were consolidated and treated as one appeal.

1) The declaration that the purported recommendation of the second, third, and fourth respondents (collectively the CAA), made through its letter dated 17 June 2011 to the first respondent, the President of the Republic of Seychelles, Mr James Michel, seeking his approval for the extension of the fifth respondent's (Mr Justice Dr Satyabhooshan Gupt Domah of the Court of Appeal of Seychelles) contract of employment for an additional

two year period, is ultra vires and unconstitutional as it has contravened article 131(3) and (4) of the Constitution; consequently the appointment made by the first respondent on 5 September 2011 based on that recommendation is null and void ab initio;

2) The finding that while the CAA may recommend reappointment of a candidate for a second term, in exceptional circumstances, under no circumstances, does it have any constitutional mandate to extend the contract period of any Judicial Appointee for any further period exceeding or beyond the period stipulated for the first term of office in the original contract of employment;
3) The finding that the CAA has constitutional mandate only to recommend a candidate for a second term of office provided that that candidate (a) is not a citizen of Seychelles (b) has already completed one term of office as a Justice of Appeal and (c) "exceptional circumstances" do in fact exist in that particular case, as contemplated under article 131 (4) of the Constitution; and
4) The order setting aside the appointment of the fifth respondent for a second term of office as Justice of the Court of Appeal, in consequence of the above declaration and findings.

In the Constitutional Court the first respondent to this appeal had filed suit as petitioner, against the first, second, third and fourth appellants (then first, sixth, seventh and fifth respondents respectively), and the second, third and fourth respondents (also named as second, third and fourth respondents in the constitutional petition) to this appeal, praying for a declaration that the recommendation of the second, third and fourth respondents and the appointment of the fourth appellant (then fifth respondent) by the first appellant for a second term to the office of Justice of the Court of Appeal, to be a contravention of the Constitution and null and void, and for the fourth appellant to vacate the office of Justice of the Court of Appeal, and with costs.

The second respondent is the Chairman, and the third and fourth respondents are members of the Constitutional Appointments Authority (hereinafter referred to as the CAA). According to the Constitution it is the CAA that proposes candidates to the President (first appellant) for appointment as the President of the Court of Appeal and other Justices of Appeal. Article 123 of the Constitution (hereinafter the reference to an article will always be a reference to an article of the Constitution) provides: "The President shall, by instrument under the Public Seal, appoint the President of the Court of Appeal and other Justices of Appeal from candidates proposed by the Constitutional Appointments Authority". The fourth appellant is not a citizen of Seychelles. Articles 131(3) and 131(4) of the Constitution govern the appointment of non-Seychellois/e to the office of Justice of Appeal and Judge.

Article 131(3) states:

> Subject to clause (4), a person who is not a citizen of Seychelles may be appointed to the office of Justice of Appeal or Judge *for only one term of office* of not more than seven years.

Article 131(4) states:

> The President *may*, on the recommendation of the Constitutional Appointments Authority *in exceptional circumstances*, appoint a person who is not a citizen of Seychelles and who has already completed one term of office as a Justice of Appeal or Judge for a second term of office, whether consecutive or not, of not more than seven years.

The first, second and third appellants have raised the following grounds of appeal:

1) The petitioner had no locus standi to file the petition under article 130(1) of the Constitution challenging the reappointment of a Justice of Appeal, in his capacity as a former and future litigant of the Court of Appeal as averred in paragraph 13 of the petition, and contend that his "interest is being or is likely to be affected" by such appointment, since such interest would only be a vested or perverse interest and not a legitimate or lawful interest which alone would be justiciable in a Constitutional challenge.
2) The Judges erred in law in holding that an appointment, with reservation, for it to take effect in future is unconstitutional and against the provision of article 131(4) of the Constitution since a reappointment to be 'consecutive' should necessarily be made before the expiry of the term.
3) The Judges erred in law in not considering and reading together the wordings 'whether consecutive or not' for an appointment of a person who has already completed one term of office as a Justice of Appeal as per the provisions of article 131(4) of the Constitution.
4) The Judges failed to consider that the President may, on the recommendation of the CAA in exceptional circumstances, appoint as per the provisions of article 131(4) of the Constitution.
5) The Judges failed to consider what constitutes 'Exceptional Circumstances" and whether those were such circumstances in the reappointment of the fourth appellant to a second term.
6) The Judges erred in giving a literal meaning to the words 'Extension' in the letter of the CAA dated 17 June 2011 when in fact, the reappointment by the President was for 5 years under article 131(4) of the Constitution. It was not an appointment under article 132(3) of the Constitution.
7) The Judges erred in law by not considering that the letter dated 17 June 2011 was a recommendation with exceptional circumstances clearly enumerated by the CAA and was the only requirement for them to consider under the Constitution for appointment of a Justice/Judge for a second term.

The first, second and third appellants have sought the following relief from the Court of Appeal:

(i) To quash the decision of the Constitutional Court
(ii) Declare that the first respondent to this appeal, who was the petitioner before the Constitutional Court did not have a locus standi and/or legitimate interest in challenging the reappointment of a sitting Justice of Appeal (fourth appellant).
(iii) Declare the recommendation of the second, third and fourth respondents (collectively the CAA) made through its letter dated 17 June 2011 is legal, valid and constitutional and in consonance with article 131(4) of the Constitution.

(iv) Declare that the appointment of the fourth appellant made by the first appellant on 5 September 2011 is legal, valid and in consonance with article 131(4) of the Constitution.

The fourth appellant has raised the following grounds of appeal:

1) Grounds 1 to 4 of appeal of the fourth appellant are identical to grounds 1 to 4 raised by the first, second and third appellants.
2) Ground 5 of appeal is similar to that of ground 5 raised by the first, second and third appellants but more detailed, namely it dwells on the issue whether the CAA recommendation based on exceptional circumstances was reasonable in the absence of a definition, and that the President had acted reasonably and in accordance with the Constitution in reappointing the appellant as a Justice of Appeal with effect from 4 October 2011 for 5 years.
3) Ground 6 of the fourth appellant is an elaboration of ground 6 of appeal raised by the first, second and third appellants and is to the effect that "the Learned Judges misconstrued the letter dated 17 June 2011 from the CAA in failing to appreciate that it was a recommendation based on exceptional circumstances to the President to appoint the appellant for a second term, *even if the CAA might have been under the mistaken belief that it had to be a two year extension in order to add up to seven years under article 131(3).* The period of the second term is the prerogative of the President subject to a maximum of seven years. (emphasis by me)
4) Ground 7 of the fourth appellant is an elaboration of ground 7 of appeal raised by the first, second and third appellants and is to the effect that the Judges erred in giving part of the letter dated 17 June 2011 a strained and inappropriate meaning to 'extension' and in disregarding the recommendation based on exceptional circumstances failed to adjudicate properly on the true meaning and intention to be accorded to this letter and coupled with the fact that there is no prescribed form for a letter of recommendation.

The relief sought by the fourth appellant from the Court of Appeal is identical to that of the relief sought by the first, second and third appellants save that the fourth appellant has in addition sought that the first respondent be ordered to pay the costs of the appeal and that of the court below.

At the very outset it is noted that the second, third and fourth respondents have not appealed against the judgment of the Constitutional Court which declared their recommendation of the fourth appellant for appointment as a Justice of Appeal to the first appellant as ultra vires and unconstitutional. In the petition filed before the Constitutional Court the petitioner had prayed for a declaration that the recommendation of the second, third and fourth respondents and the appointment of the fourth appellant as a Justice of the Court of Appeal to be a contravention of the Constitution and null and void. In view of this, two questions necessarily arise for consideration. Firstly, what weight could be attached to the appeal brought by the appellants in the absence of an appeal from the second, third and fourth respondents, who by their silence have demonstrated that they accept the judgment of the Constitutional Court. In saying this I am conscious of the right of appeal available to any person from a judgment of the Constitutional Court. The silence of the second, third and fourth respondents cannot be compared to a case where the

person who ought to have appealed is an individual who is dead or for some reason is disinterested in appealing. The CAA plays an integral role in making the appointment of constitutional appointees, for there can be no appointment of a constitutional appointee in the absence of a recommendation from the CAA. Secondly, whether the second, third and fourth respondents could have been named as "persons *directly affected by the appeal'*, in view of the fact that, if at all they were the persons directly affected by the judgment of the Constitutional Court. The Seychelles Court of Appeal Rules 2005 have not defined the words "directly affected" but rule 54(5) of the repealed Seychelles Court of Appeal Rules 1978 in stating "It shall not be necessary to serve parties not so affected" gives an indication that it means something more than a 'party concerned in the appeal'.

The facts of this case are as follows:

- The fourth appellant had been appointed as a Justice of Appeal under article 131(3) of the Constitution for a term of 5 years. According to the petition the appointment was made on 4 October 2006, but as per the fourth appellant's "updated CV" attached to his letter to the CAA dated 16 April 2011, he had been a "Judge of Appeal" since 2005. His Instrument of Appointment pertaining to this appointment was not part of the record. Neither the Attorney-General, nor counsel for the fourth appellant was able to assist the Court with the first Instrument of Appointment.

- The fourth appellant wrote to the Chairperson of the CAA the letter dated 16 April 2011, as set out below:

> Dear Sir,
>
> Renewal of Term of Office as Judge of Appeal
>
> In the absence of a written document, *I assumed that my term of office was for seven years.* However, I was recently informed that it is for five years.
>
> The years the Authority has entrusted me with the judicial office, I have made it a personal commitment of mine to contribute to the growth and development of law, justice and jurisprudence of Seychelles to the best of my ability.
>
> Accordingly, *if it pleased the Authority to entrust me with a second term of office, I pledge that my commitment and contribution will be no less if not more so* that we may complete that part of the unfinished business which we, at the Court of Appeal, set out to do as a solid team for the Judiciary and people of Seychelles.
>
> *Permit me, for that reason, to apply for renewal of my term of office for a further period* on the like trust that the Authority originally laid upon me*. I attach an up-dated CV for the purpose.*
>
> I thank you for your consideration,
>
> Faithfully Yours

S.B.Domah
Judge of Appeal

Ecls: An "Up-dated CV"
[emphasis by me]

As to whether this letter was written "during the term of office" as averred at paragraph 8 of the petition and as admitted by all the respondents before the Constitutional Court or sometime after the fourth appellant's term of office had in fact come to an end in view of his statement in his "up-dated CV" that he had been Judge Of Appeal since 2005, is not clear.

- Justice F MacGregor, President of the Court of Appeal wrote to the Chairperson of the CAA the letter dated 19 April 2011, as set out below verbatim (without making any corrections):

Dear Sir
I have received an application from Justice Domah applying for a second term of office as his contra expires *next October*.
I believe under article 131(4) of the Constitution there are exceptional circumstances in his case for the following reasons:
1. He has a very impressive CV copy already submitted to you and I believe no other judge or lawyer in Seychelles has such credentials to that extent.
2. For the *nearly four years he has worked with me* and the court, he has proven to be more then a capable team player and with the right team spirit a hard and efficient worker.
3. Our present esteem of the Court of Appeal in the country and public opinion bears this out.
4. I have sounded out also the veterans in the legal profession which does hold him in good esteem.
5. Although not a citizen he comes from a friendly sister country of Mauritius of which we have strong historical, cultural and judicial ties. He is accordingly fluent in English, French and Creole.
6. Of our judicial links 8 of the past 21 Justices of Appeal, and many Judges of the Supreme Court were from Mauritius.
7. He has a strong grounding in the French Civil Law/Code Napoleon/Code Civil which forms a large part of our fundamental laws, that all the present foreign judges in Seychelles do not have, and a sizeable amount of the lawyers locally do not have.
8. From his CV he has substantial judicial education/training qualities I want to further make use of for potential judge training in Seychelles.
9. Has credentials in judicial administration that most of our judges do not have, and again would wish to make used of it in Seychelles.
10. He has a great esteem for Seychelles often seen and experienced by me from him in international judicial forums. He has often proven supportive for Seychelles.

Yours faithfully

Justice F. MacGregor
President

Encl:
- Application
- CV
[emphasis by me]

The letter of the President of the Court of Appeal adds further confusion to the date of the first appointment of the fourth appellant.

- The CAA wrote to the President of the Republic of Seychelles the letter dated 17 June 2011, as set out below:

> Dear Mr President,
>
> In accordance with the powers conferred upon the Constitutional Appointments Authority by the Constitution of the Republic of Seychelles, the Constitutional Appointments Authority hereby *recommends for approval the extension of the contract* of Justice S. B. Domah *for an additional two year term as permitted by the Constitution (Article 131(3))* in *view of the exceptional circumstances* related to Justice Domah.
>
> Justice Domah's contribution to the good performance of the Seychelles Court of Appeal is very much appreciated by his colleagues and the public in general.
>
> Apart from his extensive qualifications and experience he is among the few to be familiar with the French Civil Law/Code Napoleon which largely serves as the basis of our Civil Code.
>
> Copies of Justice Domah's letter referring to above and that of the President of the Court of Appeal's recommendations are enclosed.
>
> Yours faithfully
> The letter had been signed by the 2nd,3rd and 4th Respondents.
> [emphasis placed by me]

- On 5 September 2011, the first appellant appointed the fourth appellant as Justice of Appeal for a period of five years commencing on 4 October 2011. The Instrument of Appointment is to the following effect:

> WHEREAS you, SATABHOOSHUN GUPT DOMAH, have been appointed as a JUSTICE OF APPEAL of the Seychelles Court of Appeal under Article 123 of the Constitution, and the said appointment will expire on the 3rd October 2011.
>
> AND WHEREAS you are not a citizen of Seychelles,
>
> AND WHEREAS further the Constitutional Appointments Authority has recommended to me that there are exceptional circumstances to appoint you as a Justice of Appeal *for a second term of office,*

> NOW THEREFORE. In exercise of the powers conferred on the President under Article 131(4) of the Constitution, I, JAMES ALIX MICHEL, PRESIDENT, appoint you
>
> SATYABHOOSHUN GUPT DOMAH
>
> to be a JUSTICE OF APPEAL for a period of five years commencing on 4th October 2011.

- As required of him under article 135 of the Constitution before entering office, the fourth appellant had taken and subscribed the Oath of Allegiance and the Judicial Oath for the due performance of the functions of the office of Justice of Appeal on the very date of his appointment, namely 5 September 2011 before the first appellant.

The only issue to be determined in this appeal is: was there a recommendation by the CAA to the first appellant, by its letter dated 17 June 2011 to appoint the fourth appellant who had already completed one term of office, for a second term of office, in exceptional circumstances in accordance with article 131(4) of the Constitution. This only calls for an interpretation of the contents of the letter dated 17 June 2011 and not an interpretation of the Constitution. The letter of 17 June 2011 set out at paragraph 9 above states that the CAA **"***recommends for approval the extension of the contract* of the fourth appellant *for an additional* two year term *as permitted by the Constitution (Article 131(3))* in *view of the exceptional circumstances*" related to the fourth appellant. The letter certainly does not make reference to article 131(4) of the Constitution, the only article in the Constitution which deals with an appointment for a second term of office. The letter does not make reference to "a second term of office" but rather an "an extension of the 'contract' for an additional two year term". There can be no 'extension to the contract' if the CAA believed, as argued by the appellants, that the fourth appellant's term had expired. It becomes helpful here to refer to the pleadings of the petitioner and the respondents before the Constitutional Court on this issue.

Paragraph 9 of the amended petition is to the effect:

> By a written document dated 17 June 2011, the second, third and fourth respondents acting in their capacities as members of the CAA recommended to the first respondent [first appellant to this appeal], for the first respondent's approval to extend the contract of the fifth respondent [fourth appellant to this appeal] for an additional two year term or to appoint the fifth respondent for a second term of office as Justice of the Court of Appeal by virtue of article 131(4) of the Constitution "in view of the exceptional circumstances related to Justice Domah……..

The first, second, third and fourth appellants have admitted this averment. It is clear on a reading of the letter dated 17 June 2011 there is an ambiguity which the second, third and fourth respondents alone, namely the authors of the letter, could have explained. Paragraph 5 of the reply to the amended petition, dated 18 November 2011, on behalf of the second, third and fourth respondents, in response to paragraph 9 of the said amended petition states:

> Paragraph 9 of the petition is admitted 'to the extent only' that the respondents recommended (to the first respondent) [first appellant to this appeal] "for approval the extension of the contract of Justice S.B. Domah in view of the exceptional circumstances related to Justice Domah" but deny and put the petitioner to proof of the rest of the averment contained in that paragraph and the corresponding part of the affidavit.

There was no affidavit attached or any reference to any affidavit in the reply to the amended petition dated 18 November 2011, on behalf of the second, third and fourth respondents.

Thus there is a clear denial by the second, third and fourth respondents in their reply to the amended petition that they recommended to appoint the fourth appellant for a second term of office, as Justice of the Court of Appeal by virtue of article 131(4) of the Constitution "in view of the exceptional circumstances" related to him. It appears that the CAA in their mistaken belief thought that an extension of the first contract of the fourth appellant was possible under article 131(3), because the fourth appellant's term of appointment had been for five years and the extension of two years was being recommended, to add up to the maximum period of seven years for which a non-Seychellois/e could be appointed under article 131(3), and that, in view of the exceptional circumstances related to the fourth appellant. That is why they used words such as: "for an *additional* two year term *as permitted* by the *Constitution (Article 131(3))"* and "*extension* of the contract." There is no mention of the words "additional term" in article 131(4). The fourth appellant in his sixth ground of appeal has submitted on the same lines when he said: "even if the CAA might have been under the mistaken belief that it had to be a two year *extension in order to add up to seven years under article 131(3).*" This is the only reasonable interpretation that could be placed on the letter dated 17 June 2011 in the absence of any further clarification of its contents by the second, third and fourth respondents at the hearing of the petition before the Constitutional Court. It is therefore clear that there was no recommendation from the second, third and fourth respondents to the first appellant under article 131(4).

In view of the onerous task placed on the CAA by the Constitution under article 139 read with article 131(4) of the Constitution, an appointment under article 131(4) can be made only where there has been a clear recommendation to the President under article 131(4). Article 139 reads –

> (1) There shall be a Constitutional Appointments Authority *which shall perform the functions conferred upon it* by this Constitution and any other law.
> (2) Subject to this Constitution, the Constitutional Appointments Authority shall not, in the performance of its functions, be subject to the direction or control of any person or authority.

The punctuation in article 131(4) referred to at paragraph 3 above after the word 'may' and before the word 'appoint' suggests that the decision pertaining to the existence of exceptional circumstances is a function conferred on the CAA by the Constitution. This is confirmed by the wording in the Instrument of Appointment which states: "AND WHEREAS further the Constitutional Appointments Authority has recommended to me that there are exceptional circumstances to appoint you as a Justice of Appeal for a second term of office,..". In this case, as stated earlier, there

was no recommendation from the second, third and fourth respondents to the first appellant under article 131(4). The recommendation was as stated earlier for an extension of the fourth appellant's contract for an additional two year term under article 131(3). It is not possible for one to argue that the CAA was not empowered to make such a recommendation and therefore it should be taken as a recommendation under article 131(4). Also it is inconceivable for the appellants to argue that merely because of the use of the words "in view of the exceptional circumstances related to Justice Domah", the letter of 17 June 2011 by the CAA to the first appellant should be treated as a recommendation under article 131(4) of the Constitution. The first appellant should necessarily have been advised to check with the CAA as to what their recommendation was, in view of its obvious ambiguity rather than be misadvised to make an appointment under article 131(4), based on a wrong interpretation of the contents of the letter dated 17 June 2011 of his advisers. I therefore dismiss grounds 6 and 7 of the appeal of the appellants.

In view of my holding that there was no recommendation from the CAA under 131(4) there is no need to consider what constitutes 'exceptional circumstances' under article 131(4) or whether there were such circumstances in the reappointment of the fourth appellant to a second term. I therefore dismiss grounds 4 and 5 of the appeal of the appellants.

Grounds 2 and 3 of the appeal of both appellants and ground 8 of the appeal of the fourth appellant do not arise for consideration in view of my finding that there was no recommendation from the CAA under article 131(4) of the Constitution for the first appellant to make a valid appointment under article 123 of the Constitution. Thus issues such as when a reappointment under article 131(4) could be made, whether it can be made before the expiry of the first term or necessarily after the expiry of the first term strictly do not arise for consideration in this case, although I have decided to deal with them. I wish to state that it was totally inappropriate for the fourth appellant to have applied for a renewal of his term of office as a Justice of Appeal on 16 April 2011 when he was yet to sit as a Justice of Appeal in the April (April session was from 18 to 29 April) and August sessions of 2011; for the President of the Court of Appeal by his letter dated 19 April 2011 to have made an unsolicited recommendation in the manner he had done; and for the CAA to have been guided by it as evidenced from their letter of 17 June 2011 to the first appellant. I am of the view that in the case of a person appointed under article 131(3), the CAA should not expect of him/her to, and the person appointed should not make an application for re-appointment in view of the wording of articles 131(3) and 131(4). There is also no need to gloat over one's qualifications and competence at this stage, as they would have certainly been considered at the time of his appointment, in view of article 122 of the Constitution which reads –

> A person is qualified for appointment as, or to discharge the functions of, ……..a Justice of Appeal if, in the opinion of the Constitutional Appointments Authority, the person is suitably qualified in law and can effectively, competently and impartially discharge the functions of the office of Justice of Appeal under this Constitution.

I also dismiss the first, second and third appellant's contention under grounds 2 and 3 of the appeal and that of the fourth appellant under ground 8 of his appeal, that "a

reappointment to be 'consecutive' should necessarily be made before the expiry of the term", in view of the clear provisions of articles 131(4) and 131(1)(e). I have referred to article 131(4) at paragraph 3 above. Article 131(1)(e) states:

> ….a person holding office of Justice of Appeal…….*shall vacate that office* in the case of a person who is not a citizen of Seychelles, *at the end of the term for which the person was appointed.* [emphasis by me]

The appellants are labouring under the mistaken notion that for the second appointment to be 'consecutive', it need necessarily commence on the day after the first appointment comes to an end, like that of a consecutive jail term, where a prisoner cannot be set free at the end of the first sentence he/she serves. I am of the view that if the recommendation for the appointment and the appointment is made a few months after the expiry of the first term, the appointment would yet be consecutive. The need to decide whether 'exceptional circumstances' exists arises only when the first term of office of a Justice of Appeal or Judge has come to an end, for circumstances can always keep on changing. If we are to agree with the appellants, then there is nothing to prevent a recommendation going out from the CAA to the President even one or two years before the expiry of the first term of the incumbent, thus possibly compromising the independence of the Judiciary, which the Constitution had sought to prevent, and making a mockery of articles 131(4) and 131(1)(e). The appellants have not suggested a limitation of the period during which a recommendation under article 131(4) may be made prior to the expiry of the first contract by the CAA and this is because it would amount to adding words to the unambiguous wording in article 131(4) of the Constitution. In this case the recommendation by the CAA was made 3 1/2 months before the expiry of the first term of the fourth appellant.

In the Seychelles context, where the Court of Appeal sessions are held during the months of April, August and December, there was no need to rush through an appointment on 5 September 2011 to take effect as from 4 October 2011, since the next Court of Appeal session commenced only on 28 November 2011. The CAA would not have breached the appellants' argument as to the need for a consecutive appointment if the recommendation had been made after the expiry of the fourth appellant's first term of office, namely 3 October 2011 and the appointment made any time before 28 November 2011. There could not have been a change to the 'exceptional circumstances' as set out in the letter of the CAA dated 17 June 2011 for the extension of the contract of the fourth appellant, referred to at paragraph 9 above, between 17 June 2011 and 4 October 2011.

In order to understand the full implications of article 131(4) of the Constitution it has to be read in conjunction with articles 131(3) and 131(1)(d) and (e). Article 131(1)(d) states:

> Subject to article 134, a person holding office of Justice of Appeal or Judge shall vacate that office in the case of a person who is a citizen of Seychelles, on attaining the age of seventy years.

Article 131(1)(e) states:

> Subject to article 34, a person holding office of Justice of Appeal or Judge shall vacate that office in the case of a person who is not a citizen of Seychelles, at the end of the term for which the person was appointed.

Article 134 speaks of removal of Justices of Appeal and Judges for inability to perform functions of the office, arising from infirmity of body or mind or from any other cause, or for misbehavior. These are the only grounds upon which a Justice of Appeal or Judge once appointed can be removed from office during his or her term of office. Security of tenure, a fixed term of office and the inability to influence Judges and Justices of Appeal by offers of extensions of contract or further appointments, among other things is a sine qua non for ensuring the independence of the Judiciary. When it comes to expatriate Justices of Appeal and Judges, the norm as provided in article 131(3) is that their appointments shall be for 'only one term of office' of not more than seven years. The only exception to this rule is when an appointment is made for a second term of office, where there are exceptional circumstances. The CAA in making a recommendation for a second term when a Justice of Appeal or Judge is not yet holding office may amount to compromising the independence of the Judiciary, which the Constitution makes every effort to prevent. It is for this reason that I take the view that a recommendation for a second term of office under article 131(4) should be made only after the Justice of Appeal or Judge has already completed his first term or at least completed the last session of the Court of Appeal before the expiry of his term and only in exceptional circumstances. I am also of the view that once the period of the term is determined in an instrument of appointment there can be no extensions to add up to the seven years. Thus the appointment may be for a period of one year or less or for seven years, and at the end of that period a person holding office of Justice of Appeal or Judge 'shall vacate that office'.

Ground 1 of the appeal of both appellants is to the effect that the petitioner had no locus standi to file the petition under article 130(1) of the Constitution. The appellants as respondents before the Constitutional Court had not in their answer to the petition raised the issue of lack of locus standi of the petitioner as an objection to the maintenance of the petition nor argued it before the Constitutional Court. Consequently we do not have the benefit of the decision on this matter from the Constitutional Court, although the Constitutional Court had alluded to it in their judgment when they said:

> …at times, some of the citizens, who have litigations in the superior courts, particularly against the State, still feel insecure and complain with trepidation that their Constitutional right to have the litigations adjudicated by an impartial and independent Court is jeopardized, especially, when judicial appointments are not made by the CAA in accordance with the provisions and the spirit of the Constitution. In the instant case, the petitioner, who undisputedly, has a number of pending litigations against the State in the superior courts, has now come before this Court seeking a Constitutional redress for his grievance. He alleges that a recent reappointment of one of the sitting Justices of Appeal- Dr Satyabhooshun Gupt Domah – to the Seychelles Court of Appeal (hereinafter called the Court of Appeal) is unconstitutional as it has contravened article 131(4) of the Constitution as well as article 131(3) as read with article 131(4),

> article 1 and article 119(2) of the Constitution and particularly, it affects or is likely to affect his interests.

In my view locus standi of the petitioner cannot be raised for the first time in this appeal, especially in a case like this, as this could have been determined as a threshold issue before the Constitutional Court since it did not need a full consideration of the merits of the complaint.

I am however of the view that as averred at paragraph 14 of the petition, the petitioner as a citizen of Seychelles has a fundamental duty to uphold and defend the Constitution and has a right to claim that the appointment of the fourth appellant contravenes the Constitution. Article 40 of the Constitution in setting out the Fundamental Duties provides:

> It shall be the duty of every citizen to uphold and defend the Constitution and to strive towards the fulfilment of the aspirations contained in the Preamble of this Constitution.

An independent judiciary is the sine qua non for upholding the rule of law and developing a democratic society; a pledge the people of Seychelles have made in the Preamble of the Constitution. Article 119(2) has specifically provided that the Judiciary shall be independent. It is to be noted that the Preamble to the Constitution provides that "all powers of Government spring from the will of the people". This in my view gives a right to any citizen to challenge a constitutional appointment under article 130(1) of the Constitution, which he or she believes contravenes the Constitution. Article 130(1) of the Constitution states:

> A person who alleges that any provisions of this Constitution, ….., has been contravened and that the person's interest is being or is likely to be affected by the contravention may, subject to this article, apply to the Constitutional Court for redress.

The interest of any citizen is likely to be affected when an unconstitutional appointment is made to the Judiciary, for complying with the constitutional provisions in making appointments to the Judiciary is a sine qua non in ensuring the independence of the Judiciary. In this case the appellants have admitted in ground 1 of the appeal that the petitioner's interest "would be a vested…interest," thus bringing his application completely within article 130(1). A vested interest can be both legitimate and lawful. I am of the view that there is no evidence from which one could conclude that the petitioner "smacks with personal vendetta and for personal gain and can be nothing in the interest of the public"(sic) as argued by the first, second and third appellants in their heads of arguments.

I am surprised to find the fourth appellant in his heads of argument arguing on the basis as if the petition is one filed under article 46(1), when in his grounds of appeal he specifically acknowledges that it is one filed under article 130(1). Nowhere in the petition does the petitioner allege that a provision of the Seychellois Charter of Fundamental Human Rights and Freedoms has been or is likely to be contravened in relation to him which would necessitate treating this application as one brought under article 46(1). The petitioner at paragraph 17 of his affidavit in support of his averments at paragraph 14 of the petition has stated:

> I aver that as a citizen of Seychelles I have a fundamental duty to uphold and defend the Constitution and as I verily believe that the appointment of the fifth respondent contravened the Constitution I have a constitutional duty, right and obligation to apply to this Court for redress.

He had gone on to state: "…that the contravention…. has affected my interest and/or is likely to affect my interest as a party to pending or any future judicial or legal proceedings."

I am of the view that it is necessary to understand the basis under which applications are made to the Constitutional Court under articles 46(1) and 130(1) of the Constitution. This necessitates an examination of the two articles.

Article 46(1) states:

> A person who claims that a provision of this Charter has been or is likely to be contravened in relation to the person by any law, act or omission may, subject to this article, apply to the Constitutional Court for redress.

Article 130(1) states:

> A person who alleges that any provision of this Constitution, other than a provision of chapter III, has been contravened 'and' that the person's interest is being or is likely to be affected by contravention may, subject to this article, apply to the Constitutional Court for redress.(emphasis by me)

In an application under article 46(1) in view of the use of the words "contravened in relation to the person", a direct link must be shown between the contravention and its effect on the person making the application. In other words the contravention should have been in relation to the person.

In an application under article 130(1) the test is not that stringent. All that one has to show is that there has been a contravention and that the person's interest is being or is likely to be affected by such contravention. Here the contravention need not be directly linked to its effect on the person making the application but something that flows out of it or ancillary to it but has to be proved in order to succeed in an application.

An applicant can succeed under article 130(1) even when the person's interest is likely to be affected. Under 46(1) one cannot succeed on the basis of a likelihood of his interests being affected, there need necessarily be a contravention in relation to the person. The reason for this differentiation is that 46(1) deals with contraventions of the Seychellois Charter of Fundamental Human Rights and Freedoms which sets out specifically the individual rights of persons which are personal to him or her. This explains why the words "in relation to the person" have been used.

Article 130(1), on the other hand, is more general and deals with contraventions of the Constitution which may affect everyone. It is because of this we see another difference between articles 46(1) and 130(1) and that is an application under article 130(1) can be made only when there has been a contravention of the Constitution,

whereas under article 46(1) an application can be made even when there is likely to be a contravention of the Constitution. A person defending his/her individual rights cannot wait until there is a contravention of the Fundamental Rights Charter in relation to him or her. The person has to make a move on the likelihood of a contravention because the contravention will affect him or her directly.

In *Paul Chow v Hendricks Gappy & Others* SCA 10 of 2007 a bench of this Court comprising of Bwana Acting P, Hodoul and Domah JJ in interpreting article 130(1) of the Constitution said:

> A Constitutional Court……. sits between the power of the people and the authority of the organized government *to ensure that public affairs are conducted within the frame-work tacitly agreed upon and enshrined in the Charter.* It is the temple and the throne to which the citizen – pecunious or impecunious – rushes to with a view to ensuring that the people's power delegated to authority are properly used and not abused. Its prime purpose is to make the Constitution work.
> Basically, what locus standi means is the right of a litigant to act or be heard before the courts. Originating in private law, it has become "one of the most amorphous concepts in the entire domain of public law". The right of a citizen to act or be heard before the courts could exist as a private right as well as a public right. Although our Constitution does not use the term "locus standi", it is a concept which encapsulates the enabling provisions of articles 46 or 130. But if it is being used to restrict or disable the provisions, it is being improperly used…. [emphasis by me]

I have no hesitation therefore in dismissing ground 1 of the appeal of the appellants.

I was particularly disturbed about a statement made in the heads of argument filed before this Court on behalf of the fourth appellant, Dr Satyabhooshun Gupt Domah in relation to the locus standi of the petitioner –

> And, if he has been able to find his way up to the appellate stage, one would not err in one's conclusion that *the Constitutional Court gave an impermissible leeway at public expense to an applicant who provided a platform to the judges to launch into an unfair attack on the CAA.*

This statement was made after the statement: "If anybody was a potential candidate, it was the Judges of the Constitutional Court before whom VD brought the case." The statement is highly derogatory of the Constitutional Court judges who heard this case and a personal attack on them without a basis. I believe that this is a totally unfair, unwarranted and improper statement to be made by Dr Satyabhooshun Gupt Domah, and not in accordance with the sentiments expressed about him by Justice F MacGregor, President of the Court of Appeal in his letter to the Chairperson of the CAA on 19 April 2011, as referred to at point 10 in paragraph 9 above. This statement is also contrary to the views expressed by Dr S G Domah along with Justices Bwana and Hodoul about the Constitutional Court in the case of *Paul Chow v Hendricks Gappy & Others* SCA 10 of 2007, as referred to in paragraph 26 above. It must be emphasized as stated at paragraph 8 above that the second, third and fourth respondents, the three members of the CAA, have not appealed against the judgment of the Constitutional Court which declared their recommendation of the fourth appellant for appointment as a Justice of Appeal to the first appellant as ultra

vires and unconstitutional. When the statement was drawn to the attention of the Attorney-General, counsel for the first, second and third appellants, he submitted it was totally inappropriate and counsel for the fourth appellant sought to withdraw the statement. Senior counsel should not be permitted to make baseless and derogatory statements about judges in papers filed before this Court and seek to withdraw them, when their attention is drawn to such statements by Court. In the case of *Solamalay v The King* (1910) MR 36 it was held that the appellant was bound by his attorney's acts. That judgment was confirmed in the case of *Seecharan v R* (1934) MR 4 and *Ransley v Soobratty* (1952) MR 206. Litigants and counsel representing them should refrain from making such derogatory statements against members of the Judiciary and impute motives pertaining to their decisions, especially when there is no basis whatsoever.

I would therefore dismiss the appeal of all the appellants and order costs against the second and fourth appellants to the petitioner.

SERRET v ATTORNEY-GENERAL

MacGregor P, Fernando, Twomey JJ
31 August 2012 Court of Appeal 9/2011

Contempt of court – Constitution – Right to a fair hearing - Procedure – Natural justice

The appellant appealed against her conviction and sentence of 7 days imprisonment for contempt of court.

JUDGMENT Appeal allowed.

HELD

1 Generally the purpose of the contempt power is not to uphold the reputation of a judge but to maintain the dignity and vindicate the authority of the court so that it can function.
2 Under art 19 of the Constitution every person charged with an offence has the right to a fair hearing by an impartial court.
3 No person should be punished for contempt of court unless the specific offence charged is distinctly stated and an opportunity of answering it given to him.
4 A judge should refer the matter to another judge or the Attorney-General if the judge prematurely forms a view of guilt.
5 The absence of a record of a finding of guilt or conviction is a defect that cannot be cured.
6 There should be a time for reflection when deciding whether to imprison a person for contempt of court. The judge should consider whether the time for reflection should extend overnight.
7 The following procedural guidelines should be followed where a judge considers summarily punishing a contemnor –
    a. The immediate arrest and detention of the offender;
    b. Telling the offender what the contempt is, and recording the substance of the charge;
    c. Giving a chance to apologise;
    d. Affording the opportunity of being advised and represented by counsel and making any necessary order for legal aid for that purpose;
    e. Granting any adjournment that may be required;
    f. Call upon the contemnor to show cause why he or she should not be convicted;
    g. Give the contemnor an opportunity to reply;
    h. Entertaining counsel's submission; and
    i. If satisfied that punishment is merited, imposing it, having given adequate time for reflection.
8 In line with art 19 of the Constitution, summary procedure should not be invoked to deal with contempt of court unless the ends of justice require such means.

Legislation
Constitution, art 19
Criminal Procedure Code, s 181(1)

Cases
Ahkon v Republic (1977) SLR 43

Foreign Cases
Appuhamy v Queen [1963] AC 474
Balough v Crown Court at St Albans [1975] QB 73
DPP v Channel Four Television Co Ltd [1993] 2 All ER 517
R v Commissioner of Police [1968] 2 QB 150
R v Huggins (2007) 2 Cr App R 8 (CA)
R v Moran (1985) 81 Cr App R 51
R v Schot and Barclay (1997) 2 Cr App R 383 (CA)
Wilkinson v S [2003] 1 WLR 1254 (CA)

Appellant appeared in person
C Jayaraj, Principal State Counsel as amicus curiae

Judgment delivered on 31 August 2012

Before MacGregor P, Fernando, Twomey JJ

FERNANDO J:

The appellant appeals against her conviction by the Supreme Court for contempt of court and the sentence of 7 days imprisonment imposed on her on 4 July 2011 by the trial judge who heard an application filed by her to stay the execution of the judgment given by the same trial judge, in respect of matrimonial property in Divorce case No 152 of 2006, where she was the petitioner.

She seeks by way of relief to set aside the sentence of imprisonment passed on her on 4 of July 2011.

The grounds of appeal are:

(1) The Honourable Judge erred in law in his finding of a contempt of court as against the appellant, ie that the evidence, facts and circumstances did not divulge or lead to such a finding in law.
(2) The Honourable Judge erred in law in failing to follow appropriate procedures, legal principles, the rules of natural justice and the appellant's fundamental and constitutional rights.
(3) The Honourable Judge erred in principle in sentencing the appellant to 7 days imprisonment on the facts and circumstances.

When the application for a stay of execution of the judgment of the Supreme Court came up before it on 16 June 2011 it had been adjourned to 1 July for filing of defence.

The application for a stay of execution of the judgment had thereafter come up before the Supreme Court on 4 July 2011. It appears from a discussion between the trial judge and counsel for the respondent to the application that the file was not before the Court although the case was cause listed for 1 July 2011. Presumably it was for this reason that the case had come up before the Court on 4 July 2011.

When it came up before the Court, the trial judge had inquired as to what the case was about. After a few queries by the trial judge in regard to the documents filed in the case the trial judge had remarked: "*We must have this because that lady insulted me all the time*." [emphasis by us]

We have thought it necessary to record the proceedings before the Court on 4 July, verbatim, from the time the trial judge made the remark referred to above.

> Court: Do you know that and it is a contempt of court.
> Mr Gabriel (Counsel, who appeared for the appellant on 4 July before the Supreme Court): Yes.
> Court: *I will send her to prison you know that.* She insulted me right here before the court. [emphasis by us]
> Mr Gabriel: Who?
> Court: Your client.
> Mr Gabriel: I'am sorry I was not here.
> Court: *You must watch me carefully. I'll send her in and you will not be able to defend her*, tell her. [emphasis by us]
> Mr Gabriel: I apologize as I was not aware.
> Court: *Tell her right now if the file was there I was going to send her for 15 days contempt of court insulting the Judge*. [emphasis by us]
> Mr Gabriel: I will get her to apologize.
> Court to Petitioner
> Q: Right, then I'm not a joker.
> A: Ask him when.
> Q. *When I say I say.* [emphasis by us]
> A: What has he to do with all that?
> Mr Gabriel: I will speak to her my Lord.
> Court to Petitioner
> Q: *You shut up and I will send you right now.* You have to respect me and respect the court. [emphasis by us]
> A: I always respect you. I always.
> Court to Petitioner
> Q; By insulting me.
> A: In the court. I have a right.
> Court to Petitioner
> Q: You stand up and come here.
> A: OK.
> Court: Mr Gabriel warns (sic) your client I'm taking her now for contempt of court and for insulting me in court.
> Mr Gabriel: Mrs Serret please apologise to the court.
> A: *I have not insulted him.* [emphasis by us]
> Court to Petitioner
> Q: *Are you apologizing or not?* [emphasis by us]
> A: *No I have not insulted him so I cannot apologize to him.* [emphasis by us]
> Court order: Madam for contempt of court and for refusing to apologize to me for the purging of your contempt I send you for 7 days to prison for contempt of court.
> A: No I will not apologize even if you will send me to prison. *I can't apologize something which I have not done* even though you're a Judge. [emphasis by us]
> Court: Right now in court she is arguing with me.
> A: You can judge me if you want.
> Court: Case adjourned to 18 July 2011 at 2.00pm.

The proceedings do not disclose the date, time or the words used by the appellant to insult the trial judge nor is there any evidence or affidavit to that effect. The appellant has denied that she insulted the trial judge. It is difficult to conclude from the statement made by the trial judge: "Right, then I'm not a joker" that it was a retort to what the contemnor possibly said, but taken in conjunction with the trial judge's statement "that lady insulted me all the time", gives an indication that the statement made by the contemnor, if at all, is a personal insult hurled at the Judge. Generally the purpose of contempt power is used not to uphold the reputation of a judge but to maintain the dignity and vindicate the authority of the court so that it could function. In *Balough v Crown Court at St Albans* [1975] QB 373 the defendant told the Judge in Court "You are a humourless automaton. Why don't you self-destruct?" Lord Denning said that such insults are best treated with disdain, and took no action. In the case of *R v Commissioner of Police* [1968] 2 QB 150 Lord Denning said:

> Let me say at once that we will never use this jurisdiction as a means to uphold our own dignity. That must rest on surer foundations. Nor will we use it to suppress those who speak against us……

In view of the absence of proceedings in respect of the date, time or the words used by the appellant to insult the trial judge, we are in a difficulty in making a determination on the first ground of appeal. However this appeal can be determined on the basis of the second and third grounds of appeal.

The proceedings of 4 July 2011 as set out at paragraph 8 above leave no doubt in our minds that the appellant has to necessarily succeed in her second and third grounds of appeal. Under our criminal justice system and as required by article 19 of the Constitution, every person charged with an offence has the right to a fair hearing by an impartial court. The Constitution states that such a person is innocent until the person is proved or has pleaded guilty; shall be informed in detail of the nature of the offence; given adequate time and facilities to prepare a defence to the charge; has a right to examine, in person or by legal practitioner, the witnesses called to testify against her; and shall not be compelled to confess guilt.

Section 181(1) of the Criminal Procedure Code dealing with the procedure in trials before the Supreme Court in its summary jurisdiction states:

> The substance of the charge or complaint shall be stated to the accused person by the court, and shall be asked whether he admits or denies the truth of the charge.

It has been held by the East African Court of Appeal that the arraignment of an accused is not complete until he or she has pleaded. In the Sri Lankan case of *Daniel Appuhamy v Queen* [1963] AC 474, the Privy Council stated that the rule that no person shall be punished for contempt of court, which is a criminal offence, unless the specific offence charged is distinctly stated and an opportunity of answering it given to him, applies in relation to summary punishment for giving false evidence. Although there is no necessity to provide the contemnor with a written charge sheet, it is incumbent upon the court to inform the contemnor in detail of the nature of the contempt committed. We do not see that this has been done in this case.

In the case of *Wilkinson v S* [2003] 1 WLR 1254 (CA) (Civ Div) it was said that in many cases, where there had perforce to be delay between the alleged contempt and the summary trial, it would be wise to refer the matter to another judge if only to forestall arguments as to apparent bias. It is clear from the proceedings at paragraph 8 above that the alleged insult had been prior to 4 July, the day the appellant was summarily dealt with for contempt.

The question by Court to the appellant: "Are you apologizing or not?" in our view is more in the nature of a compulsion to the appellant by Court to confess guilt rather than giving her an opportunity to apologize. In *DPP v Channel Four Television Co Ltd* [1993] 2 All ER 517 (DC) and *R v Schot and Barclay* (1997) 2 Cr App R 383 (CA) it was held that a judge should refer the matter to another judge or to the Attorney - General if the judge prematurely expresses a view of guilt. A perusal of the proceedings of 4 July makes it clear that not only was the trial judge biased against the contemnor but had already decided upon her guilt.

We also do not find on record a finding of guilt nor conviction. It was held in the case of *Ahkon v Republic* (1977) SLR 43 that such a defect is fatal and cannot be cured.

In the case of *R V Moran* (1985) 81 Cr App R 51 it was held that a decision to imprison a person for contempt should never be taken too quickly and that there should always be time for reflection as to what is the best course to take. The judge should also consider whether that time for reflection should not extend to a different day because overnight thoughts are sometimes better than thoughts on the spur of the moment. It was also held in *R v Huggins* (2007) 2 Cr App R 8 (CA) that the judge should consider whether that time for reflection should extend overnight.

The proceedings of 4 July as set out at paragraph 8 above make it clear that the trial judge had erred in law in failing to follow appropriate procedures, the rules of natural justice and the appellant's fundamental human rights that are enshrined and entrenched in the Constitution, resulting in a serious miscarriage of justice.

We therefore do not hesitate to allow the appeal, quash the conviction and grant the relief as prayed for in the notice of appeal.

As guidelines that may be followed in the future in cases of this nature we wish to state that where a judge considers summarily punishing the alleged contemnor, certain procedures should ordinarily be followed. These are particularly important when the contemnor is at risk of committal to prison, and may in appropriate cases include:

(i) the immediate arrest and detention of the offender;
(ii) telling the offender what the contempt is, and recording the substance of the charge;
(iii) giving a chance to apologize;
(iv) affording the opportunity of being advised and represented by counsel and making any necessary order for legal aid for that purpose,
(v) granting any adjournment that may be required;
(vi) call upon the contemnor to show cause why he should not be convicted;
(vii) give the contemnor an opportunity to reply;

(viii) entertaining counsel's submission; and,
(ix) if satisfied that punishment is merited, imposing it, having given adequate time for reflection.

It must however be stated that 'summary procedure' to deal with contempt of court as stated in *Balough v St Alban's Crown Court* [1975] QB 73 at 90 -

> …must never be invoked unless the ends of justice really require such drastic means: it appears to be rough justice; it is contrary to natural justice; and it can only be justified if nothing else will do.

This is in line with our 'right to a fair hearing' clause enshrined and entrenched in article 19 of our Constitution.

SOPHA v REPUBLIC

Fernando, Twomey, Msoffe JJ
31 August 2012 Court of Appeal 27/2010

Murder – Common intention – Malice aforethought - Misdirection

This is an appeal against conviction for murder. The appellant was charged with murder under s 193 of the Penal Code on the basis of s 23 of the Penal Code (common intention). The offenders went to the house of the deceased believing he was not home, intending to steal from him. When the deceased woke up, they tied him up and gagged him. There was a struggle and the deceased fell off the bed and hit his head on the floor. The other offender took a brick and hit the deceased on the head while the appellant held the deceased's hands behind his back. They continued searching the house and left.

JUDGMENT Appeal dismissed.

HELD

1 In order to establish malice aforethought and seek a conviction for murder it must be proved beyond reasonable doubt that the perpetrator of the unlawful act causing death had intended to cause the death or do grievous harm to a person, or had the knowledge that the unlawful act or omission, which resulted in death, would probably cause death or grievous harm. The requisite intention could be formed and the knowledge gathered on the spur of the moment.
2 Section 196 of the Penal Code recognises the principle of 'transferred intention or knowledge': The person killed need not necessarily have been the person the perpetrator set out to kill.
3 Section 196 stipulates that when liability arises on the basis of the perpetrator's knowledge, that person's wish that death or grievous harm may not be caused, or his indifference to it, is of no relevance.
4 In the absence of malice aforethought a person may be convicted of the offence of manslaughter (involuntary manslaughter) provided there is proof of an unlawful and intentional act that resulted in death.
5 A person who was suffering from diminished responsibility (s196A Penal Code) or acting under provocation (s 198 Penal Code) at the time of the killing cannot be convicted of murder, but can be convicted of manslaughter.
6 Under s 23 of the Penal Code a person can be liable for a secondary offence if they have knowledge that the secondary act is a probable consequence of the intended first act. Intention to commit the secondary offence is not required.
7 Knowledge of probable consequences is a mental element to be proved by the prosecution. It is an objective test.
8 Murder can include the failure to take measures that lay within the accused's power to counteract the danger created, such as calling for medical assistance or summoning help.
9 A trial judge will have erred in the direction by not leaving open to the jury to consider the alternative verdict of manslaughter where the charge is murder and where it is not a case where the alternative offence is so trifling or insubstantial in comparison to the offence with which the accused has been charged, that the

judge thinks it best not to distract the jury by asking them to consider something which is remote from the real point of the case.

10 A misdirection as to law will lead to the quashing of a conviction only if that misdirection causes the conviction to be unsafe.

Legislation
Constitution, arts 19(2)(a), 19(10)(b)
Court of Appeal Rules, rule 31(5)
Criminal Procedure Code, ss 114(a)(iv),(b)(i), 129(1), 192-279, 344
Evidence Act, s 12
Penal Code, ss 14, 23, 192, 193, 196

Cases
Kilindo and Payet v Republic (2011) SLR 283

Foreign Cases
Bakari v Republic (1992) TLR 10
Donoghue (1987) Cr App R 267
Edwards (1983) 77 Cr App R 5
Gumbo v Republic (2006) TLR 50
Olenja v Republic (1973) EA 546
Petero Sentali s/o Lemandra v Reginam (1953) 20 EACA 20
R v Evans (Gemma) [2009] EWCA Crim 650
R v Miller [1983] 2 AC 161 (HL)
R v Sheaf (1925) 19 Cr App R 46
Singh (Gurphal) [1999] Crim LR 582
Willoughby [2004] EWCA Crim 3365

Foreign Legislation
Criminal Appeal Act (UK), s 2(1)
Criminal Procedure Act (Tanzania), ss 192, 243-263
Penal Code (Tanzania), s 200
Penal Code (Uganda), s 186

K Domingue for the appellant
D Esparon, Principal State Counsel for the respondent

Judgment delivered on 31 August 2012

Before Fernando, Twomey, Msoffe JJ

FERNANDO J:

This is an appeal against the conviction of the appellant for the offence of murder. As per the particulars of offence the appellant together with Maxime Tirant on 5 June 2009 at Bel Ombre, Mahe, with common intention murdered France Henriette. Maxime Tirant was deceased at the time of the filing of the indictment, although no mention of it is made in the charge sheet.

The appellant has filed the following grounds of appeal:

> (1) The verdict is unsafe, unsound and unreasonable in that it is against the evidence adduced.
> (2) The trial Judge erred in admitting the first statement of the appellant.
> (3) The trial Judge erred in directing the jury not to return a verdict of manslaughter.

This was a case where the appellant had, at the trial, given sworn evidence from the witness stand. According to the appellant's evidence, on 5 June 2009, on a pre-arranged plan to steal at the house of the deceased, he along with Maxim Tirant came in a vehicle and embarked near the house of the deceased. They had been informed that the deceased was not at home and was at a function at the District Community Center in Belombre. Throughout his evidence it had been the appellant's position that he and Maxim did not know until they went into the room in which the deceased was sleeping that the deceased was in the house. Arriving near the house of the deceased they had sat under a bridge for about one and a half hours and smoked drugs and cigarettes. Thereafter they had entered the house of the deceased around 11 pm, by removing three louver blades. The appellant had been armed with a machete and Tirant with a small knife. Tirant had stolen some money from the kitchen. The appellant had seen the deceased sleeping on his bed and reported it to Tirant. They had agreed to tie up the deceased. When the appellant and Tirant were searching in the room the deceased had woken up due to the noise.

In the words of the appellant:

> When he woke up I jumped on the bed and hold his hands at the back and I told Maxim to place his hands on the mouth of Mr Henriette (*deceased*) for him not to shout. While maxim was gagging his mouth he fought with us at first and fell off the bed and hit his head on the tiles of the floor……. He continued to struggle with us and he attempted to stand and when he had managed to stand up there was a brick which had been lying on the floor close to the door, Maxim took the brick and hit Mr Henriette in the head with it at the time I was holding the hands of Mr Henriette at the back. Maxim hit him only once and he struggled and tried to scream when he tried to scream….I tore the bed sheet. I gagged his mouth with the torn bed sheet. He had fallen down when I was tying his mouth. At the time he was struggling and saying "wait I will give it to you" repeatedly. He tried to remove the bed sheet from his mouth for him to scream and I pressed him again and again Maxim tried to gag his mouth. While he was lying on the floor Maxim kicked him with his feet four or five times in the groin. When I was holding his hands at the back he relaxed a bit and I released his hands. We continued to search the house…….

On being questioned by his counsel, the appellant had said that Maxim Tirant had hit the deceased on his head with the brick only once and that Maxim had also tied the deceased's hands at the back while he held them. The appellant had admitted that it was for the first time in Court that he had mentioned that the deceased had fallen from the bed and hit his head on the floor and had not mentioned it in his statements. They had found money at various places in the house and two mobile phones and taken them.

Thereafter in the words of the appellant:

> I told Maxim that there is nothing else in the house and that it was time for us to leave. Before we left I went to check up on Mr Henriette. I could see that he was still breathing. I removed the piece of cloth gagging his mouth and hands because we did not come to that place with the intention to hit the man we had only the intention to steal.

At this stage "He [deceased] did not talk but his eyes remained open he was just panting like someone who is tired." Under cross-examination the appellant had denied mentioning about the eyes of the deceased. Thereafter they had left the house in the same way they had entered it through the louver blades, having spent "approximately half an hour or quarter of an hour" in the house. Under cross-examination the appellant had said "Maybe 1 hour to one and a half hours maybe less." According to the evidence of those who arrived at the house of the deceased soon after the incident, no mention is made of the deceased being tied in any way thus corroborating the testimony of the appellant.

The appellant had been cross-examined at length in relation to the causing of the death of the deceased. The appellant had been silent when it was suggested to him by counsel for the prosecution that if he had not jumped on the bed, held the deceased's hands, overpowered him and struggled with the deceased, Maxim Tirant could not have struck the deceased with the brick. The appellant had admitted that "I held his hands because Maxim Tirant was a small skinny man and he could not have held a person that size." In answer to Court, the appellant had said the plan was to tie him up, rob and go.

On the issue of causing the death of the deceased, the following dialogue by the appellant and his counsel is of significance:

> Q. Do you think that you did anything that led to the death of Mr Henriette?
> I do not know if it was the blow he received from Maxim with the small brick or *perhaps when I was struggling with him he hit his head on the floor* but we had not come with an intention to kill Mr Henriette.(emphasis by us)
>
> Q. Do you have anything to say about this incident involving Mr Henriette?
> I accept that I went into that house to steal but I do not accept that I went into that house to kill Mr Henriette. I would like to ask his family members for forgiveness that it so happened that Mr Henriette lost his life but it was not my fault perhaps during the struggle force was used and an accident happened.

The appellant had said in his re-examination that they had no intention to do any grievous harm to the deceased.

On being questioned by his counsel about the machete and knife they had with them, the appellant had said that he uses the machete in the forest to get food and if they had an intention to murder the deceased they would have used the machete. On being questioned under cross-examination as to why he had to enter the house with the machete without leaving it outside, the appellant's answer had been to the effect that he keeps his machete everywhere he goes because he was an escape convict and the police were after him. The appellant had denied the suggestion of

counsel for the prosecution, that he was prepared to confront anyone if the need arose in that house and would have used the machete, the moment the deceased jumped from his bed. The appellant had admitted under cross-examination that in three previous cases, violence had been used in committing the offences of robbery he was convicted of.

On the issue of intoxication, the following dialogue by the appellant and his counsel is of significance:

> Q. You have related to the court in quite some details what happened on that day. Are you sure and certain that you remembered you recollected everything that happened on that day given that you were under the influence of drugs?
> Yes I am sure that I told everything the way it happened.
> Q. Your mind was not blurred in any way by the effect of drugs?
> Yes my mind was not 100% clear I was under the influence of drugs because we are in the effect of drugs.
> Q. What you recollect is it correct, 100%, 75% correct. How do you rate it?
> What I recall is 90% correct. All that I am telling the court is correct.

Intoxication has been set out in section 14 of the Penal Code –

> (1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.
> (2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and-
> (a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or
> (b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.
> (3) Where the defence under subsection (2) is established, then in a case falling under paragraph (a) thereof the accused person shall be discharged, and in case falling under paragraph (b) the provisions of section 13 shall apply.
> (4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.
> (5) For the purposes of this section “intoxication” shall be deemed to include a state produced by narcotics or drugs.

In view of the evidence set out in paragraph 10 above and the rest of the evidence, it is clear that subparagraph (2) of section 14 does not apply to the facts of this case. Further subsection (4) of section 14 would also have no application since liability for murder under sections 196(b) and 23 of the Penal Code can arise even on the basis of knowledge.

In view of his detailed testimony in Court by the appellant, the complaint as regards the admission of the appellant’s first statement is of no significance. The trial judge had admitted the 14 page statement, signed by the appellant at 28 places, after a voir dire and having heard the evidence of both the police officers involved in the taking of the statement and that of the appellant. The trial judge had said:

> This court has judiciously considered the evidence adduced in its entirety. The allegations leveled against the police officers while interrogating the accused thereby putting the confession statement in issue, in my view, are baseless, unsubstantiated and, as described by SI Ghislain, a pack of lies. The accused's testimony is fanciful, highly doubted and amounts to nothing more than an exaggeration. To me it clearly appears like the accused wanted to give such confession statement voluntarily at that time and now he is feeling the 'pinch' of its contents…..Accordingly, having been satisfied beyond a reasonable doubt that the accused made the statement in question voluntarily same is hereby admitted in evidence as prayed by the prosecution.

The trial judge had the opportunity to observe the demeanour of the witnesses who testified at the voir dire and we see no reason to disturb that finding. In fact the evidence on oath by the appellant in relation to how the deceased came to be injured is almost identical to that of his statement, save for a few discrepancies which in our view would not have caused any prejudice to the appellant and a miscarriage of justice. We therefore dismiss the second ground of appeal.

Again, in view of the detailed testimony of the appellant in Court under oath placing himself at the scene of offence at the relevant time and accepting his involvement with the co-accused Maxim Tirant in the incident resulting in the death of France Henriette, the only matter that needs to be considered in relation to ground 1 of the appeal referred to at paragraph 2(1) above is whether the appellant should have been convicted for murder or manslaughter. The benefit of a complete acquittal is certainly not available to the appellant even on his own testimony nor has it been sought in this appeal.

The evidence of the doctor who did the post-mortem examination is consistent with the mouth of the deceased having been gagged, as narrated by the appellant. The injuries on the head, which caused subdural haemorrhage resulting in death, according to the doctor, could have been caused by a blow or a fall. This corroborates the testimony of the appellant who while testifying had said that the deceased may have sustained his injuries when he was struck with a brick by Maxim Tirant or by striking his head on the floor while struggling with the appellant. Unfortunately neither counsel had questioned the doctor about the height from which the deceased had to fall to sustain the head injuries he had. Since the height of the bed was known and was depicted in the photographs, one of the possible causes for the head injuries could then have been excluded. The doctor had gone on to state that the gagging of the mouth could have contributed to the death of the deceased, that the external injuries found on the face of the deceased could also have been caused by a blow or a fall, the brick recovered from the room of the deceased could have been used to cause the head injuries and the bruises on the face, and that the deceased may have succumbed to his injuries within 30 minutes of receiving the injuries. The doctor had not been in a position to say the force with which the blows were delivered and her evidence is indicative of a single blow or a fall on a hard surface. If these matters pertaining to the number of blows and the force could have been clarified it may have been possible to come to a definitive conclusion as to the intention of the attackers, taking into consideration the other circumstances of this case.

In this case the appellant had been charged of the offence of murder under section 193 of the Penal Code on the basis of section 23 of the Penal Code, namely 'offences committed by joint offenders in prosecution of common purpose'. This necessitates us to examine in detail the elements of the offence of murder and section 23.

Murder has been defined in section 193 of the Penal Code in the following manner:

> Any person who with malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.

The offence of murder carries a mandatory life sentence. The distinction between the offence of murder as defined in section 193 and the offence of manslaughter as defined in section 192, which carries a discretionary life sentence, is the absence of malice aforethought in the definition of manslaughter in section 192:

> Any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed 'manslaughter'. An unlawful omission is an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health, whether such omission is or is not accompanied by an intention to cause death or bodily harm.

Malice aforethought has been defined in section 196 of the Penal Code –

> Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:-
> (a) an intention to cause the death of or to do grievous harm to any person, whether such person is the person actually killed or not;
> (b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous harm is caused or not, or by a wish that it may not be caused.

"Grievous harm" according to the Penal Code means:

> any harm which amounts to a maim or dangerous harm, or seriously or permanently to injures health or which is likely so to injure health, or which extends to permanent disfigurement or to any permanent or serious injury to any external or internal organ, membrane or sense.

Thus in order to establish malice aforethought it must be proved beyond a reasonable doubt that the perpetrator of the death causing, unlawful act, had intended to cause the death or do grievous harm to a person, or had the knowledge that his unlawful act or omission, which resulted in death, would probably cause death or grievous harm to a person. Section 196 recognizes the principle of 'transferred intent and knowledge', namely the person killed need not necessarily have been the person the perpetrator set out to kill. Section 196 also stipulates that when liability arises on the basis of the perpetrator's knowledge, his wish that death or grievous harm may not be caused or his indifference towards it is of no relevance. Thus in order to establish malice aforethought and seek a conviction for murder, the intention or knowledge as specified in section 196 must necessarily be proved. The

requisite intention could be formed and the knowledge gathered on the spur of the moment. In the absence of malice aforethought a person may be convicted of the offence of manslaughter, commonly known as 'involuntary manslaughter', provided there is proof of an unlawful and intentional act that resulted in death. However our Penal Code also provides that despite the existence of malice aforethought and the rest of the elements required to constitute the offence of murder, a person shall not be convicted of murder if he was suffering from diminished responsibility (section 196A) or acting under provocation (section 198) at the time of the killing. In such circumstances a person may be convicted of the offence of manslaughter. This is commonly known as 'voluntary manslaughter'. Thus every case of murder is also manslaughter but not vice versa.

The prosecution in this case has in charging the appellant adopted the draft charge for murder as set out in the Fourth Schedule of the Criminal Procedure Code (CPC) as provided for in section 114(a)(iv) of the CPC, which states:

> the forms set out in the fourth schedule to this Code or forms conforming thereto as nearly as may be shall be used in cases to which they are applicable, and in other cases forms to the like effect of conforming thereto as nearly as may be shall be used,….

Section 114(b)(i) states:

> Where an enactment constituting an offence states the offence to be an omission to do any one of different acts in the alternative, or the doing or the omission to do any act in any one of any different capacities, or with any one of different intentions, or states any part of the offence in the alternative, the acts, omissions, capacities or intentions, or other matter stated in the alternative in the enactment, may be stated in the alternative in the count charging the offence.

The prosecution by using the generic word 'murdered' France Henriette in the indictment has charged the appellant for causing the death of France Henriette by an unlawful act and omission.

With that brief introduction to the offence of murder it becomes necessary to examine how a person shall be held liable for the offence of murder on the basis of section 23. What is to be noted is that section 23 sets out a general principle of criminal liability and does not create a substantive offence.

Section 23 of the Penal Code states:

> When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.

Thus under section 23 a person can be made jointly and severally liable not only for the offence the parties set out to commit but also for any other offence that is committed in the prosecution of the offence they set out to commit, provided that the

commission of the other offence was a probable consequence of the prosecution of the offence they set out to commit. This brings in the element of knowledge ie knowledge on the part of the perpetrators as to the probable consequences of the prosecution of the offence they set out to commit. In such circumstances proof of the requisite intention on the part of the perpetrators, which may be an element of the other or second offence, need not be proved and proof of knowledge would suffice.

This Court in the case of *Jean-Paul Kilindo and Gary Payet v Republic* (2011) SLR 283 said:

> The law in Seychelles is that it suffices to show that a secondary act took place as a probable consequence of the agreed first act intended. In this jurisdiction we do not need to look for the intention of the perpetrator to carry out the secondary act. All that is necessary is that the secondary act took place as a probable consequence of the first agreed act to which they had agreed upon.

Is the element of 'knowledge of probable consequences' one of strict liability or part of the mental element to be proved by the prosecution? The wording in section 23: "an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose" excludes strict liability. The next issue to be determined is whether it is an objective test or a subjective test that is called for under section 23 to determine knowledge of probable consequences, namely of the other offence, on the part of the perpetrators. Section 23 uses the words: "each of them is deemed to have committed the offence." This 'deeming' provision provides for an objective test and is in line with the derogation provided for in article 19(10)(b) of the Constitution to the right to innocence enshrined in article 19(2)(a) of the Constitution. Article 19(10)(b) states:

> Anything contained in or done under the authority of any law necessary in a democratic society shall not be held to be inconsistent with or in contravention of clause (2)(a), to the extent that the law in question…….declares that the proof of certain facts shall be prima facie proof of the offence or of any element thereof.

However if one is to be convicted of having committed murder, while prosecuting the offence of robbery, the words 'of such a nature' necessarily requires proof from an objective standpoint, of knowledge of the three elements required to constitute the offence of murder, namely, the causing of death, by an unlawful act or omission, with malice aforethought, and of the probability of death ensuing in such circumstances.

Section 193 specifically provides for causing murder by an unlawful act or omission. Further since murder is a result-crime the conduct of the accused that is causative of the result may consist not only of their gagging the deceased and striking his head with a brick or struggling with him which caused the deceased to fall on the floor but the failure of the accused to take measures that lay within their power to counteract the danger that they had created by calling for medical assistance or summoning help. This is in accordance with the principle laid down by Lord Diplock in the case of *R v Miller* [1983] 2 AC 161 (HL).

In *Sing (Gurphal)* [1999] Crim LR 582 the Court of Appeal held that the question as to whether a situation gave rise to a duty to act was one of law for the judge to determine. However in the case of *Willoughby* [2004] EWCA Crim 3365 Rose LJ confirmed that, although there may be special cases where a duty obviously exists (such as that between doctor and patient) and where the judge may direct the jury accordingly, the question whether a duty was owed by the defendant to the deceased will usually be a matter for the jury provided there is evidence capable of establishing a duty in law.

In *R v Evans (Gemma)* [2009] EWCA Crim 650 the appellant obtained heroin and gave some to her sister who self-administered the drug. The appellant was concerned that her sister had overdosed so decided to spend the night with her but did not try to obtain medical assistance as she was worried she would get into trouble. When she woke up she discovered that her sister was dead. She was convicted of manslaughter and appealed. The Court of Appeal dismissed her appeal. For the purposes of gross negligence manslaughter, when a person had created or contributed to the creation of a state of affairs that he or she knew, or ought reasonably to have known had become life threatening then, normally, a duty to act by taking reasonable steps to save the others life would arise. They also held that the question of whether a duty of care existed was a question of law for the judge and not the jury.

In this case the appellant had said in his examination-in chief that prior to leaving the house of the deceased, he had noticed that the deceased was not moving, was panting like someone who is really tired and that he felt that this was a bit strange. He had however said that he had not seen any “blood oozing from” the deceased. The appellant’s testimony bears out that the deceased had earlier struggled and fought with the two accused and tried to scream. The appellant had also said: “I found that he was a strong man.” When Freddy Aimable called the appellant around 2 am the following morning, which is about 3 hours after leaving the house of the deceased and informed him that it seemed that France Henriette had passed away the appellant had said that ‘he had been afraid’ and told Maxim Tirant, the co-accused, that he should not have hit the deceased. This is evidence that the appellant knew that he had created or contributed to the creation of a state of affairs that had become life threatening and of the failure of the appellant to take measures that lay within his power to counteract the danger that they had created, by calling for medical assistance or summoning help. It is to be noted that the appellant had tried to make out that he had no intention to harm the deceased.

The third ground of appeal is to the effect that the trial judge erred in directing the jury not to return a verdict of manslaughter. This ground had been based on the following passages of the summing up –

> Defence counsel has invited the jury to look at the lesser offences available such as manslaughter. Moreover, looking at the evidence adduced before the court, there is no support or disclosure of any aspect or issue of self-defence or provocation and intoxication or even insanity or diminished responsibility, which aspects can lead to reduction of the charge of murder. The way I look at it two verdicts are open to you thus either the accused is guilty or not guilty of murder. Ladies and gentleman of the jury the law has chosen you alone to

> decide on the facts of this case. You may return a verdict of manslaughter if only you have a basis.

Having clearly stated that there is no evidence of self-defence, provocation, intoxication, insanity or diminished responsibility which could lead to reduction of the charge of murder to one of manslaughter, the trial judge had removed from the consideration of the jury the verdict of manslaughter (involuntary). In making the above statement the trial judge had only considered the concept of voluntary manslaughter, whereas the issue of involuntary manslaughter as a result of absence of malice aforethought was also open for consideration by the jury as explained at paragraph 17 above. We must however state that self-defence and insanity do not reduce a charge of murder to manslaughter. The Judge was correct when he ruled out provocation and diminished responsibility as there is no evidence whatsoever in this regard. He was also correct to have ruled out intoxication in view of what is stated in paragraphs 10 and 11 above.

We also find that the trial judge had expressed himself too strongly on the facts of this case rather than leaving the matter for the decision of the jury. Two such instances are:

> A very small and light object for instance or, slight hitting of the head on the wall or floor would not have occasioned such grave injuries on the deceased. *The perpetrators of this crime must have known that……hitting him on the head with force would cause grievous harm or subdural haemorrhage.* [emphasis by us]

The trial judge had also said:

> When one strikes so hard or causes serious or grave injury to the vital or sensitive part of the body like the head, brain, skull of another with a heavy or sharp object such as a concrete brick weighing about a kilogram *he should have had the knowledge that it would probably cause the death of, or grievous harm to that person,* although such knowledge is accompanied by indifference whether death or grievous harm would be caused or not even by a wish that it may not be caused. [emphasis by us]

By doing this he had virtually imputed the necessary knowledge to the appellant. Further this statement is contrary to the doctor's evidence. When questioned by the prosecution as to how much of force would have been used to cause the head injury the answer had been:

> In subdural haemorrhage the head does not have to be hit by anything to produce this. We cannot be definitive about the amount of force. It can be large or small.

We find this a misdirection both on facts and the law.

We also find that the trial judge's direction to the jury on common intention is inadequate and faulty. On common intention what the trial judge had done mainly was to repeat to the jury the wording in section 23 and quote from previous decisions and authorities. In our view, section 23 should have been explained to the jury in

layman's language rather than leave it to them to comprehend its meaning with all its technicalities, by reference to its definition in the Penal Code and case law and authorities they are not familiar with. His explanation on common intention is to the effect:

> ….What counts is the participation of the accused in the criminal object as explained by the authors above, and not necessarily the degree of involvement or part played……..*Not only the law but also the evidence would hold him responsible for whatever results flowing from his criminal actions of that fateful night whether he knew, wished or intended them or not.* [emphasis by us]

To say that the appellant would be responsible for the murder of France Henriette regardless of whether he knew of the results flowing from his criminal actions is contrary to the provisions of section 23 which specifically provides for knowledge on the part of the perpetrators as to the probable consequences of the prosecution of the offence they set out to commit as explained in paragraphs 19-23 above.

This in our view is both a misdirection and a non-direction on the law.

It is our view that the trial judge had erred by not leaving open to the jury to consider the alternative verdict of manslaughter (involuntary) for this was not a case where the alternative offence was relatively so trifling or insubstantial (for example, common assault) in comparison to the offence with which the appellant had been charged, that the judge thinks it best not to distract the jury by asking them to consider something which is remote from the real point of the case.

However a misdirection as to law will lead to the quashing of a conviction only if that misdirection causes the conviction to be unsafe. Thus in *Edwards* (1983) 77 Cr App R 5 and *Donoghue* (1987) 86 Cr App R 267, the Court of Appeal dismissed the appeals despite the judge having failed to direct the jury as to the standard and burden of proof respectively. In each case the court observed that the evidence against the defendant was very strong and justified the exercise of the proviso which then applied under section 2(1) of the Criminal appeal Act 1986. In *R v Sheaf* (1925) 19 Cr App R 46, Avory J said:

> When we once arrive at the conclusion that a vital question of fact has not been left to the jury, the only ground on which we can affirm a conviction is that there has been no miscarriage of justice, on the ground that if the question had been left to the jury, they must necessarily have come to the conclusion that the appellant was guilty.

Section 344 of the Criminal Procedure Code provides:

> Subject to the provisions herein before contained, no finding …….. by a court of competent jurisdiction shall be reversed or altered on appeal…… on account ……of any misdirection in any charge to a jury, unless such……. misdirection has in fact occasioned a failure of justice.

Rule 31 (5) of the Seychelles Court of Appeal Rules 2005 provides:

> Provided that the Court may, notwithstanding that it is of opinion that the point or points raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.

We are of the view that in this case the evidence against the appellant on his own testimony before court is overwhelming for any properly directed jury to have convicted him of murder on the basis of an objective test under section 23 of the Penal Code. The following items of evidence are of relevance –

(i) The fact that the appellant and another attacked the deceased who was sleeping,
(ii) The fact that the two of them entered the house of the deceased armed with a machete and a small knife,
(iii) The fact that they tied the deceased's hands, gagged his mouth and the appellant had struggled with him which made the deceased fall off the bed,
(iv) The fact that the deceased was hit with a brick on his head by the other assailant while the appellant held him,
(v) The fact that the fall from the bed or the blow to the head caused subdural haemorrhage, resulting in death,
(vi) The fact that the gagging of the mouth could result in suffocation according to the doctor's testimony,
(vii) The fact that the subdural haemorrhage resulting from the fall from the bed or the blow to the head was sufficiently severe to cause the death of the deceased within 30 minutes of his suffering such injury,
(viii) The failure of the appellant and his co-accused to take measures that lay within their power to counteract the danger that they had created by calling for medical assistance or summoning help, when they realized that the deceased, who the appellant had described as a strong man and had fought hard with them, was lying motionless and without speaking.

These items of evidence would have sufficed for a properly directed jury to convict the appellant of the offence of murder even without the application of section 23, on the basis of his knowledge that the acts or omissions causing death will probably cause the death of or grievous harm to the deceased. The appellant's insistence that he did not intend to harm the deceased is of no relevance in view of the definition of malice aforethought in section 196 as set out in paragraph 16 above.

We therefore have no hesitation in dismissing the appeal.

MSOFFE J:

I have read in draft the judgment of my brother Fernando JA and I concur. However, I will add a few comments.

It is common ground that the death of Mr France Henriette on the fateful day occurred in the course of a robbery. The appellant's testimony at the trial was that he and Mr Maxime Tirant (who is dead) went to the deceased's home with the

intention of stealing and not to kill him. He still maintains that stance at this appeal stage. It is in this context that in the third ground of appeal it is averred that the trial judge erred in directing the jury not to return a verdict of manslaughter.

Section 192 of the Penal Code defines manslaughter – "Any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed manslaughter".

Manslaughter is distinguished from murder by a lack of intention to kill or to cause bodily harm. It is available where there are defences like provocation and diminished responsibility. The appellant did not raise any of these defences. His only defence was that he did not intend to kill the deceased. However, since there is evidence that he admitted jumping on, tying and gagging the deceased, it is evident that there was an intention to harm.

The question is whether on the available evidence the appellant should have been convicted of the lesser offence of manslaughter. In order to answer this question it is pertinent to state the definition of malice aforethought. This is important because to prove murder it must be established that there was malice aforethought.

Section 196 of the Penal Code defines malice aforethought as –

> (a) an intention to cause the death of or to do grievous harm to any person, whether such person is the person killed or not;
> (b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person whether such person is the person actually killed or not, *although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, by a wish that it may not be caused.*
> [emphasis added]

In this case the evidence shows that the appellant and his deceased colleague were indifferent as to the grievous harm caused to the deceased. Both went to his home armed with a machete and a knife. They attacked him when they could have easily left him to enjoy his sleep.

So, in Seychelles if one is indifferent as to whether death is caused by one's action(s) the indifference is sufficient to prove murder. It is in this context that the submission by Mr David Esparon, Principal State Attorney, citing my sister Twomey in *Jean-Paul Kilindo and Garry Payet v Republic* SCA 4/2010, is pertinent where he states –

> It suffices to show that a secondary act took place as a probable consequence of the agreed first act. In this jurisdiction we do not need to look for the intention of the perpetrator to carry out the secondary act. All that is necessary is that the secondary act took place as a probable consequence of the first act which they had agreed upon.

The above principle of law finds support in other jurisdictions in East Africa as I shall endeavour to show hereunder.

In the Ugandan case of *Petero Sentali s/o Lemandwa v Reginam* (1953) 20 EACA 20 the facts established that the deceased died in consequence of violence inflicted on her by the appellant in the furtherance of, or in consequence of his committing a felony in his house. It was held that by virtue of section 186 of the Penal Code, if death is caused by an unlawful act or omission done in furtherance of an intention to commit any felony, malice aforethought is established.

In *Olenja v Republic* (1973) EA 546, a case from Kenya, a pregnant girl died as a direct result of an attempted abortion by the appellant who was unqualified and inexperienced in the obtaining of abortions. The appellant was convicted of murder by the trial judge, holding that malice aforethought was established by proof of an intent to commit a felony. On appeal, the conviction was substituted for manslaughter because, in the circumstances of that case, malice aforethought was not necessarily established by proof of intent to commit a felony. However, for purposes of our discussion in this case it should be mentioned that in *Olenja* (supra) the Court also observed that as a general principle a person who uses violent measures in committing a felony involving personal violence is guilty of murder if death results even inadvertently.

In Tanzania the definition of malice aforethought is more or less similar to that in Seychelles. Section 200 of the Penal Code provides -

> Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:-
> (a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
> (b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although that knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
> (c) an intent to commit an offence punishable with a penalty which is graver than imprisonment for three years;
> (d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit an offence.

In the Tanzanian case of *Fadhili Gumbo alias Malota and three others v Republic* (2006) TLR 50, the murder in question was committed in the course of a robbery. The High Court convicted the appellants. On appeal to the Court of Appeal it was held that the law is clear that a person who uses violent measures in the commission of a felony involving personal violence does so at his/her own risk and is guilty of murder if these violent measurers result in the death of the victim. The Court went on to observe that if death is caused by an unlawful act in the furtherance of an intention to commit an offence, malice is deemed to have been established in terms of section 200(c) of the Penal Code.

There is another aspect of the case which I wish to address. This is in relation to the law of evidence, particularly circumstantial evidence in this case. On this, I am mindful that as a general statement, in Seychelles the law of evidence is the English Law of evidence by virtue of section 12 of the Evidence Act which provides -

> Except where it is otherwise provided by this Act or by special laws now in force in Seychelles or hereafter enacted, the English law of evidence for the time being shall prevail.

Also see Andre Sauzier *Introduction to the Law of Evidence in Seychelles* (2nd ed) at 1.

In this sense, I believe that the law on circumstantial evidence in the English tradition applies to Seychelles as well in the context in which in his summing up to the jury the trial judge directed them at page 903 of the appeal record, *inter alia*, as follows -

> I find that the whole of the above circumstances and evidence taken together create a conclusion of guilt with as much certainty as human affairs can require……..
> Further, if you so agree with me, then you must be warned to be sure that these inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt.

In my view the trial judge, by the above statement, correctly stated the law on circumstantial evidence. On this aspect, I will also add the position in Tanzania as stated in the case of *Ally Bakari v Republic* (1992) TLR 10 where the Court of Appeal held that –

> Where the evidence against the accused is wholly circumstantial the facts from which an inference adverse to the accused is sought to be drawn must be proved beyond reasonable doubt and must be connected with the facts which the inference is to be inferred.

However, in my view, the best exposition of what constitutes circumstantial evidence is as stated by *Sarkar on Evidence* (15th ed, reprint 2004) at 66 to 68 –

1. That in a case which depends wholly upon circumstantial evidence, the circumstances must be of such a nature as to be capable of supporting the exclusive hypothesis that the accused is guilty of the crime of which he is charged. The circumstances relied upon as establishing the involvement of the accused in the crime must clinch the issue of guilt.
2. That all the incriminating facts and circumstances must be incompatible with the innocence of the accused or the guilt of any other person and incapable of explanation upon any other hypothesis than that of his guilt, otherwise the accused must be given the benefit of doubt.
3. That the circumstances from which an inference adverse to the accused is sought to be drawn must be proved beyond reasonable doubt and must be closely connected with the fact sought to be inferred thereof.
4. Where circumstances are susceptible of two equally possible inferences the inference favouring the accused rather than the prosecution should be accepted.
5. There must be a chain of evidence so far complete as not to leave reasonable ground for a conclusion therefrom consistent with the innocence of the accused, and the chain must be such human probability the act must have been done by the accused.

6. Where a series of circumstances are dependent on one another they should be read as one integrated whole and not considered separately, otherwise the very concept of proof of circumstantial evidence would be defeated.
7. Circumstances of strong suspicion with more conclusive evidence are not sufficient to justify conviction, even though the party offers no explanation of them.
8. If combined effect of all the proved facts taken together is conclusive in establishing guilt of the accused, conviction would be justified even though any one or more of those facts by itself is not decisive.

Of course, in the instant case, invoking circumstantial evidence in convicting the appellant would not necessarily arise because the evidence against the appellant was not wholly circumstantial. There were other pieces of evidence that would be enough to ground a conviction including the appellant's own testimony in Court that he and Mr Maxime Tirant went to the deceased's house with the intention of stealing. As it is therefore, a discussion on circumstantial evidence in this case is merely academic, if one may respectfully say so.

Perhaps, I should mention one other point in passing. I notice that this was a protracted or long trial in which a total number of 24 witnesses testified for the prosecution and in the process a number of exhibits were tendered and admitted in evidence. Indeed, the record of appeal to this Court consists of four bound volumes. All this suggests to me that a lot of time, effort and expense were put in the trial. This state of affairs has prompted me to make the point which I will demonstrate hereunder.

In the Criminal Procedure Code, Chapter 54 of the Laws of Seychelles, there is an elaborate procedure of how to conduct a preliminary inquiry (PI) by the Magistrates Court, proceedings after committal for a trial etc, as is well propounded under sections 192 to 279 thereto. In Tanzania the scheme of a PI is more or less similar to Seychelles as per sections 243 to 263 of the Criminal Procedure Act (Cap 20 RE 2002), save that in Seychelles under section 198 of the above Code a Magistrates Court has power to discharge an accused person if the evidence against him is insufficient to put him on trial. In Tanzania a Magistrates Court has no such power. I am making this point purely out of interest because I am aware that a PI is different from a preliminary hearing (PH).

It seems to me that Seychelles does not have a preliminary hearing (PH) similar to that of Tanzania in the conduct of criminal trials. In saying so, I am aware that in Seychelles there is a procedure for proof by formal admission under section 129(1) of the Criminal Procedure Code but, in my view, it is not on all fours with the Tanzanian procedure. The object of a PH in the context of Tanzania is to accelerate trial and disposal of cases. In the process, a lot of time, effort and expense are saved. To this end, section 192 of the Criminal Procedure Act provides as follows –

> (1) Notwithstanding the provisions of section 229, if an accused person pleads not guilty the court shall as soon as is convenient, hold a preliminary hearing in open court in the presence of the accused or his advocate (if he is represented by an advocate) and the public prosecutor to consider such matters as are not in dispute between the parties and which will promote a fair and expeditious trial.

(2) In ascertaining such matters that are not in dispute the court shall explain to an accused who is not represented by an advocate about the nature and purpose of the preliminary hearing and may put questions to the parties as it thinks fit; and the answers to the questions may be given without oath or affirmation.

(3) At the conclusion of a preliminary hearing held under this section, the court shall prepare a memorandum of the matters agreed and the memorandum shall be read over and explained to the accused in a language that he understands, signed by the accused and his advocate (if any) and by the public prosecutor, and then filed.

(4) Any fact or document admitted or agreed (whether such fact or document is mentioned in the summary of evidence or not) in a memorandum filed under this section shall be deemed to have been duly proved; save that if, during the course of the trial, the court is of the opinion that the interests of justice so demand, the court may direct that any fact or document admitted or agreed in a memorandum filed under this section be formally proved.

(5) Wherever possible, the accused person shall be tried immediately after the preliminary hearing and if the case is to be adjourned due to the absence of witnesses or any other cause, nothing in this section shall be construed as requiring the same judge or magistrate who held the preliminary hearing under this section to preside at the trial.

(6) The Minister may, after consultation with the Chief Justice, by order published in the Gazette make rules for the better carrying out of the purposes of this section and without prejudice to the generality of the foregoing, the rules may provide for-

(a) Delaying the summoning of witnesses until it is ascertained whether they will be required to give evidence on the trial or not;

(b) The giving of notice to witnesses warning them that they may be required to attend court to give evidence on the trial.

I may as well add here that in practice in a PH a list of the prosecution and defence witnesses is drawn and is made part of the record of proceedings. The object and purpose of doing so is to ensure that the witnesses to be summoned at the main trial will only be those who will come to court and testify on matters that are in dispute.

It might also be of interest to mention here that in Tanzania a PH is conducted in both the Resident/District Magistrates Courts and the High Court in the exercise of their respective original jurisdictions.

In this case, if a PH had been conducted along the above stated lines perhaps a lot of time, effort and expense would have been avoided or saved in the process. I say so because, after all, the following matters were not in dispute –

(i) That Mr France Henriette was dead.

(ii) That the death was unnatural.

(iii) That as per the Post Mortem Examination Report (Exh PE 26) the cause of death was due to (a) subdural haemorrhage and (b) blunt head trauma.

(iv) That, therefore in view of (iii) above, the cause of death was not in dispute.

(v) That on 5 June 2010 the appellant together with Mr Maxime Tirant went to the home of the deceased with intention to steal and in the ensuing violence the deceased met his death.

Since the above matters were not in dispute it is my further view that if there had been a PH at the commencement of the trial in line with the procedure obtaining in Tanzania probably fewer witnesses would have been called to testify and possibly also fewer exhibits would have been tendered in evidence thereby accelerating the trial and disposal of the case. In the process, it is my view that a lot of time, effort and expense would have been spared.

All in all, the appellant's conviction was well grounded. The appeal is devoid of merit. It is accordingly dismissed.

SANDAPIN v GOVERNMENT OF SEYCHELLES

Egonda-Ntende CJ, Burhan J
13 November 2012 Constitutional Court 13/2010

Constitution – Right to fair trial - Right to liberty

The petitioner was arrested and charged with trafficking in controlled drugs. After 11 months in remand custody the petitioner was acquitted at the close of the prosecution case after submission of no case to answer was made. The petitioner claimed his constitutional rights under arts 18(1), 18(6) and 19(1) of the Constitution had been contravened, and sought a declaration and compensation under art 18(10).

JUDGMENT Petition dismissed.

HELD

1 There are two stages in assessing whether there has been a fair hearing within a reasonable time under art 19(1) of the Constitution. The Court first adds up the length of the proceedings and then assesses whether the length was excessive.
2 In determining the period to be taken into account in a criminal case, the starting-point is the day on which a person is charged. The end period is the date of the final judgment.
3 The reasonableness of the length of proceedings must be assessed in light of the circumstances of the case and requires an objective assessment of the following criteria: the complexity of the case, what was at stake for the applicant, and the conduct of the applicant and of relevant authorities.
4 The reasonable time for a case to be concluded should be decided on a case by case basis.
5 An order remanding an accused to custody can be made only by a competent court.
6 There is a right of appeal to the Court of Appeal for remand to custody orders made by a trial court.
7 While the Constitution guarantees the right of the Attorney-General to institute and undertake criminal proceedings against any person, such persons can challenge decisions made by the Attorney-General in a competent court at any stage, including at the time of institution of proceedings.

Legislation
Constitution, arts 18(1),(6),(7),(10), 19(1), 46(1), 76(4)
Criminal Procedure Code, ss 61A, 179

Cases
Beehary v R SCA 11/2009, LC 326

Foreign Cases
Buchholz v Federal Republic of Germany (A-42, 7759/77) ECHR 6 May 1981
Dobbertin v France (1993) 16 EHRR 558
Frydlender v France (30979/96) ECHR 27 June 2000

Golder v United Kingdom (1975) 1 EHRR 524
Konig v Federal Republic of Germany (1983) 5 EHRR 1
Moreira de Azavedo v Portugal (1991) 13 EHRR 721
Neumesiter v Austria (1936/63) ECHR 27 June 1968
Portington v Greece (109/1997/893/1105) ECHR 23 September 1998
Vernillo v France (1991) 13 EHRR 880

Foreign Legislation
European Convention on Human Rights, art 6(1)(4)

F Elizabeth for the petitioner
J Chinnasamy Principal State Counsel for the first and second respondents

Judgment delivered on 13 November 2012

Before Egonda-Ntende CJ, Burhan J

BURHAN J:

This is an application under article 46(1) of the Constitution of the Republic of Seychelles where the petitioner seeks the following relief from court -

(a) A declaration that the petitioner's constitutional rights under article 18(1), 18(6) and 19(1) have been contravened.
(b) An order that the respondent pays the petitioner compensation in a sum of R500,000 pursuant to article 18(10) of the Constitution.

The background facts on which the petitioner has based his application areas follows.

The petitioner was arrested on 23 October 2009 by the officers of the NDEA (National Drug Enforcement Agency) and charged in the Supreme Court of Seychelles with two counts of trafficking in controlled drugs namely heroin and cannabis resin in case number SCCS 49 of 2009. It is admitted that the petitioner was remanded to custody on an order of court and after a period of 11 months in remand custody by a ruling dated 28 September 2012, the petitioner was acquitted on all counts at the close of the prosecution case, after a submission of no case to answer had been made.

The petitioner contends that his constitutional right under article 18(6) of the Constitution was contravened in that he was tried 11 months after his arrest and thus denied his constitutional right to have a fair trial within a reasonable time pursuant to article 19(1) and article 18(6) of the Constitution.

Counsel for the petitioner in his submissions further contends that serious charges had been framed against his client at the whim of the Attorney-General who had also moved and convinced court that his client be detained. This he stated had resulted in his client being deprived of his freedom for a period of 11 months and therefore was entitled to the compensation claimed. He further submitted that the Attorney-General as a guardian of justice should be able to distinguish between a person against

whom they had plenty of evidence as opposed to a person they did not have any evidence at all and further contended that the Attorney-General had therefore acted maliciously against his client.

The petitioner further contends that his arrest and subsequent detention was unlawful and contravened his constitutional rights under article 18(1) of the Constitution in that the said arrest and detention was orchestrated by NDEA agents using an "agent provocateur" to entrap him.

This court will first deal with counsel for the petitioner's claim that the petitioner was denied his constitutional right to have a fair trial within a reasonable time pursuant to article 19(1) of the Constitution.

Article 19(1) of the Constitution reads -

> Every person charged with an offence has the right, unless the charge is withdrawn, to a fair hearing within a reasonable time by an independent and impartial court established by law.

Article 6 of the European Convention on Human Rights (ECHR effective 3 September 1953) reads -

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

In *Golder v United Kingdom* (1975) 1 EHRR 524 it was stated that -

> Article 6 … enunciates rights which are distinct but stem from the same basic idea and which, taken together, make up a single right": thus the right to a court is coupled with a string of "guarantees laid down … as regards both the organisation and composition of the court, and the conduct of the proceedings. In sum, the whole makes up the right to a fair hearing.

One of these guarantees concerns compliance with the reasonable time requirement, intended by the Convention to counter excessively long judicial proceedings and highlight the importance of administering justice without delays which would jeopardize its effectiveness and credibility - refer *Vernillo v France* (1991) 13 EHRR 880*.* By making "reasonable time" an element of a fair trial it is often stated that the Convention has enshrined a favourite maxim of British jurists, namely that "justice delayed is justice denied".

Frédéric Edél in *The Length of Civil and Criminal Proceedings in the Case Law of the European Court of Human Rights* at 103 states -

> …..it is important to note that the right to judicial proceedings within a reasonable time is an original and fundamental achievement of the European Convention of Human Rights and its control system. By creating a genuine right to a trial within a reasonable time, with legal penalties for a state's non-compliance, the European system for safeguarding human rights has played a decisive part in combating the sometimes excessive slowness of judicial

> systems in Europe and has been at the root of many reforms of judicial institutions and procedure in Convention member states.

In reviewing compliance with the reasonable time requirement, the court always begins by determining the starting-point (*dies a quo*) and the end (*dies ad quem*) of the period to be considered. Basically the court assesses whether the length of proceedings from the starting-point to the end in the case before it has been reasonable or not. This is done in two stages. The first deals with the factual position and consists in adding up the relevant length of the proceedings. The second, although relying on a series of objective criteria, is more of a value judgment, assessing whether the length was excessive (Frédéric Edél (supra) at 16 and 39). Although usually complaints are made in respect of the total length of judicial proceedings which may entail more than one tier of jurisdiction, there could also be complaints made in respect of judicial delay only at a certain stage of the proceedings. In *Portington v Greece* (109/1997/893/1105) ECHR 23 September 1998 the complaint was in respect of appeal proceedings before the Court of Appeal.

In determining the period to be taken into account in a criminal case it was held in the case of *Neumeister v Austria* (1936/63) ECHR 27 June 1968 - "the period to be taken into consideration…necessarily begins with the day on which a person is charged".

Charge for the purpose of article 6 paragraph 4 of the Convention being "the official notification given to an individual by the Competent Authority of an allegation that he has committed a criminal offence." The end period would be the date of the final judgment marking the definitive end of the proceeding and which has become final and been executed.

In the case of *Frydlender v France* (30979/96) ECHR 27 June 2000 it was held by the European Court of Human Rights that -

> the "reasonableness" of the length of proceedings must be assessed in the light of the *circumstances of the case* and with reference to the following criteria: *the complexity of the case, the conduct of the applicant* and of *relevant authorities* and what was at stake for the applicant in the dispute. (emphasis mine).

It further stated that reasonableness is to be assessed primarily with the reference to "the circumstances of the case" and emphasized that such assessment is highly relative and specific to each case *Konig v Federal Republic of Germany* (1983) 5 EHRR 1.

This court too is of the view that the test for reasonableness requires an objective assessment of a number of criteria namely -

a) the nature of the case which would include as set out in the *Frydlender* case (supra) the complexity of the case and what is at stake for the applicant, and
b) the conduct of the applicant and of relevant authorities.

In regard to paragraph (a) ie the nature of the case, the complexity of the case would be in regard to complexity in facts, complexity in legal issues and complexity in proceedings. Complexity in facts would be, to name a few, the number and particular nature of the charges, the number of defendants and witnesses (*Dobbertin v France* (1993) 16 EHRR 558). Complexity in legal issues would include respect for the principle of equality of arms and include questions of jurisdiction and constitutionality or interpretation of international treaty, while complexity of the proceedings would include the number of interlocutory applications, the number of parties and witnesses, obtaining files and documents of foreign proceedings and transfer of cases from one division to another on grounds of public safety.

In regard to paragraph (b) ie the conduct of the applicant (the person seeking redress and alleging failure to comply with the reasonable time requirement) would include requests for adjournments, repeated changes of lawyers, fresh allegations of fact which prove to be incorrect, failure to appear at hearings, creating a procedural maze ie applications for release, challenges against judges, request for transfer of proceedings to other courts, uncooperative attitudes etc (Frédéric Edél (supra) at 53 and 54). The conduct of the applicant should be examined to determine whether the applicant delayed the procedure with his acts or with his omissions. Such delays cannot be considered as contributing towards a failure to comply with the requirements of a reasonable time.

Conduct of the relevant authorities would include delays on the part of Judiciary authorities including the registry, administrative authorities and other national authorities including the government and legislature. In *Moreira de Azevedo v Portugal* (1991) 13 EHRR 721 it was held "the court notes that the State is responsible for all its authorities and not merely its judicial organs". According to established case law *Buchholz v Federal Republic of Germany* (A-42, 7759/77) ECHR 6 May 1981, "only delays attributable to the State may justify [the Court's] finding … a failure to comply with the requirements of 'reasonable time'".

It is to be noted that in a number of resolutions, the Council of Europe's Committee of Ministers has stated that "excessive delays in the administration of justice constitute an important danger, in particular for respect for the rule of law".

Counsel for the petitioner in the instant case moved court that a finding be made by this court to determine what timeframe would constitute a "reasonable time" for a case to be concluded in order to come within the ambit of this article. This court is of the view having considered in detail the aforementioned decisions of the European Court of Human Rights that it would not be possible to broadly set down a general timeframe for cases be they criminal or civil to be concluded as computing reasonable time is both a complex and sensitive issue. It is the view of this court that reasonable time for a case to be concluded should be decided on a case by case basis taking into consideration the aforementioned circumstances peculiar to each case.

In the case before this court, considering the circumstance in the light of article 19(1) of our Constitution it is common ground that the trial against the petitioner was concluded in a period of 11 months from the day of his arrest and the petitioner acquitted of all charges by the Supreme Court of Seychelles which, admitted by all

parties, is a competent court established by law. The petitioner has not sought to contest the independence or the impartiality of the said court. Considering the salient facts of this case, I find no evidence to even suggest that the petitioner who was eventually acquitted in a period of 11 months had been deprived of his right to a fair hearing and therefore this ground must quite obviously fail.

Counsel for the petitioner further contended that the petitioner's right under article 18(6) had been contravened.

Article 18(6) reads – "A person charged with an offence has a right to be tried within a reasonable time".

The petitioner in this case had been arrested on 23 October 2009 and the charges framed against him in the Supreme Court on 5 November 2009. Judgment acquitting the petitioner has been delivered on 28 September 2010. Thus in a period of 11 months the case has been concluded. Counsel in his submissions has not alleged any State attributed delays as discussed earlier. It therefore cannot be said that there was a failure to comply with the requirements of reasonable time in the hearing of this instant case. This court is of the view the time limit within which this instant case was concluded was reasonable.

Counsel for the petitioner further contended that the petitioner had been charged at the whim of the Attorney-General who had also moved and convinced court that his client be detained. It would be pertinent at this stage to draw attention to section 179 of the Criminal Procedure Code Cap 54.

Section 179 of the Criminal Procedure Code reads -

> Before or during the hearing of any case, it shall be lawful for the court in its discretion to adjourn the hearing to a certain time and place to be then appointed and stated in the presence and hearing of the party or parties or their respective advocates then present, and in the meantime the court may suffer the accused person to go at large or may commit him to prison, or may release him upon him entering into a recognisance with or without sureties, at the discretion of the court, conditioned for his appearance at the time and place to which such hearing or further hearing shall be adjourned:
>
> Provided that, if the accused person has been committed to prison, no such adjournment shall be for more than fifteen clear days, the day following that on which the adjournment is made being counted as the first day.

It is therefore apparent from a reading of this section that an order committing an accused person to prison before or during the hearing of a case or remanding an accused to custody could only be done by a competent court. The Attorney-General has no power or discretion to remand to custody an accused as it falls strictly within the purview of a competent court and in this instant case the remand order was made by a competent court.

Further article 18(7) of the Constitution reads -

> A person who is produced before a court shall be released, either unconditionally or upon reasonable conditions, for appearance at a later date for trial or for proceedings preliminary to a trial except where the court, having regard to the following circumstances, determines otherwise –
>
> (a) Where the court is a magistrates' court, the offence is one of treason or murder;
> (b) The seriousness of the offence;
> (c) There are substantial grounds for believing that the suspect will fail to appear for the trial or will interfere with the witnesses or will otherwise obstruct the course of justice or will commit an offence while on release;
> (d) There is a necessity to keep the subject in custody for the suspect's protection or where the suspect is a minor, for the minor's own welfare;
> (e) The suspect is serving a custodial sentence;
> (f) The suspect has been arrested pursuant to a previous breach of the conditions of release for the same offence.

The derogations contained in article 18(7) (a) to (f) of the Constitution grants court the power not to release a person brought before court. The Attorney-General is not precluded by law from making an application for remanding a person to custody under section 179 of the Criminal Procedure Code but it is the court which finally decides whether a person is to be remanded to custody or not. Further in the case of a remand to custody order being made by a trial court a right of appeal lies from such an order to the Seychelles Court of Appeal as held in the case of *Roy Beehary v R* SCA 11 of 2009. This court is therefore satisfied that sufficient safeguards exist in the Constitution and in the law to ensure that persons are not detained unfairly. The order remanding the petitioner in this case has been made by a competent court and the petitioner has not sought to appeal against the remand order made by the trial Judge. In fact even in this instant application counsel for the petitioner does not seek to complain against the said remand order made by court but in his submission merely states that as the "wheels of justice" turn slowly his client should be compensated for being in remand for such a long time.

Counsel next contended that there was a certain amount of maliciousness on the part of the Attorney-General in filing the said case against the petitioner and this could be determined by the fact that there was no evidence against the petitioner and the fact that he had chosen to rely on the statement of a person who was an agent provocateur and who in his statement had stated that - "I was detained at the office of NDEA that night. And I have made my mind on how to help myself in his problem."

It is counsel for the petitioner's contention that the second respondent the Attorney-General should not have relied on the said statement as when the said Marcus Victorin was in the custody of the NDEA, it had been impressed on the said Marcus Victorin by the agents of the NDEA that he had others involved with him and the said Marcus Victorin in order to help himself had conveniently given the name of the petitioner as he was employed in the hotel owned by the petitioner.

At this stage it is pertinent to draw our attention to article 76(4) of the Constitution which reads –

> The Attorney-General shall be the principal legal adviser to the Government and, subject to clause (11), shall have power, in any case in which the Attorney-General considers it desirable so to do –
>
> (a) To institute and undertake criminal proceedings against any person before any court in respect of any offence alleged to have been committed by that person;
> (b) To take over and continue any such criminal proceedings that have been instituted or undertaken by any other person or authority; and
> (c) To discontinue at any stage before judgment is delivered any criminal proceedings instituted or undertaken under subclause (a) or by any other person or authority.

Therefore it is apparent that the Attorney-General has the power to institute and undertake criminal proceedings against any person before any court in respect of any offence alleged to have been committed by that person. It would also be relevant to at this stage to refer to section 61A of the Criminal Procedure Code which reads -

> (1) The Attorney-General may, at any time with the view of obtaining the evidence of any person believed to have been directly or indirectly concerned in or privy to an offence, notify an offer to the person to the effect that the person –
> (a) Would be tried for any other offence of which the person appears to have been guilty; or
> (b) Would not be tried in connection with the same matter,
> (c) On condition of the person making a full and true disclosure of the whole of the circumstances within the person's knowledge relative to such offence and to every other person concerned whether as principal or abettor in the commission of the offence.
> (2) Every person accepting an offer notified under this section shall be examined as a witness in the case.

It should be borne in mind while the Constitution guarantees the right of the Attorney-General to institute and undertake criminal proceedings against any person, such persons are not precluded from challenging such decisions made by the Attorney-General in a competent court *at any stage* (emphasis added) even at the stage of the very institution of the case. In this instant case I note, as pointed out by counsel for the respondents, that no such prior challenge was made. Counsel for the petitioner was provided with all the statements soon after the case was filed in the Supreme Court and would have been aware of the contents of the statement of Marcus Victorin and therefore could have challenged even the institution of proceedings before court. Having not done so counsel for the petitioner cannot now seek to complain that he was in remand custody for a period of 11 months as the "wheels of justice" turn slow.

Further on a reading of the entire statement of Marcus Victorin produced by the petitioner, it is clear that the said statement contains sufficient material for the Attorney-General to act as empowered under article 76(4) of the Constitution and section 61A of the Criminal Procedure Code and therefore this court totally rejects

the contention of counsel for the petitioner that the Attorney-General had acted maliciously in indicting the petitioner or that his arrest and subsequent detention was unlawful and contravened the petitioner's constitutional rights under article 18(1) of the Constitution.

For the aforementioned reasons I find no merit in the application of the petitioner and would proceed to dismiss the petition and make further order that each party bear their own costs.

CAMILLE v VANDAGNE PLANT HIRE COMPANY (PTY) LTD

Karunakaran J
2 December 2012 Supreme Court Civ 29/2008

Contract - Contributory cause or fault – Quantum of damages

The parties entered into a contract for the defendant to build a driveway for the plaintiff based on the plaintiff's engineer's approved plan. The driveway was built with the engineer's supervision. The plaintiff alleged the defendant deviated from the engineer's plan and that the driveway was unusable as the gradient was too steep. The plaintiff sought damages of R 90,000 resulting from the defendant's alleged breach of the contract.

JUDGMENT Plaintiff awarded damages of R 72,000 (defendant liable for 80% of the total loss and damages, as the plaintiff's engineer was held 20% responsible for the defective work) and costs.

HELD

1 Contributory negligence can be pleaded as a defence in delict cases under arts 1382 to 1384 of the Civil Code.
2 Although contributory negligence may not constitute a defence in matters of a breach of contract, the court can apportion the damages in proportion to the degree of fault or negligence found against the parties respectively.

Legislation
Civil Code, arts 1382, 1383, 1384

Cases
Attorney-General v Jamaye (1980) SCAR 348
Shami Properties (Pty) Ltd v Oliaji Trading Company Ltd (2008) SLR 176

Foreign Cases
Lanworks Inc v Thiara (2007) CanLII 16449 (ON SC)
Mandin v Foubert D 1982 25
SCI Lacouture v Enterprises Caceres Bull civ 1980 III no 206

Foreign Legislation
French Civil Code, art 1382, 1384(1)
German Civil Code, s 254

F Elizabeth for the plaintiff
P Pardiwalla SC for the defendant

Judgment delivered on 2 December 2012 by

KARUNAKARAN J:

The plaintiff has brought this action against the defendant claiming damages in the sum of R90,000 resulting from an alleged breach of contract by the defendant, a construction company incorporated in Seychelles. On the other side, the defendant, in its statement of defence, having completely denied the plaintiff's claim, not only averred that it was not in breach but also claims that it duly executed the road construction as per the instruction or direction given by one Mr Amade, the plaintiff's engineer when the work was in progress.

It is not in dispute that at all material times the plaintiff was the owner of Title No H6654 situated at Pointe Conan, Mahe, which lies on the mountainside, away from the public highway. The defendant is a licensed building contractor and is engaged inter alia in the business of concrete road building. In March 2007 the plaintiff and the defendant entered into a contract for the latter to build a concrete driveway for the sum of R55,000 and as per a plan and drawing drawn by Patrick Amade, a licensed engineer which was approved in January 2007. The works were admittedly executed between 29 March and 31 April 2007. During the execution of works the engineer visited the site. It is the case of the plaintiff that despite several attempts and entreaties by the engineer to the defendant while on site to execute the works as per the pegged demarcation on site and to stick to the gradient as per drawings, the latter persistently refused to do so.

As a result thereof, at the completion of works it became visually apparent that the driveway was defective; it had not been properly routed as it had been deviated from the plan and the gradient profile was too steep. Motorable access onto the road up to the car park space was too steep and the parking area was too high up. The plaintiff was unable to use her access by vehicle.

According to the plaintiff, on 7 May 2007 during a joint site visit by the officials from the Planning Authority and Mr Amade, the defendant agreed to remedy the works subject to a substitute plan that would be drawn by Patrick Amade. The substituted plan was submitted in July 2007 and approved in August 2007. Despite several requests by the plaintiff and by her counsel in writing to the defendant to remedy the works at his own costs as he undertook in May 2007, the latter failed to do so.

The plaintiff testified that the defendant having been paid R55,000 for the construction of the driveway as per the plan and in good workmanship, has breached the contract for which he is liable for the rectification of works and for consequential loss and damage suffered by the plaintiff arising out of the said breach. Hence, the plaintiff claims from the defendant for loss and damage as follows:

Loss of use, enjoyment of the access drive, inconvenience and moral damage	R25,000
Extra expenses for engineer and professional services	R15,000
Remedial works as per substituted plan	R50,000
Total	R90,000

The plaintiff's witness Mr Joel Philo, Development Control Officer from the Planning Authority also testified in support of the plaintiff's case. According to this official, upon his inspection of the completed construction work, he found and reported that the driveway in question had not been built in accordance with the original approval plan in Exhibit P1. It was defective as the defendant had failed to observe the gradient ratio 1:4. The road was therefore not usable as a motorable driveway. He testified that even when he went for the said inspection, his own vehicle was not able to drive up the steep driveway. Hence, the Planning Authority asked the plaintiff to submit another plan to rectify the defect. This officer also testified that it was normal practice of the Planning Authority, that when development work was not carried out in accordance with the original approved plan, they would instruct the owners to submit a substitute plan for approval to rectify the defect. A relevant excerpt from a letter (Exhibit P3) dated 24 March 2009 from the Planning Authority to the defendant reads:

> Reference is made to the above mentioned development. It was observed that the construction of the access road has not been carried out according to approval granted. It is also a fact that you have also failed to submit the mandatory reinforcement notice prior to casting of concrete. Mr. Patrick Amade, the engineer responsible to monitor the project was written a letter dated 10th May 2007 which was copied to you. He thereafter submitted a substitute plan approved on 6th August 2009 to remedy the construction. (Refer to letter attached)
> Note that in view of non-compliance to the original approved plan dated 26th February 2007 you are now liable to rectify the construction to adhere with the approval granted on the 6 th August 2007.(sic) Planning Authority should be informed of every stages of the development 48 hours to implementation.
> Note that failure to comply with Planning Authority's directives will result in further action being instigated against your license.

In Exhibit P8, according to a memo from Development Control Officer Derek Marie to the CEO of the Planning Authority, it indicated that not only had the defendant failed to construct in accordance with the alignment and gradient of the original plan, but had also failed to submit a reinforcement notice, which would then have allowed an opportunity for the Quality Assurance Engineer to check the reinforcement and compliance to approved documents, prior to casting of the concrete.

In these circumstances, the plaintiff contends that the defendant was liable for the defective work and bad workmanship as he has failed to adhere to the original approved plan and is therefore in breach of the contract of service. Hence, the plaintiff claims the sum of R90,000 for loss and damages resulting from the said breach of contract.

On the other hand, the defendant testified in essence that he built the driveway in accordance with the original approved plan. Moreover, it is the case of the defendant that throughout the construction work the plaintiff's engineer, Mr Amade was present and supervising the work regularly, giving directions to the defendant. Hence, the defendant contends that he was not personally responsible for any defect therein. In any event, the defendant testified that the driveway he built is motorable and has no defects either in construction or workmanship. Further, the defendant testified that

the second approval of the substitute plan relates to a different contract for which he is not liable. The defendant also testified that he never agreed to rectify the supposed defects either with the plaintiff, the engineer, or any other officials from the Planning Authority. Therefore the defendant seeks the dismissal of this case with costs.

I meticulously perused the evidence on record, including the documents adduced by both parties. Obviously, the following questions arise for determination:

1. Was the driveway constructed by the defendant defective in that it was not a viable motorable access?
2. If so, was the defect caused solely due to the breach of contract by the defendant in that he failed to adhere to the approved plan, or was there any other contributory cause or fault or negligence through any act or omission of the plaintiff's engineer, who supervised the work? What is the legal impact of such contributory cause or fault or negligence on the quantum of damages awardable to the plaintiff?
3. What is the extent or degree of such contributory cause or fault or negligence, if any? And, what is the quantum of damages the plaintiff is entitled to, if any?

As regards the first question, it is evident from the testimony of the independent witness Mr Joel Philoe (PW2) - Development Control Officer from the Planning Authority - that the driveway was defective in that it was not usable as motorable access. It is also evident from the fact that even his own vehicle was not able to climb up the steep driveway, while he went to inspect the site. The report submitted by the Development Control Officer to the CEO of the Planning Authority in Exhibit P8 also corroborates the fact that the road in question was not built to the approved specifications and was indeed defective due to gradient-problem. All these support the plaintiff's testimony that she was not able to use the road and adds further unusable state of the driveway. I do not believe the defendant in his evidence that the driveway was in fact useable. I reject his self-serving evidence in toto in this respect. Therefore, the answer to the first question is apparent. The constructed driveway was indeed defective and was not a viable motorable access.

I will now turn to the second question as to the alleged cause for the defect. Finding answer to this question is not as simple as the first as it involves mixed questions of law and facts.

Undoubtedly, the defendant has failed to construct the road in accordance with the original approved plan. The on-site presence of the plaintiff's engineer Mr Amade was only to supervise the work. It would be expected of the defendant, as a prudent and reasonable builder, first of all, to follow the approved plan even in the absence of any supervision by an engineer or otherwise. In any event, the defendant while executing the work should have sought the assistance or supervision of the engineer to ensure at every stage that work is carried out in accordance with the original approved plan. Furthermore, the reinforcement notice is an important procedural requirement that gives an opportunity to the Quality Assurance Engineer to check the reinforcement, and compliance to the approved documents prior to the casting of the concrete. However, this was not done by the defendant vide Exhibit P8. As I see it, this entire situation could have been averted had the defendant issued the

required reinforcement notice prior to the casting of the concrete. In my view, this fault is the substantive cause that necessitated the plaintiff to submit a substitute plan for planning approval with a view to rectify the defect. Having said that, the evidence on record also shows that the breach of contract by the defendant was not the sole cause for the defect; the omission by plaintiff's engineer to properly supervise the work in progress has also contributed to certain degree to the cause that has resulted in the defective work.

Coming back to the contributory cause or fault or negligence of the plaintiff's engineer, here too, there should have been prudence on the part of Mr Amade, the plaintiff's engineer in ensuring that the construction, through its various stages, adhered to the approved plans in order to meet the gradient requirements for motorable access. This, albeit a minor omission, to my mind, it is a contributory cause or fault or negligence on the part of the plaintiff's engineer. Then, what is the legal effect of such contributory factor?

While the concept of a 'contributory cause' or 'contributory fault or negligence' is unknown to our law of contract, its application to our law of delict is very much an everyday occurrence. As I see it, there is not much logical heavy-lifting required to apply this concept to breach of contract as it has been applied in other civil law jurisdictions and even in the USA, Canada and St Lucia.

For instance, both France and Germany have systems of apportionment for dealing with the plaintiff's or his servant's or agent's fault. The German Civil Code (Forrester et al, *The German Civil Code* (1975) at [254]) provides that:

> If any fault of the injured party has contributed to causing the damages, the obligation to compensate the injured party and the extent of the compensation to be made depends upon the circumstances, especially upon how far the injury has been caused predominantly by the one or the other party.

This paragraph applies whether the action is in contract or tort (vide *German Private and Commercial Law - An introduction* (1982) at 153). Similarly, in France too, the liability of the defendant can be reduced where there has been faute de la victime. This principle applies both to tortious and contractual liability, vide Mazeaud, H L & J *Traite Theorique et Pratique de la Responsabilite Civile II* (6th ed, 1970) no 1457.

It is pertinent to note what this court has also pronounced on the issue of contributory negligence in *Shami Properties (Pty) Ltd v Oliaji Trading Company Ltd and Another* (2008) SLR 176. Although the English law of tort recognizes "contributory negligence" on the part of the plaintiff or any third party as a valid defence against tortious liability, our law of delict under article 1382 to 1384 of the Civil Code does not seem to have expressly recognized the concept of "contributory negligence" as a defence against liability. Is then, contributory negligence available under article 1384(1)? The French commentators and the jurisprudence have answered that question in a positive way. It does exist under 1384(1) and likewise it should also exist under article 1382 (1) to (4).

In support of this proposition, we find for example, in *Dalloz Encyclopedie de Droit Civil 2nd ed. Tome VI, Verbo Responsabilite du Fait des choses inanimees, note 573,* which provides that -

> 573. Alors que le fait d'un tiers ne peut normalement entraîner qu'une exonération totale de la responsabilité du gardien, à l'exclusion d'une exonération partielle, le fait ou la faute de la victime pourra entraîner aussi Bien une exonération partielle qu'une exonération totale de la responsabilité, le problême ne se présentant pas de la même façon que pour le fait d'un tiers.

This refers to article 1384(1). This is what the commentators have said and again in *Mazeaud Traité Théorique et Pratique de la Responsibilité Civile,* Tome II, note 1527 at page 637:

> Aujourd'hui les arrets affirment que le gardien doit être exonéré partiellement, dans une mesure qu'il appartient aux juges du fond d'apprécier souverainement, si le fait relevé à l'encontre de la victime, quoique non imprévisible ni irrésistible, a cependant contribué à la production du dommage.

This being so, since contributory negligence may be pleaded in a claim founded on article 1384(1) from which our article 1383(2) has been inspired, then that defence may also be pleaded in a claim based on article 1383(2) because, as I have said, that article in our Code Civil has been borrowed from article 1384(1) of the French Civil Code.

At the same time, it is interesting to note that as Laloutte JA observed in *Attorney-General v Jumaye* (1980) SCAR 348 in article 1383(2) in relation to motor accident cases, an attempt has been made to solve by legislation one of the difficulties which had arisen in France that time in connection with collision with motor vehicles. According to his interpretation, that legislature has removed "contributory negligence" from being raised as a defence to liability under article 1383(2). Be that as it may, in the case of: D. 1982, 25 *Mandin v Foubert* - Cour de cassation - the Court in view of article 1382 of the Code Civil held -

> Given that a person whose fault, even if criminal, has caused damage is partially relieved of liability, if he proves that fault on the part of the victim contributed to the harm.

Besides, it is a recognized principle in French jurisprudence that when a complainant or any person for whom is responsible, is found to have contributed to the damage caused, the courts are free to decide the extent to which each party is liable for the damage. Vide, Bull.civ. 1980 HI no. 206 Case SCI *Lacouture v Entreprises Caceres.* Indeed, in any action for damages that is founded upon the fault or negligence of the defendant, if such fault or negligence is found on the part of the plaintiff or third party that contributed to the damages, the court shall apportion the damages in proportion to the degree of fault or negligence found against the parties respectively. See, *Lanworks Inc v Thiara* (2007) CanLII 16449 (Ontario SC). Hence, in my view although the contributory negligence may not constitute a defence in matters of a

breach of contract, the court shall apportion the damages in proportion to the degree of fault or negligence found against the parties respectively.

I will now turn to the third question (supra) as to the extent or degree of contributory cause or fault or negligence on the part of the plaintiff's engineer. The evidence on record and the surrounding circumstances clearly show that the primary cause for the defective driveway is the breach of contract by the defendant. At the same time, the fault of the plaintiff's engineer lies in that he omitted to check the work, then and there while the work was in progress. This omission is significant enough to merit consideration as a contributory cause/fault/negligence. The degree of contributory cause or fault or negligence on the part of the plaintiff's engineer, in my considered view, is a 20% responsibility for the defective work. Hence, the consequential damages payable by the defendant should be reduced by 20% on the loss and damage sustained by the plaintiff in this matter. Hence I hold the defendant liable only to the extent of 80% of the total loss and damages the plaintiff suffered. Therefore 80% of the plaintiff's claim payable by the defendant amounts to R72,000.

I therefore, enter judgment for the plaintiff in the sum of R72,000 and with costs of this action.

FINANCIAL INTELLIGENCE UNIT v SENTRY GLOBAL SECURITIES LTD

MacGregor P, Domah, Twomey JJ
7 December 2012 Court of Appeal 21/2011

Proceeds of Crime (Civil Confiscation) Act section 4 – Procedure

The Financial Intelligence Unit appealed against a decision of the Supreme Court, which found that the FIU had not attained the evidential threshold necessary to permit a s 4 interlocutory order to be made under the Proceeds of Crime (Civil Confiscation) Act against the respondents.

JUDGMENT Appeal allowed.

HELD

1 The court may make an order under s 4 of the Proceeds of Crime (Civil Confiscation) Act if it appears to the court on prima facie evidence (or reasonable belief evidence) of the Financial Intelligence Unit that the property is the benefit of criminal conduct and the respondent neither appears nor contests the application.
2 The court shall not make an order where the respondent, in response to the prima facie evidence or belief evidence, is able to show on the balance of probabilities that the property is not wholly or partly directly or indirectly the benefit of criminal conduct.
3 The court shall make an order where it is not satisfied that the respondent has adduced evidence on a balance of probability that the property is not the proceeds of crime.
4 In a case where the respondent has met the evidential burden, the court should proceed to examine the evidence adduced by the applicant and balance that evidence against the respondent's in the usual way and decide the issues.

Legislation

Constitution, art 120
Anti-Money Laundering Act, s 9(7)
Anti-Money Laundering (Amendment) Act
Court of Appeal Rules, rule 3(2), 9(2)
Proceeds of Crime (Civil Confiscation) Act, ss 3, 4, 4(1),(3), 5, 8, 9, 9(1), 24

Cases

Allisop v R (Financial Intelligence Unit) (unreported) SCA 24/2010
Financial Intelligence Unit v Allisop (unreported) SSC 144/2009
Financial Intelligence Unit v Mares Corp (2011) SLR 404

Foreign Cases

McK v H (unreported) [2006] IESC 63
Murphy v GM [2001] 4 IR 113, [2001] IESC 82

Foreign Legislation

Proceeds of Crime Act (Ireland), ss 2, 3

D Esparon, Principal State Counsel for the appellant
D Sabino for the respondent

Judgment delivered on 7 December 2012

Before MacGregor P, Domah, Twomey JJ

TWOMEY J:

The appellant, the Financial Intelligence Unit (FIU) has appealed against a decision of the Chief Justice in which he found that the FIU had not attained the evidential threshold necessary to permit a section 4 interlocutory order to be made under the Proceeds of Crime (Civil Confiscation) Act 2008 (hereinafter POCCCA) against the respondent(s) 1-13 who are accountholders in Barclays Bank (Seychelles) Ltd, the 14th respondent.

The thrust of the appellant's case briefly is that the respondents have in their possession or control property constituting, directly or indirectly, benefit from criminal conduct, that the property as set out in a table annexed to the proceedings, were acquired from criminal conduct. The respondents are persons and legal entities with addresses in Costa Rica and Spain. The total amount standing to credit at 24 June 2010 in the 13 accounts was US$306, 283.09, equivalent then to R3,781,432.29.

The appellant annexed to the court pleadings the affidavit of Liam Hogan, Deputy Director of the FIU, in which is outlined his belief evidence of the activities of respondents 1-13 who he states are part of a criminal organisation based in Costa Rica. His affidavit is lengthy in that it outlines each and every aspect of matters leading to his belief that the property of respondents 1-13 invested in accounts with respondent 14, Barclays Bank amounting at US$306, 283.09 constituted directly or indirectly, benefit from criminal conduct and were acquired, in whole or in part, with or in connection with property that, directly or indirectly, constituted criminal conduct.

The grounds for his belief are articulated in his affidavit and it is important to describe them fully for reasons that will become clear:

> i) That as a result of the FUI's investigations, a criminal organisation namely Red Sea Management, based mainly in Costa Rica was identified. This organisation had affiliated to it other companies i.e Sentry Global Securities Limited and Sentry Global Trust Limited.
> ii) That the investigations confirmed that Red Sea Management and its affiliates had also been the subject of investigations by both the United State FBI and Costa Rican police.
> iii) That serious criminal activities by the organisation had been confirmed.
> iv) That the investigations revealed that Red Sea Management Ltd was a shell company operating by itself and through its affiliates only for criminal purposes i.e. hiding illegal financial assets and perpetrating securities fraud, mainly "pump and dump" stock schemes designed to defraud investors in public markets.
> v) That in November 2007 a civil action was taken by a number of allegedly defrauded investors against Red Sea Management Limited seeking the return

of US$7.4 million in a securities scam. Subsequently on July 31st 2008 other defendants including Jonathan Curshen, the third Respondent in this appeal and the Chief Executive of Red Sea Management Limited were also joined as defendants. A default civil judgment was entered against Red Sea Management limited on the 7th October 2008. A charge of securities fraud was brought against the third Respondent before Judge Sand of the United States District Court on 15th January 2009. (copy of charge sheet and arraignment proceedings exhibited).

vi) Further, that the New York Securities Exchange Commission New York Regional Office brought proceedings against the 3rd Respondent and one Bruce L. Grossman alleging a securities fraud detected by way of a sting operation which occurred between June 27th and July 2nd 2008 and that the 3rd Respondent pleaded guilty to one of the charges preferred against him. (Copy of preliminary statement dated 10th September 2008 before Judge Gardephe of the United States District Court exhibited).

vii) That in separate litigation between the Securities and Exchange Commission and C. Jones & Co. & others, including the Third Respondent to the present appeal, the United States District Court in the District of Colorado entered a final judgment against the Third Respondent finding him liable for securities fraud.

viii) That as a result of his criminal activities on 9th October 2008 the Third Respondent was stripped of his privileges as a diplomat of the government of St. Kitts and Nevis for which he had acted as Honorary Consul in Costa Rica. (Copy of Litigation Release dated September 11th 2008 exhibited)

ix) That subsequent to a Suspicious Transaction Report received from Barclays Bank, the 14th Respondent, pursuant to section 10 of the Anti Money Laundering Act 2008 (AMLA), the FIU established that the Red Sea Management Company and its affiliates and persons
associated with then in the course of criminal investigations, opened a number of offshore accounts with Barclays and these accounts had been corruptly used for the purpose of laundering the fraudulently obtained benefit from the criminal conduct outlined above.

x) That Asset Agents of the FIU analysed the information received relating to the accounts of the first 13 Respondents and prepared a detailed spread sheet setting out the name of each of the account holders, the subject matter of the application for the interlocutory injunction, the name of the individuals operating the bank account, the correspondence address, the authorised signatories, the address of the registered office, the directors, the beneficial owner(s) and the operating address.

xi) That the data disclosed the operating address of all the accounts as Piso 8, Oficina 8-4, Edificio Colon, Paseo Colon, San Jose, Costa Rica. This is the same address given by the 3rd Respondent as his correspondence address.

xii) That as part of the criminal modus operandi of Red Sea Management Company, its affiliates and associates, it was established that employees or nominees of the criminal group actually operated the bank accounts which were created for the furtherance of criminal conduct. The data disclosed and exhibited in the spreadsheet before the Supreme Court showed that Respondents 1,2,5,6,7,8,9,10,11,12 and 13 appear either by themselves or with others in different combinations as persons operating the individual bank accounts or as authorised signatories.

xiii) That Respondents 1,2,3,5,6,7,8,9,10,11,12,13 have as their correspondence address the same apartment building, namely Apartado San Jose, Costa Rica similar to and believed to be a different description of the same building in San Jose, Costa Rica. The correspondence addresses have the same telephone number, the same fax number and the same e-mail

> address. Apart from a separate e-mail, fax and phone number for the 4th Respondent, (frank@abellanhos.es, 34629676949, 34660138351)there is no individual fax number, telephone number or e-mail address furnished for any of the bank account holders and first 13 Respondents nor any correspondence address, authorised signatory or registered office address, director, beneficial owner or any operating address.
> xiv) That the affidavit of Felix Lostracco, a Federal Agent of the FBI which itself was carrying out an investigation into the criminal activity of Red Sea Management, its affiliates and associates, sworn on September 11th 2009 avers that Red Sea Management group is a corrupt criminal organisation only existing for the purpose of implementing extensive securities fraud including pump and dump schemes. (copy of affidavit exhibited).
> xv) That in relation to Respondent 4, the investigations and enquiries have revealed his involvement in a fraudulent Trans-Atlantic pump and dump scheme with others involving US$13 million. An action brought by the US Exchange Commission entitled Securities and Exchange Commission v Francisco Abellan, et al filed on 14th August 2008, an order was made to freeze the assets of Respondent 4 (copy of litigation release exhibited).
> xvi) That the Barclay's Bank account number 7607153 was in the name of Francisco Abellan, residential address, Turo de Monterols 11 3-1. 08006, Barcelona, Spain, with home number and e-mail address given above. That the initial deposit of US$99,980 on that account was from Sentry Global Securities Ltd, and subsequent to that, two further deposits of US$50, 059 were deposited n the account on 26th March 2009 and 26th May 2009 from Sentry Global Securities .

An order was made by the Chief Justice in January 2011 to issue and serve respondents 1-13 out of the jurisdiction pursuant to section 47(3) of the Seychelles Code of Civil Procedure. On the return date for service Mr Barry Galvin, counsel for the appellant informed the court that although attempts had been made to serve respondents 1-13, none of them had been at the two addresses specified, namely Turo de Monterols 11 3-1. 08006, Barcelona, Spain and Piso 8, Oficina 8-4, Edificio Colon, Paseo Colon, San Jose, Costa Rica. The Attorney and Notary Public, Oswald Bruce, engaged by the FIU to effect service in Costa Rica averred in an affidavit that the address given was that of a funeral services company. The address in Spain also proved to be non-existent. In the circumstances, leave was granted pursuant to section 4(1) of POCCCA to proceed against the 14th respondent, Barclays Bank, for a proceeding in rem, as it had possession and control of the specified property.

The Chief Justice then proceeded to hear the motion for the granting of the interlocutory injunction to freeze the assets of the 1st - 13th respondents pursuant to section 4 and the appointment of a receiver for the said assets pursuant to section 8 of POCCCA. The 14th respondent, Barclays Bank stated that they were not adopting any position in the matter.

No opposing affidavit was filed by any of the respondents. However, in his judgment the Chief Justice dismissed the application finding that the evidential threshold under the Act had not been reached in the case.

The appellant has lodged four grounds of appeal –

> 1. The Chief Justice erred in law in holding that the applicant had not attained the evidential threshold in the circumstances of this case to permit a section 4 interlocutory order to be made
> 2. The Chief Justice erred in law in not finding that the facts adduced in the pleadings amounted to reasonable doubts for the statutory belief set out in the said pleadings of Liam Hogan, Deputy Director of the FIU within the meaning of section 9(1) of POCCCA.
> 3.The Chief Justice erred in law in determining that the evidence adduced did not attain the threshold of "appearing to the court" within the meaning of section 4 POCCCA.
> 4. The Chief Justice erred in law in not applying section 9(7) of the Anti-Money Laundering Act 2006 as amended by the Anti-Money Laundering (Amendment) Act 2008 (AMLA).

The 14th respondent in his written arguments and at the hearing of appeal restated his assertion that he took no view on the merits of the case but went on to provide substantive arguments on the evidential threshold in such cases. His counsel stated that did so in the interest of developing jurisprudence on this issue. His arguments in this respect, although academic, are welcomed by this court.

The fourth ground of appeal as submitted is meaningless as it contains a reference to a provision that is non-existent and was not pursued at the appeal hearing.

Respondents 1-13 are added to this appeal for the sake of completeness in that they appear as respondents in the original case. They have not been served the proceedings of this appeal as their last known addresses are bogus. In the circumstances the Court dispenses of the need for personal service of this appeal and deems alternative service the publication of the cause list pursuant to rule 9(2) of the Seychelles Court of Appeal Rules. They do not refute any of the allegations as made by Liam Hogan in the affidavit nor have they filed any proceedings to counter the making of the section 4 interlocutory order.

It seems to us that the only matter to be decided by this Court is whether under the provisions of POCCCA and AMLA there exists sufficient evidence for the making of a section 4 interlocutory order in this case. This calls for a determination of what constitutes "belief evidence" under POCCCA. It would appear that four years on from the passing of these Acts dealing with the proceeds of criminal conduct and although several cases on this issue have been heard both by the Supreme Court and the Court of Appeal, certain evidential aspects and procedures have not yet been clearly bedded down. This is despite our clear decision in *FIU v Mares Corp* (2011) SLR 404 and our call therein to the Attorney-General to bring this to the attention of the Legislature to resolve both procedural and substantive insufficiencies contained in the Act. Furthermore, the Chief Justice although mandated by section 24 of POCCCA to make rules to regulate the procedure before this Court has still not done so even though recent cases have clearly demonstrated that such rules are imperative. This is extremely disappointing and does not in any way help the administration of justice.

While this Court in the absence of rules can exercise its inherent power under section 120 of the Constitution of Seychelles and has the same authority as the Court from which this matter is brought, it can only guide procedure. It cannot substitute itself for the Supreme Court or more precisely the Chief Justice in making rules of procedure when these powers are specifically vested in him by an Act, which is the case in POCCCA. We can only draw his attention to the fact that those rules are not in operation. The only alternative would be for the Legislature to act urgently to remedy the situation. Failure to do so is a hindrance to all concerned in the battle against international crime and money laundering and does not help the image of Seychelles abroad. It also does not assist the innocent investor or account holder whose assets may be confused as proceeds of crime and who is at a loss to understand what procedure to follow in such cases.

Accordingly, in the absence of dedicated rules in such matters, we may only go by already established procedural and substantive authorities on POCCCA bound by precedents established by the Court of Appeal. With this in mind we proceed to the issue in this case.

What is the evidential burden of each party and at each stage contained in the provisions of POCCCA? In *Financial Intelligence Unit v Mares Corp* (2011) SLR 404 we clearly stated that:

> A careful reading of sections 4 and 9 of POCCCA indicates that the procedure in the Act involves a reverse burden of proof to the extent that once the applicant provides the Court with *prima facie evidence* that is, reasonable grounds for his belief in compliance with section 9(1) in terms of his application under section 4(1) of POCCCA, the evidential burden shifts to the respondent to show on a balance of probability that the property is not the proceeds of crime… [emphasis ours]

In *Clive Lawry Allisop v R (FIU)* 24/2010 (unreported) we again stated:

> POCCCA being a 'standalone proceedings,' it is clear that in order to make an application under sections 3, 4 or 5 of POCCCA there is no need for the applicant to prove the commission of a predicate crime.

It is abundantly clear that section 4 applications under POCCCA involve different evidential burdens used in both criminal and civil cases. Practitioners and judges need to accept once and for all that such legislation introduces new concepts that are not comparable to the law we have hitherto practised. This calls for new ways of practice and adjudication to give effect to the law.

It is important to bring into view the relevant sections of the legislation concerned, namely section 4(1) of POCCCA:

> Where, on an inter partes application to Court, in that behalf by the Applicant, *it appears to the Court, on evidence, including evidence admissible by virtue of section 9, tendered by the applicant* that-
> a) a person is in possession or control of
> (i) specified property and that the property constitutes, directly or indirectly, benefit from criminal conduct: or

> (ii) specified property that was acquired in whole or in part, with or in connection with property that, directly or indirectly, constitutes benefit from criminal conduct; and
> (b) the value of the property or the total value the property, referred to in subparagraphs (i) and (ii) of paragraph (a) is not less than R50,000
> the Court shall make an interlocutory order prohibiting the person specified in the order or any other person having notice of the making of the order from disposing of or otherwise dealing with the whole or, any part of the property, or diminishing its value, unless, it is shown to the satisfaction of the Court, on evidence tendered by the respondent or any other person, that-
> (i) the particular property does not constitute directly or indirectly, benefit from criminal conduct and was not acquired, in whole or in part, with or in connection with property that, directly or indirectly, constitutes benefit from criminal conduct; or
> (ii) the total value of all the property to which the order would relate is less than R50,0000.
> Provided that the Court shall not make the order if it is satisfied that there would be a risk of injustice to any person (the onus of establishing which shall be on that person) and the Court shall not decline to make the order in whole or in part to the extent that there appears to be knowledge or negligence of the person seeking to establish injustice, as to whether the property was as described in subsection (1) (a) when becoming involved with the property. [our emphasis]

Section 9(1) of POCCCA provides:

> Where the Director or Deputy Director states in proceedings under section 3 or 4 on affidavit or, if the Court so permits or directs, in oral evidence, that *he believes*, that-
> (a) the respondent is in possession or control of specified property and that property constitutes directly or indirectly, benefit from criminal conduct; or
> (b) the respondent is in possession or control of specified propertyand that the property was acquired, in whole or in part, with or in connection with property that, directly or indirectly, constitutes benefit from criminal conduct; and
> (c) the value of the property or as the case may be the total value of the property referred to in both paragraphs (a) and (b) is not less than R50,0000
> then, if the Court is satisfied that *there are reasonable grounds for the belief* aforesaid, the statement shall be evidence of the matters referred to in paragraph (a) or in paragraph (b) or in both paragraphs (a) and (b) as appropriate, and of the value of the property…
> (3) The standard of proof required to determine any question arising under this Act …shall be that applicable to civil proceedings. [our emphasis]

The Chief Justice in his judgment dated 11 May 2011 found that the "applicant ha[d] not attained the evidential threshold" to permit a section 4 interlocutory order to be made in this case. He based this finding on the examination of evidence before him as set out in the affidavit of Mr Hogan. He stated that:

> the fact that the standard of proof here is the civil standard of proof does not mean the applicant may ignore available best evidence to support their allegations against the respondent and then choose to rely on belief of the director or Deputy Director of the applicant. Under section 9 of POCA the court must be satisfied that there are reasonable grounds for such belief.

> Where there are convictions of criminal offences and civil judgments for fraud it is the production of evidence for such convictions and or civil judgments that can form reasonable grounds for belief. It is unreasonable to rely only on documents that initiated action without making available documents that show the result where such documents exist and are or ought to within reach. Hence the fact that documents produced by the appellant disclose the proceeding brought by the respondents in the courts of the USA they do not confirm the final outcome of the cases.

With respect, the Chief Justice cannot exact the best evidence that could have been brought by the FIU in this case as the legislation, specifically the provisions of section 9 of POCCCA, does not set the bar that high. The burden of proof at this initial stage is neither one of a criminal case of 'beyond reasonable doubt' nor that of a civil matter of 'on a balance of probability'. All that is necessary is "a reasonable belief" that the property has been obtained or derived from criminal conduct by the designated officer of the FIU. That belief pertains to the designated officer and hence involves a subjective element. It is therefore only prima facie evidence or belief evidence. No criminal offence need be proved, nor mens rea be shown. As Hardiman J stated in the Irish Supreme Court case of *Murphy v GM* [2001] 4 IR 113 at 148 –

> If the legislature had intended that no such order should be made unless it had first been established that the person in possession or control of the property had acquired it with a criminal intent, it would have said so.

As long as there are reasonable grounds for the belief by the applicant that the property is the proceeds of crime it is sufficient evidence to result in the granting of the order. If the FIU relies on belief evidence under section 9 the court has to examine the grounds for the belief and if it satisfied that there are reasonable grounds for the belief it should grant the order. There are appropriate and serious protections for the respondents as at different stages they are permitted to adduce evidence to show the Court that the property does not constitute benefit from criminal conduct. Their burden in this endeavour is that "on a balance of probabilities." In other words, once the applicant establishes his belief that the property is the proceeds of crime, the burden of proof shifts to the respondent to show that it is not. Hence, unless the court doubts the belief of the officer of the FIU which is reasonably made he cannot refuse the order. The Chief Justice therefore could not exact better evidence of Mr Hogan as this is not required by the legislation. As he does not state that he disbelieved him and as no evidence to the contrary has been tendered by the respondent or by any other person the order must be made.

That in fact is not the end of the matter for the respondents. They are afforded further protection by the provisions of POCCCA. Section 4(3) provides that where the interlocutory order is in force, the Court can discharge the order if an application is made by the respondent or any other person claiming an interest in the property and showing to the satisfaction of the Court that the property is not one derived from criminal conduct. It is therefore still open to them to come forward and show such evidence.

There is no inequality of arms created by the provisions and there is no need for the court to attempt to redress the difference in the evidential burden to be acquitted by

each side. It is particularly instructive to recall Irish jurisprudence on this matter, from which our legal provisions were borrowed. In this respect the corresponding Irish provisions of our sections 3 and 4 of POCCCA are their sections 2 and 3. In *Murphy v GM* [2001] 4 IR 113,155 Hardiman J stated:

> As to the submission that there was no 'equality of arms' between the parties because evidence of opinion was permitted in the case of the applicant but not in the case of the respondents, the court is satisfied that no such inequality has been demonstrated: the respondents to an application under s. 2 or s. 3 will normally be the persons in possession or control of the property and should be in a position to give evidence to the court as to its provenance without calling in aid opinion evidence.

In the recent case of *McK v H and H* [2006] IESC 63 at 10-11 Hardiman J expressed the view that, once the two statutory pre-conditions were met in relation to the belief statement, that it is held and expressed, and that there are reasonable grounds for it, then the belief constitutes evidence. He continued:

> This evidence is not conclusive and may be counteracted by evidence called by or on behalf of the defendant. Accordingly, the effect of the expression of an admissible belief under the Section, if it is not undermined in cross examination, is to create a prima facie case which may be answered by the defendant if he has a credible explanation as to how he lawfully came into possession or control of the property in question, and established this in evidence.

The high evidential bar placed by the Chief Justice in this case is decidedly out of line with previous cases decided on much less evidence and which were unlike the present case contested. For example in *FIU v Allisop* SSC 144/2009 (unreported) a vigorous defence was mounted on much less prima facie evidence produced by the FIU and yet the interlocutory order was made. In the present case 18 grounds for the belief of the designated officer supported by document evidence is set out. None of these grounds are contested. Most of these averments would of their own have, in our opinion, sufficed to cause the interlocutory order to be made.

In summary, and in order to guide courts in similar cases, we state:

> 1. On an application by the designated officer of FIU, if it appears to the Court on prima facie evidence (or reasonable belief evidence) of the designated officer of the FIU that the property is the benefit of criminal conduct and the respondent neither appears nor contests the application, the Court must make the order.
> 2. Where, in response to the prima facie evidence or belief evidence the respondent engages in the court process, be it by filing an affidavit or by leading direct evidence and is able to show to the satisfaction of the court (on a balance of probabilities) that the specific property is not wholly or partly directly or indirectly the benefit of criminal conduct, the Court shall not make an order under section 4 of POCCCA.
> 3. Where the Court is not satisfied that the respondent has adduced evidence on a balance of probabilities that the property is not the proceeds of crime then the Court shall make the interlocutory order.

> 4. In a case where the respondent has met the evidential burden, the Court should proceed to examine the evidence adduced by the applicant and balance that evidence against the respondent's in the usual way and decide the issues.

In the present case step 1 only had been reached and as we have pointed out there was no reason for the Chief Justice to exact more than the requisite statutory standard of evidential proof. The application of the designated officer of the FIU was comprehensively and ably supported by an affidavit showing grounds for his reasonable beliefs and also by documentary evidence.

Finally, in the last paragraph of the ruling of the Chief Justice is the statement:

> In the result I am satisfied that *presently* the applicant has not attained the evidential threshold in the circumstances to permit a section 4 interlocutory order. [emphasis ours]

Mr Galvin for the appellant has submitted that operating under the belief that the FIU could subsequently submit further evidence to meet the threshold, attempted to introduce copies of orders of the courts of the United Sates against some of the respondents. This was refused by the Supreme Court. We exercised our discretion under rule 3(2) of the Seychelles Court of Appeal rules and permitted him to produce the evidence. Among other documents he produced we have had sight of the *USA v Jonathan Curshen* Criminal Information dated 15 January 2009, the Department of Justice notification detailing the conviction of Jonathan Curshen and anor and the order of the United States District Court, Western District of Washington at Tacoma against Jonathan Curshen of 7 December 2009. This was in no way necessary to support the making of the order pursuant to section 4 of POCCCA. We did so only to further ensure that all evidence so far gathered by the FIU was on record.

In view of our findings above we allow this appeal and make the following orders:

> 1. An interlocutory order pursuant to section 4 of the Proceeds of Crime (Civil Confiscation) Act 2008, prohibiting the respondents or any other person having notice of the making of the order from disposing of or otherwise dealing with the whole or any part of the property standing to credit in the accounts set out in the table attached to the affidavit of Liam Hogan in this application or diminishing its value;
> 2. Thereafter an order pursuant to section 8 of the Proceeds of Crime (Civil Confiscation) Act 2008, appointing Liam Hogan as the Receiver of the specified property and to hold the same in an interest bearing account in Barclays Bank (Seychelles) Ltd.
> 3. That the Receiver be entitled to appoint agents or counsel, or any other person considered by him to be necessary, and pay the costs and expenses of same and his own costs and expenses as they shall arise from time to time out of the funds he shall receive under this order.
> 4. That the present order remain valid until a disposal order is made pursuant to section 5 of the Proceeds of Crime (Civil Confiscation) Act 2008.
> 5. That respondents 1 to13 pay the costs of this case.

6. That a copy of this judgment is brought to the attention of the Legislature, specifically in reference to the fact that rules of court to regulate the procedure before it in respect of the Proceeds of Crime (Civil Confiscation) Act 2008 have yet not been made and need to be made to ensure the fair, just, timely and effective resolution of proceedings under its provisions.

GOMME v MAUREL

Domah, Fernando, Msoffe JJ
7 December 2012 Court of Appeal 6/2010

Res judicata – Abuse of process

The appellant moved for the order of a new trial of a civil action in which he claimed that the sale of a parcel of land should be annulled for fraud committed by the two respondents. The Supreme Court upheld the respondents' plea in limine that the matter was res judicata.

JUDGMENT Appeal dismissed.

HELD
1 Abuse of process has a wider scope than the three requirements of res judicata.
2 Courts should not attempt to define what may amount to an abuse of process.
3 Abuse of process may arise where parties who were not originally involved in the case seek re-litigation of the case which had already been decided.

Legislation
Civil Code, art 1351
Court of Appeal Rules, rules 25, 26

Cases
Hoareau v Hemrick (1973) SLR 272
Julienne v Julienne (1992) SLR 121
Pouponneau v Janisch (1979) SLR 130
Rouillon v Tirant (1983) SLR 169
Seychelles Housing Development Corporation v Fernandez (unreported) SSC Civ 131/1989

Foreign Cases
A Minor v Hackney London Borough Council [1996] 1 WLR 789
Arnold v National Westminster Bank Plc [1991] 2 AC 93
Ashmore v British Coal Corporation [1990] 2 QB 338
Barrow v Bankside Agency Ltd [1996] 1 WLR 257
Board in Brisbane City Council v Attorney-General for Queensland [1979] AC 411
Bradford & Bingley Building Society v Seddon Hancock [1999] 1 WLR 1482
Bragg v Oceanus Mutual Underwriting Association (Bermuda) Ltd [1982] 2 Lloyd's Rep 132
Greenhalgh v Mallard [1947] 2 All ER 255
Henderson v Henderson (1843) 3 Hare 100
House of Spring Gardens Ltd v Waite [1990] 2 All ER 990
Johnson v Gore Wood & Co (unreported) [1998] EWCA Civ 1763
MCC Proceeds Inc v Lehman Brothers International (Europe) [1988] 4 All ER 678
Morris v Wentworth-Stanlay [1999] 2 WLR 470
North West Water Ltd v Binnie & Partners [1990] 3 All ER 547
Re Morris [2001] 1 WLR 1338
Talbot v Berkshire Country Council [1994] QB 290

Thoday v Thoday [1964] P 181, [1964] 1 All ER 341
Yat Tung Investment Co Ltd v Dao Heng Bank Ltd [1975] AC 581

Joel Camille for appellant
Basil Hoareau for respondent no 1
Frank Ally for respondent no 2

Judgment delivered on 7 December 2012

Before Domah, Fernando, Msoffe JJ

DOMAH J:

The appellant has moved for an order of a new trial of a civil action involving a property transfer where he had averred that the sale of a particular parcel: namely, V 6331, should be annulled for fraud committed by the two above respondents. The Supreme Court had gone into the merits of the case before upholding the plea *in limine* which the respondents had raised to the effect that the matter was *res judicata.*

The appellant has challenged the decision on the single ground that the Supreme Court erred in its decision in holding that the matter was *res judicata* as against both respondents. On the day of hearing of this appeal, the appellant sought to introduce new grounds of appeal. We declined to grant the motion of counsel. We gave our reasons. Had we granted the motion, it would have constituted an evil precedent of condonation of delay. The motion was made in breach of rules 25 and 26 of the Court of Appeal Rules. The appellant had shown no good cause, as he was required for a belated eleventh hour application. Allowing the motion would have looked so much as condoning the appellant's continuing in the conduct of the case, encouraging him to make a further abuse of the process of the court and giving scant regard to the right of the respondents to be entitled to a finality in a judgment in a case that had started in 2001. Allowing the motion would have protracted the case to April 2013. That is the reason which prompted the court to comment on the responsibility of counsel in the conduct of a case. In giving this judgment, however, we shall not confine ourselves to the only ground which was raised by the appellant.

The Facts, the Determination and the Issue before the Supreme Court

The facts relevant to this appeal are by and large as follows. Respondent no 1, a public notary, had made a transfer of sale of property of V6431 to the appellant and his common law wife, now deceased. The appellant's claim was that he was also meant to effect the transfer of the sale of property V6331 which the notary had failed to do. The appellant later learned that, on 11 June 1999, V6331 had been transferred in the name of respondent no 2. The appellant, accordingly, started an action where he sought, inter alia, an order that the transfer of 1999 of V6331 be declared null and void on the ground that there had been fraud. Both respondents had raised preliminary objections to the suit being heard on the merits. The plea of respondent no 1 was that the matter was *res judicata*; the plea of defendant no 2 was that the matter was prescribed in time. The preliminary objections were not heard *ex facie* the plaint but along with the merits. This, we should add, was the

correct approach because such issues as were raised could not have been dealt with on the face of the pleadings only. They could have been dealt with in one of the two ways: either the shorter method of hearing after adducing some evidence just on the issues raised to determine the objections on the plea *in limine*; or, alternatively, the longer method of hearing all the evidence before deciding those preliminary issues along with the merits. The Chief Justice decided to take the more elaborate and painstaking route.

At the hearing, evidence was adduced by the appellant himself who was the only one who deposed for his version of facts whereby he had paid R60,000 and R90,000 for two plots (V6331 and V6431) and not just for one (V6431). He produced two cheques: one dated 6 June 1990 for the sum of R30,000 and another dated 15 June 1990 for the same sum to make the sum of R60,000, stating that the difference was paid by the Seychelles National Housing Corporation (SNHC) from which he had taken a loan of R90,000. He was able to later repay his loan. He went on to state that the two transactions were conducted at the same time but, to his dismay, the transfer was not made for V6331 by respondent no 1 who only transferred plot V6431 in his name and that of his then wife. He stated that he occupied the plot claimed by a construction and a chicken coop and only learned about the "fraud" when in 1999 he got a letter from the attorney of respondent no 2 following which he started an action which he lost and a second action which he again lost. Both these actions had proceeded on appeal and confirmed on appeal.

Doubt was cast on whether the document whereby the transfer was made from the original owner, Antoine Collie, to respondent no 2 was an authentic one since the above transactions had taken place at an arms length. Both were living abroad: the latter had signed in Hull, the United Kingdom and the former in Australia. The lawyers involved were of foreign jurisdictions.

The Reasons for the Dismissal of the Action in the Court Below

The Chief Justice, in a well written judgment, had concluded that the plaintiff could not be believed. He gave a number of reasons for not accepting the version of the appellant. One reason he gave is that oral evidence could not be admitted for the transaction alleged of V6331. It was caught by the prohibition in article 1341 of the Civil Code unless it fell within the exception provided under article 1347. Article 1347, in his view, was inapplicable because there was no beginning of proof in writing. There was no beginning of proof in writing as the documents produced could not be linked to the transaction alleged. That the documents suggested a transaction consistent with a sale of only V6431 for the sum of R150,000.

We have gone through the record of proceedings and the documents and we are unable to say that the Chief Justice reached the wrong conclusion on that aspect. Our own assessment is that there arises nothing in the documents and the surrounding circumstances which render the version given by the appellant "*vraisemblable aux faits allégués*." To qualify as an exception to article 1341, the facts and the circumstances should lend verisimilitude to what is alleged. There is no such semblance of verity in the allegations of the appellant. Accordingly, it cannot be said that the Chief Justice erred in his appreciation of the facts with regard to this aspect of the case of the appellant.

A second reason which the Chief Justice gave was that we had only the word of the appellant for such a serious transaction as a land transfer following sale. The Chief Justice found that the appellant was not worthy of belief. In our view, counsel for the appellant has been unable to show to us that that conclusion is perverse. In fact, as far as may be gathered from the record of proceedings, the appellant treated the importance of his deposition in Court with the same levity with which he had treated the transaction. For a matter involving R60,000 he did not bother to find out from his transfer documents as to what he and his wife had actually bought when those documents were sent to him. He stated that, at the notary, the document was not read to him and that he only learned of the omission in 1999 and that until then he had assumed that parcel V6331 belonged to him. That is hard to believe. The record shows that he is a man of knowledge of society and the world. The Court commented that there was "no convincing explanation as to how he could have appended his signature to a document which was contrary to his express instructions to the notary public." We agree with that reasoning. It is worthy of note that to crucial questions raised in cross-examination, the appellant stated that his glasses were not with him to enable him to answer one way or the other.

In our final analysis, we are unable to disturb the finding of fact of the Chief Justice to the effect that the notary public followed the instructions he had been given by the appellant for a single transaction of V6431 and not two transactions of V6331 and V6431.

A third reason given in the judgment was that for an action based on fraud, it is not enough to just adumbrate it. One who alleges fraud should have material to ground his allegation on. In this case, the decision reads: "there was no scintilla of evidence to bear out the claim that the transfer of parcel V6331 …. was a sham and a fraud.'" We cannot but agree with the judgment both in law and on the facts. The appellant called no witness nor produced any document in support of his allegation which, on the record, seems to be based simply on his personal perception of things.

A fourth reason he gave is that *res judicata* applied to the transaction. The Chief Justice referred to the Civil Case Cause Number 215 of 1999 to decide that the three elements required for a plea of *res judicata* were satisfied in this case: namely, the subject-matter of the dispute, the nature of the action and the parties to the action. He applied the decision of *Hoareau v Hemrick* (1973) SLR 272.

We find no reason to depart from the conclusion he reached on the matter of *res judicata*. The question in the previous case of the appellant involved the title to the land in V6331. That in the present case involves the same issue, if approached differently. The prayer sought in that action was the recovery of parcel V6331 and the rectification of the title to reflect the name of the appellant. This is exactly what the appellant sought in the present case.

Res Judicata and Abuse of Process

We consider that it is apposite that at this state we state a few things about multiplicity of litigation. The plea of *res judicata* provided for in article 1351 of the Civil Code was designed to stop such abuses. It reads:

> The authority of a final judgment shall only be binding in respect of the subject matter of the judgment. It is necessary that the demand relate to the same subject matter; that it relate to the same class; that it be between the same parties and that it be brought by them or against them in the same capacities.

For interpretation one may refer to the cases of *Heirs Rouillon v Alderick Tirant* (1983) SLR 169, *Pouponneau and Others v Janisch* (1979) SLR 130, *Seychelles Housing Development Corporation v Fernandez* Supreme Court (Civil Side) No 131 of 1989, *Julienne v Julienne* Supreme Court (Civil Side) No 68 of 1991, and *Hoareau v Hemrick* (1973) SLR 272.

The rationale behind the rule of *res judicata* and its strict application is grounded on a public policy requirement that there should be finality in a court decision and an end to litigation in a matter which has been dealt with in an earlier case. Because of the imaginative use that has been made to go round the rule, courts have developed the rule of abuse of process. The rule of abuse of process encompasses more situations than the three requirements of *res judicata*. Courts cannot stay unconcerned where their own processes are abused by parties and litigants. There is a time when they have to decide that enough is enough where the lawyers have not advised their clients. Abuse of process will also apply where it is manifest on the facts before the court that advisers are indulging in various strategies to perpetuate litigation either at the expense of their clients who may be hardly aware or at the instance of their clients who have some ulterior motive such as of harassing parties against whom they have brought actions or others who may not be parties. Courts have a duty to intervene to put a stop to such abuses of legal and judicial process: see *Bradford & Bingley Building Society v Seddon Hancock & Ors* [1999] 1 WLR 1482, *House of Spring Gardens Ltd & Ors v Waite and Others* [1990] 2 All ER 990, and *In Re Morris* [2001] 1 WLR 1338.

The proper adherence to the rule of law in a democratic society enjoins one to ensure that one is debarred from rehashing the same issue in multifarious forms. Litigation should be reserved for real and genuine issues of fact and law. The dictum of Sir James Wigram VC in *Henderson v Henderson* (1843) 3 Hare 100 at 115, reproduced in the case of *Bradford & Bingley Building Society* (supra), is worth reproducing:

> where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest; but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an

> opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

In the case of *Bradford & Bingley Building Society*, Auld LJ had this to say on the difference between the two rules:

> In my judgment, it is important to distinguish clearly between res judicata and abuse of process not qualifying as res judicata, a distinction delayed by the blurring of the two in the courts' subsequent application of the above dictum. The former, in its cause of action estoppel form, is an absolute bar to re-litigation, and in its issue estoppel form also, save in "special cases" or "special circumstances": see *Thoday v Thoday* [1964] P. 181, 197-198, per Diplock L.J and *Arnold v National Westminster Bank Plc.* [1991] 2 A.C. 93. The latter, which may arise where there is no cause of action or issue estoppel, is not subject to the same test, the task of the court being to draw the balance between the competing claims of one party to put his case before the court and of the other not to be unjustly hounded given the earlier history of the matter.

The wider scope of abuse of process is put succinctly by Auld LJ in the case referred to:

> Thus, abuse of process may arise where there has been no earlier decision capable of amounting to res judicata (either or both because the parties or the issues are different) for example, where liability between new parties and/or determination of new issues should have been resolved in the earlier proceedings. It may also arise where there is such an inconsistency between the two that it would be unjust to permit the later one to continue.

Abuse of process is not a new discovery under the rule of law and the court's control of cases coming to court. The "source of the doctrine of abuse of process" may be traced to a 1947 decision of Somervell LJ in *Greenhalgh v Mallard* [1947] 2 All ER 255 at 257. The scope may be found in the following pronouncement of the court. Abuse of process is:

> … not confined to the issues which the court is actually asked to decide, but … covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them:

Lord Kilbrandon in *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581 at 590A, stated that such cases may still be aborted by the application of the rule of *res judicata* in "its wider sense"; and Stuart-Smith LJ in *Talbot v Berkshire Country Council* [1994] QB 290 at 296D-E made similar comment when he referred to the application of *res judicata* in a "strict" or "true" sense.

So much for the scope. Now for the limit. That may be found in what Lord Wilberforce, delivering the opinion of the Board in *Brisbane City Council v Attorney-General for Queensland* [1979] AC 411 at 425, stated when he confined it to its "true

basis": namely, the prohibition against re-litigation on decided issues. Abuse of process -

> …. ought only to be applied when the facts are such as to amount to an abuse; otherwise there is a danger of a party being shut out from bringing forward a genuine subject of litigation.

As Kerr LJ and Sir David Cairns respectively emphasized in *Bragg v Oceanus Mutual Underwriting Association (Bermuda) Ltd* [1982] 2 Lloyd's Rep 132 at 137 – 139, the courts should not attempt to define or categorize fully what may amount to an abuse of process and that the doctrine should not be "circumscribed by unnecessarily restrictive rules" inasmuch as the purpose was to prevent abuse by not endangering the maintenance of genuine claims.

For a recent application of the doctrine, one may refer to Sir Thomas Bingham MR as he then was, in *Barrow v Bankside Agency Ltd* [1996] 1 WLR 257 at 260:

> The rule is not based on the doctrine of res judicata in a narrow sense, nor even on any strict doctrine of issue or cause of action estoppels. It is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on for ever and that a defendant should not be oppressed by successive suits when one would do. That is the abuse at which the rule is directed.

To come back to the present appeal, we have gone through the record and the history of the dispute which started some 11 years ago. The decision of the Chief Justice cannot be impugned when he found that the appellant was engaged in re-litigation. The case of *Bradford & Bingley Building Society* [supra] is pretty clear on this point that even parties who were not originally in the case may be caught by the doctrine of abuse of process if they seek a re-litigation of a case which has already been decided upon.

The very fact of engaging in a second action to re-litigate an issue resolved in an earlier matter should raise professional eyebrows. As Auld LJ stated:

> In my view, it is now well established that the Henderson rule, as a species of the modern doctrine of abuse of process, is capable of application where the parties to the proceedings in which the issue is raised are different from those in earlier proceedings where such a course is reasonably practicable, and whenever it is so and is not taken then, in a appropriate case, the rule may be invoked to render the second action an abuse: see *Yat Tung Investment co Ltd v Dao Heng Bank Ltd* [1975] AC 581; *Bragg v Oceanus Mutual Underwriting Association (Bermuda) Ltd* [1982] 2 Lloyd's Rep 132; *North West Water Ltd v Binnie & Partners* [1990] 3 All ER 547; *M.C.C Proceeds Inc v Lehman Brothers International (Europe)* [1998] 4 All ER 678 and *Morris v Wentworth-Stanlay* [1999] 2 WLR 470.

Auld LJ had followed the above from the pronouncement of Kerr LJ in the *Bragg's* case:

> it is clear that an attempt to re-litigate in another action issues which have been fully investigated and decided in a former action may constitute an abuse of process, quite apart from any question of res judicata or issue estoppels on the ground that the parties or their privies are the same.
> (*Bragg* [supra] at 137)

The rule has also been applied in a case where a plaintiff who could and should have pursued his claim in an earlier action against the same defendant: see eg *Ashmore v British Coal Corporation* [1990] 2 QB 338, *Johnson v Gore Wood & Co* 919980 EWCA Civ 1763, and *(A Minor) v Hackney London Borough Council* [1996] 1 WLR 789.

We agree with the decision of the Chief Justice that *res judicata* applies. However, it is more a case of abuse of process, judged by the foregoing citations. It is hard to imagine that a buyer of two plots of land who proceeds to have two transfers effected returns home after signing the papers and only discovers some 9 years later that the transfer was effected only as regards one land and not the other! That is simply implausible. It is hard to accept such a story from, as was pointed out by the Chief Justice, a man of the plaintiff's literacy. The more plausible story is that after the paper was served in 1999 by the attorney for encroachment at the boundary line by a CIS structure and chicken coop and occupation by his chickens, the appellant decided that he could attempt to sell to the court that story.

The other reason apparent in the judgment is the sheer coherence and plausibility in the defence version and evidence compared to those of the appellant. Defence evidence included the deposition of Mr Barry Cesar, the accountant of SHDC whose evidence, even if of a general nature, yet contained one statement important which discredited the version of the appellant: The NHDC would not have given a loan to the appellant if it was being asked to buy two plots inasmuch as the policy was that of giving a loan to a person limited the purchase of one property. If he was to buy two plots, he was disqualified for an NHDC loan.

The first respondent also deponed stating that the appellant and his concubine had come for the transaction with regard to parcel 6431 and that he had explained the document to them without any complaint whatsoever. The second respondent deposed as to why the sale took place at arm's length. She was herself at the time residing in Hull, United Kingdom. She needed to secure access to her property V7895 by a proper access road. Her uncle who owned V6331 gave her permission to do so. But the authorities would not approve unless the property was in her name. She, accordingly, bought the plot from her uncle. She signed the papers in Hull and her uncle signed in Australia where he had retired by that time. To enable the development to take place, she had to cause a legal notice to be served on the appellant to remove the chicken coops and the CIS structure not because they were, at the time on the property but because they were encroaching over boundary line. If anything the occupation, in her view, was by the chicken and not by the appellant.

Mr Chang Seng deponed as to the neighbour who had also built the access road. His evidence does not show an occupation of parcel V6331 by the appellant. He also stated that at the time, the property was deserted, slopy and rocky.

In light of the above, we uphold the decision of the Chief Justice. We find no merit in the appeal. We dismiss it with costs.

GOVERNMENT OF SEYCHELLES v MOULINIE

Domah, Twomey, Msoffe JJ
7 December 2012 Court of Appeal 16/2012

Constitution – Compulsory acquisition

The respondent's land was compulsory acquired by the Government. The Constitutional Court ordered the return of three properties and compensation for the other properties under s 14(1) of Schedule 7 part 3 of the Constitution.

JUDGMENT Appeal partly allowed. Remitted to Constitutional Court to determine quantum of compensation.

HELD

1 Compensation for land compulsory acquired should be prompt, adequate and effective. If the compensation does not achieve this then the owner has a right of adjustment of the compensation.
2 Payment of compensation, where the quantum is disputed, is not a bar to the return of land under s 14 of Schedule 7 part 3 of the Constitution.
3 The overriding criterion for whether there has been development is the concept of public interest. If the development is one the owner could do, public interest dictates the owner should be given the opportunity and incentive to carry out the development.
4 The government must show that the compensation it has given is full in the sense that it is adequate, prompt and effective to alleviate the hardship imposed.

Legislation
Constitution, Sch 7 (pt 3 s 14)
Lands Acquisition Act

Cases
Atkinson v Government of Seychelles SCA 1/2007, CM III 56
Du Boil v Government of Seychelles (unreported) SCC 5/1996

Foreign Cases
Frères v Ministry of Housing, Lands and Town and Country Planning [1987] UKPC 40

Alexandra Madeleine for appellants
Philippe Boullé SC for respondent

Judgment delivered on 7 December 2012

Before Domah, Twomey, Msoffe JJ

DOMAH J:

The respondent is the executor of the estate of late Michel Paul Moulinie who in his lifetime had made a timely application to the Government under section 14(1) of Part III of Schedule 7 of the Constitution for constitutional redress with respect to all his properties which had been compulsorily acquired by government on 1 December 1980. The negotiations went on for 14 years without the respondent having obtained satisfaction. Finally, on 5 August 2011, he brought an action before the Constitutional Court which ordered the return of three of the properties and ordered compensation for the rest. The property for which there was an agreement for part return and part compensation was PR13, situated in Praslin. Judgment was entered as per agreement reached. The other parcels on which there was dispute were V5317, V5318, V5319 and V5320. With regard to 5317, the court found that the property was subdivided into 3 plots V7121, V7122 and V7123, for which there has been no serious insistence by the respondent for their return. However, he sought full compensation for same. The Court found, with regard to parcel V5318 that this property was developed at the time of acquisition but had not been further developed by the Government. With regard to parcel V5319, it found that it had been in 1989 transferred to the Seychelles Industrial Development Corporation but, in 2008, the entity returned it to the Government. At the date of the hearing, it emerged that a large construction was being put up and had come off the ground, the continuing of which was stopped by an order of injunction. With regard to parcel V5320, it found that the property, stated to have remained undeveloped by the respondent, is being used as a multipurpose court for the benefit of the community. The Constitutional Court ordered that all three properties, the agreed parts of V5317 and the whole of V5318, V5319 and V5320, be returned to the respondent.

With regard to compensation it decided that there should be proper evaluation of the properties before it could be paid inasmuch as the figures looked to be unsupported by expert evidence.

Grounds of Appeal

The Government and the Attorney-General (the appellants) have appealed against that decision on the following grounds:

(1) The Constitutional Court erred in its appreciation and consideration of the facts of the case in holding that parcels V5318, V5319 and V5320 were available for return to the respondent because:

a. some compensation in the total sum of R1.95m million had been paid to the respondent for the acquisition of the properties under the Lands Acquisition Act, 1977;

b. at the time of the application under section 14 of Part III Schedule 7 to the Constitution –

(i) parcel V5319 was developed and had been transferred to the Seychelles Development Corporation for its redevelopment and therefore was not available for return;
(ii) parcel V5318 was developed into a multi-purpose court for use by the community at the time and therefore was not available for return;
(iii) parcel V5320 was developed and was being used for accommodation of the first appellant's expatriate workers and therefore not available for return;

c. following the tespondent's application under section 14 of Part III Schedule 7 to the Constitution, negotiations between the first appellant and the respondent proceeded on a monetary basis;
d. at the time of filing of the petition in the Constitutional Court –
(i) parcel V5319 had been leased to the Seychelles Pension Fund for a commercial development which was underway as witnessed by a copy of the said lease agreement which had been annexed to the Affidavit in support of the Reply to the Petition as Annex W.
(ii) parcel V5320 was still being used as a multipurpose court by the community;
(iii) parcel v5318 was still being used for the accommodation of the first appellant's expatriate workers.

(2) The Constitutional Court erred in ordering the return of the acquired properties or remainder undeveloped part thereof on payment of monetary compensation in respect of the acquired properties or part thereof that had been transferred to third parties without considering the compensation that had already been paid under the Lands Acquisition Act, 1977.

(3) The Constitutional Court erred in holding that parcels V5318, V5319 and V5320 were undeveloped at the time of the filing of the application under section 14, Part III Schedule 7 to the Constitution and was therefore available for return because compensations had been paid under the Lands Acquisition Act, 1977 and the said properties were developed as stated under ground (1)d.

(4) The Constitutional Court erred in holding that appellant failed to convey to the Court the actual status quo of land parcels V5319 in that a copy of the lease agreement between the Republic and Seychelles Pension Fund was annexed to the Affidavit in support of the Reply to the Petition as Annex W.

(5) The Constitution Court erred in holding that the appellant had ignored options (1)(2) and (3) which it was obliged to consider first in priority before jumping to option 4 to tell the respondent that he is entitled to only monetary compensation because it failed to consider that monetary compensation has been paid under the Lands Acquisition Act, 1977 and the properties were developed into and used as multipurpose court by the community and was therefore not available for return.

(6) The Constitutional Court erred in holding that no evidence had been adduced that parcel V5319 had been developed or in any case was developed at the time of receipt of the application of the respondent because it was deponed in the Affidavit in support of the Reply to the Petition that parcel V5319 was developed, transferred to Seychelles Industrial Development Corporation in 1989 for a redevelopment project and subsequently leased to Seychelles Pension Fund for a commercial development and the lease agreement was annexed to the said Affidavit as Annex W.

(7) The Constitutional Court erred in law in holding that since V5319 was transferred back to the Government in 2008 it was available for return because it failed to consider the operative words of section 14(a) of Part III Schedule 7 to the Constitution namely: "on the date of receipt of the application" and that the said parcel V5319 was subsequently leased to the Seychelles Pension Fund for a commercial development.

(8) The Constitutional Court erred in rejecting the appellants' contention that the facts of the present appeal were distinguished from the facts of the case of *Atkinson v the Government of Seychelles and the Attorney-General* SCA1/2007.

(9) The Constitutional Court erred in holding that in all cases where land has not been developed by the government between the date of compulsory acquisition and date of receipt of the application for return under section 14(1)(a), such land must be returned to the former owner because it fails to make a distinction between cases where the bare ownership in land was acquired and cases where developed land was acquired and put to use.

(10) The Constitutional Court erred in holding that land parcel V5320 was not developed and merely used as a multipurpose court because the said V5320 was developed and used as such.

The appellants have moved, therefore that the decision of the Constitutional Court ordering the return of parcels V5318, V5319 and V5320 to the respondent be quashed. The reasons the appellant has given are apparent in the grounds of appeal.

The appellants seek, accordingly:

> a declaration that compensation having been paid under the Lands Acquisition Act, 1977 in respect of all the acquired properties, the respondent is only entitled to a review of the monetary compensation paid to be calculated at the market value of the properties as at June 1993 or such other value as may be agreed upon between the parties less the sum of R1.95 million paid in respect of the same properties under the said Lands Acquisition Act, 1977;
>
> a declaration that on the date of receipt of the application under section 14 of Part III Schedule 7 to the Constitution, V5319 was not available for return as it had been transferred to the Seychelles Development Corporation and that

parcel V5320 was developed and used as a multipurpose court by the community and was, therefore, not available for return;

a declaration that the respondent is entitled to monetary compensation in respect of parcels V5318, V5319 and V5320 to be calculated at the market value of the properties as at June 1993 or such other value as may be agreed upon between the parties less the sum of R1.95 million paid in respect of the same properties under the said Lands Acquisition Act, 1977.

Grounds of Cross-Appeal

The respondent have cross-appealed against the decision and put up the following grounds:

14

(1) The Constitutional Court erred in awarding compensation to the respondent for the land sold by the first respondent based on the market value as at the coming into force of the Constitution on 21 June 1993.
(2) The Constitutional Court failed to take into consideration the violation of the respondent's constitutional right to ownership of the property sold to the third parties, which should attract compensation outside the scope of compensation for developed land in respect of which the State's obligation may be limited to payment of compensation valued as at the date of coming into force of the Constitution.
(3) The finding of the Constitutional Court that there was no proof of the value of the property failed to take into consideration the best evidence available on such value found in the admission of the appellants on the pleadings before the Constitutional Court.
(4) The finding of the Constitutional Court that the petitioner had not proved the losses and damages claimed in the petition, failed to take into account the best evidence available to support the claim found in the admission of the appellants on the pleadings before the Constitutional Court.

In our view, this appeal involves the determination of three key issues. The first is the purport of section 14(a) of Part III Schedule 7 to the Constitution and whether the payment of compensation debars an applicant from applying for a return of his land for which he has received some compensation; the second is the meaning of development as envisaged by the law on state acquisition of property; and the third, where the manner in which the quantum of compensation should be assessed under the law.

Compensation: Is it a Bar to Return?

What the respondent has been claiming in this case is the return of the lands on which he has taken the view there has been no development. We need to state here that we are using the word return for the sake of simplicity. The section itself speaks of transfer back to the person. The parcels on which there is continuing disputes on full compensation are parts of PR13 and V5317. Those on which there is dispute for the return are: V5318, V5319 and V5320. The argument of the appellants is that

compensation has been paid in the sum of R1.95m so that the respondent cannot complain.

The appellants argue that once compensation has been paid, the divested owner loses his right to return of the lands. Our examination of the text shows that nothing in Part III of Schedule 7 of the Constitution shows that such an interpretation is permissible. On first blush, that would seem to be an attractive argument.

One needs to be cautious in adopting it, though. We are here not in the realm of the ordinary law of compulsory acquisition of property where the quid pro quo principle applies in that once the compulsory acquisition of property is effected by the state, what ensues is payment and there is no returning back unless challenged in a court of law. We are here in the realm of the application of a special constitutional provision which speaks in so many words of payment of full compensation and the possibility of return. First, compensation should be prompt, adequate and effective. If the compensation falls short of it, the owner has no right to the return of the property acquired under the statutory law but a right to an adjustment of the compensation so that his or her right to a prompt, adequate and effective compensation is given effect to. But that is under the general law. In the case of the acquisition we are concerned with, we are dealing with a constitutional provision which overrides any other law. We do not read into the relevant text of the Constitution such a possibility. There must be a very good reason which motivated the draftsmen of this text not to insert such a provision. One reason which immediately occurs to our mind is that, if such a possibility were open the whole objective of Part III would have been defeated. It would have given the Government an escape route to flee from their obligation of return of lands which had been compulsorily acquired for no good cause, as it were. The acid test was development or no development.

Another distinguishing feature in our case is that we are not in a situation where a development has been specifically identified by government following which it proceeds to make an acquisition in public interest. We were dealing with a situation where at one time there was a wholesale acquisition of property at various parts of the island without any concrete government plan yet to develop any, in pursuit of some unidentified obscure policy. Such acquisitions are inherently anti-constitutional and oppressive. And the only mitigation is the return. The wholesale acquisition is obvious by the extent and the places at which the acquisitions were done.

That today would be regarded as a blot on the democratic image of the country so that the earlier we make it a thing of the past the better it is. In light of the peculiar history of those acquisitions, one may say that it is by concession to government that the Constitution provided that if the Government was genuinely pursuing a development project in the wholesale acquisition, it could continue to do so insofar as the part development was concerned.

It is worthy of note that payment of compensation was not inserted as a bar to the return of lands except where the compensation was full. We may now look at the constitutional provisions which constitute our supreme source of law for their proper purport:

The relevant section of Part III of Schedule 67 of the Constitution reads –

> (1) The state undertakes to continue to consider all applications made during the period of twelve months from the date of coming into force of this Constitution by a person whose land was compulsory acquired under the Lands Acquisition Act, 1977 during the period starting June , 1977 and ending on the date of coming into force of this Constitution and to negotiate in good faith with the person with a view to;-
>
> (a) where on the date of the receipt of the application the land has not been developed or there is no Government plan to develop it, transferring back the land to the person;
>
> (b) where there is a Government plan to develop the land and the person from whom the land was acquired satisfies the Government that the person will implement the plan or a similar plan, transferring the land back to the person;
>
> (c) where the land cannot be transferred back under sub-sub-paragraphs (a) or sub-sub-paragraph (b);-
>
> (i) as full compensation for the land acquired, transferring to the person another parcel of land of corresponding value to the land acquired;
>
> (ii) paying the person full monetary compensation for the land acquired; or
>
> (iii) as full compensation for the land acquired, devising a scheme of compensation combining items (i) and (ii) up to the value of the land acquired.
>
> (2) For the purposes of subparagraph (1), the value of land acquired shall be market value of the land at the time of coming into force of this Constitution or such other value as may be agreed to between the Government and the person whose land has been acquired.
>
> (3) No interest on compensation paid under this paragraph shall be due in respect of the land acquired but Government may, in special circumstances, pay such interest as it thinks just in the circumstances.
>
> (4) Where the person eligible to make an application or to receive compensation under this paragraph is dead, the application may be made or the compensation may be paid to the legal representative of that person.

As may be seen, the Constitution deals with only three scenarios: where there has not been any development; where there is no government plan to develop it; and where there is a government plan to development but the development may be undertaken by the divested landowner.

Nowhere do we see a provision that states that where compensation has been paid, the divested landowner has no right to make a claim for return. It is eloquent that the appellants do not state that full compensation has been paid; they themselves aver that “some compensation” has been paid in the total sum of R1.95 million. The above-cited constitutional provisions make no mention of the fact that no transfer back is possible where there has been compensation paid, all the more when it is

just “some”. All that they state about compensation is that, on certain events occurring, compensation remains the only option. These are: where there has been development on the land and where there is government plan to develop same which development, on having been offered to the land owner, he declines to carry out. In such a case, the Government may take upon itself to develop it and to pay full compensation.

We hold, therefore, that payment of compensation, where the quantum is disputed, is not a bar to a demand for the return of the land under the relevant constitutional provisions. Inherent in the constitutional provision is the concept of full compensation. If government is not prepared to pay full compensation for any plot of land subject to the section 14 applications, it cannot argue that the applicant cannot ask for the return of the lands. In this case, the respondent has always disputed the quantum of compensation it has received. Accordingly, he is entitled to be considered for the return if the conditions for return are satisfied. And the conditions are those which have been specified in section 14(1) (a) and (b): namely, the land has not been developed or there is no government plan to develop it; however, where there is a government plan to develop it, an option should be given to the owner to develop it.

This leads us to the obvious question as to the meaning of development.

Meaning of Development

A lot lies on the crucial question of the meaning of development. The Chief Justice, with whom Burhan J agreed, commented that use was not development. Dodin J gave a meaning to a term so crucial but which the Constitution left undefined. To Dodin J, “the nature of development always involves a certain goal or several goals that must have been met for the benefit of the community or the targeted group.” Holding on to property without doing anything extra to improve or change it would not amount to development. We endorse that view to the extent that it comes near to the true meaning of development in the law of compulsory acquisition of property demands.

The meaning is inherent in section 14(1)(a) and (b): a development which only the government can undertake in public interest for public purposes and one which any private developer would not wish to undertake for its lack of business viability.

Development should be understood in that sense. Land is a national asset. In a competitive world assets cannot be left to lie fallow so to speak. They should be developed. The question is who should develop what in the public interest for public purposes and who should develop what in the national interest for world competiveness. Where the development may best be done by the private owners, the private owners should be left to do it and government concerned with running government and not running business. There are developments which the private owners will not be able to undertake such as the construction of airports, roads and infrastructure, in the context of small islands. These mega projects should be left to the Government to do. But it is not only mega projects which become the concern of government. Even small projects are their concern: construction of drains, enlargement of roads, provision for a pitch for football, a market place etc. The

private sector will be little interested in engaging in such developments as they do not give business returns. Businesses are interested in mega projects like luxury hotels or luxury flats. The key question is what is in the public interest which can only be undertaken by government and not the private sector. That is the concept in the Constitution. That is also what underlies the provision of section 14 when it provides that where there is a plan for development the option should be given to the owner. It is not the business of government to engage in business. It is the business of government to create an enabling environment for business and development and to facilitate it. If land is scarce, it is in the interest of government not to hold on to land and thereby inhibit development. It is in its interest to return it and encourage its exploitation.

That is the reason for which we endorse the departure of the Chief Justice from the decision of *Lise du Boil v Government of Seychelles and Others* Constitutional Case No 5 of 1996. That 1996 decision should be put to rest. If *Lise du Boil* were allowed to stand in our case law it would mean that the Government would have a right to enter into any successful or unsuccessful private business or development, take it over and run it with the only attached responsibility of paying compensation with all the risk and peril to which government run businesses become vulnerable. That is not what the Constitution envisaged. By the use of the expression “has not been developed” it does mean that Government should show that on acquiring a property, it has a serious project to develop it for a public purpose in public interest, a development which the private sector would not be interested in.

In this sense, as rightly remarked by the Constitutional Court, there was a duty on the Government to put the option to the respondent to present its plan of development and give him the option to develop the property, and if he agreed to allow him to do so; or if he declined, to give him full compensation for same. In this regard, the decision of the Judicial Committee of the Privy Council in the case of *Harel Frères v Ministry of Housing, Lands and Town and Country Planning* [1987] UKPC 40 becomes very persuasive for our purposes. The Government of Mauritius proceeded to acquire property of H on the ground that the Government needed the property for the purposes of boosting its economy in the tourism sector. The project it envisaged was that of the construction of a hotel. The Law Lords underscored the principle that compulsory acquisition of property is not meant for such types of development which can best be done by the private sector. When government comes up with such a plan, government should -

> lead evidence indicating with all necessary particularity the nature and extent of the proposed hotel development, showing how, when and by whom it is proposed to be carried out and why it is necessary or expedient that it be achieved through the medium of public ownership of the land. The appellant will in its turn have the opportunity to controvert the Minister's case by demonstrating, if it can, its own willingness and ability, which it has asserted, to secure that the appropriate development is carried oat so as to achieve the social and economic benefits of tourism envisaged by the Government without the need for public acquisition of the land.

Any acquisition of property has to be in the public interest. At this juncture it is worth stating that the previous law used the word acquisition in the national interest which was undefined and left to the imagination of the policy maker as to what was in

national interest. One could even argue under such a law to confiscate a property of someone wealthy and keeping it away from him or her was in the national interest. The new law avoids importing that term the time-honoured concept of “in the public interest.” The term “acquire in the public interest,” in relation to land, is defined as the “acquisition or taking possession of land for its development or utilization to promote the public welfare or benefit or for public defence, safety, order, morality or health or for town and country planning.” It takes care also to define it so that whatever is done by government may be properly tested by the letter and the spirit of the law in keeping with the laws of the market economy and the laws of a liberal democracy.

With the above, we now come to the application of the meaning of development to the facts of the case. The Constitutional Court proceeded on the premises that the factual aspects of the case were not in dispute. That is true for the most part. But because the facts were inadequate for our own consideration, we invited the parties to the case to file an affidavit as to what is the present state of the properties. The content of the affidavits confirm the findings of the Judges on the state of the play with regard to V5318. V5318 is in the same state as it was when the Government acquired it. At the time, it was a block of flats. It has remained a property with the same block of flats. As regards V5319, the property given to the Seychelles Industrial Development Corporation in 1989, it was returned to the Government in 2008. There is the construction of a high rise which has been stopped by an order for injunction applied for by the respondent.

As for V5320, the facts before the Constitutional Court were that there were no developments except a small one serving the community with sports facilities. An impression was given to us that it had only tarmac laid. When the photographs were produced annexed to the affidavits, we found that that development is a modern infrastructure for leisure in the public interest. It cannot be returned and full compensation should be paid under section 14(1)(c).

We have stated above that, in case the land cannot be returned, government should pay compensation. Compensation shall be for the market value of the land at the time of coming into force of the Constitution or such other value as may be agreed between the Government and the divested owner.

However, it should be noted that the date of entry into the Constitution was set down as the cut-off date because it was thought that all claims would be settled within a reasonable time. 30 years have elapsed since. It follows that the idea of market value should not be defeated by an interpretation which smacks of bad faith in causing a delay. Government should not be seen to be benefitting from the circumventing the clear provision of the Constitution by causing a delay in compensation which is clearly inordinate. It is a fundamental principle that all compensations arising out of compulsory acquisitions of land should be prompt, effective and adequate.

We consider that the proper way for the Government to deal with its undertaking it has assumed some 14 years ago is to set up a statutory or an administrative tribunal through decision of Cabinet presided over by some competent persons knowledgeable in the history of this law so that all the applications received could be dealt with along the lines suggested above. While we concede that these matters

could not have been determined overnight, the fact remains that delay beyond a certain point amounts to denial. The delay has in this case had ended up in denials of constitution justice.

If two to three years delay may be granted to the Government to have disposed of the applications, any delay beyond has become denial of constitutional justice for which constitutional redress should be granted unless the Government comes up with an acceptable recital of facts in this regard. The matter should have been better dealt with through the setting up of a proper system. We are unaware whether there was or there was not one.

In sum, the principles which should guide the determination of pending cases should be:

1. The overriding criterion of whether there has been development or not is the concept of public interest. If the development was one that the owner could himself do such as development of a restaurant, a hotel, a block of flats for expatriates etc, public interest dictates that the owner should be given the option to decide whether it will develop the property on that plan or agree to be compensated instead.
2. If public interest lies in undertaking a development such as building a public road, a bridge, a motorway or an airport, then there is a development in the constitutional sense. That may be said for acquisition of a small plot for the construction of a drainage system which may serve the community. Sometimes, just a small plot is needed to adjust an uninterrupted flow of water in which the private developer will not be interested.
3. A distinction should be made between a development that a private owner may do and another which a private owner may not be interested in doing. Where the development is one that the previous owner may undertake, the property should be returned and the owner given the incentive to develop the property.

In light of the above, we allow the appeal with regard to parcel V5320. It is a multi-purpose sports complex already in place which obviously serves the community. It cannot be returned without denying the community a benefit to which they have been enjoying. There is no evidence that alternative facilities are available to the community should the parcel be returned. We confirm the decision of the Constitutional Court for parts of V5317 and the whole of V5318. With regard to parcel V5319, we note from the pictures and photographs submitted that the Government has seriously started developing the property. There is no evidence of the type of development involved. The respondent caused an injunction to be issued against the continuing construction of the building. There is no evidence that the respondent was given the option to exercise his 14(1)(b) option. That option should be given to him. We so order. Should he decide not to exercise it, then full compensation should be paid to him.

The Cross-Appeal

The cross-appeal questions the decision of the Constitutional Court on the quantum of the compensation. It should be straightway stated that the issue of compensation in land acquisition matters is not treated the same way as a claim in damages. As the Judicial Committee of the Privy Council stated in the case of *Harel Frères v Ministry of Housing, Lands and Town and Country Planning* [1987] UKPC 40, hardship is inherent in a case of compulsory acquisition.

> Every compulsory expropriation of an unwilling landowner is prima facie a hardship and the question whether there is reasonable justification for imposing such a hardship … is intimately bound up with the question whether it is necessary or expedient that the land should be taken into public ownership in order to achieve one of the public purposes.

It is for the Government to show that the compensation it has given is full in the sense that it is adequate, prompt and effective to alleviate the hardship imposed on the citizen whose property has been taken away from him to be dedicated for public purposes.

One uses the comparative method to determine the market value of the property *in lite*. The Court, in awarding compensation in the case of the respondent took the view that there was insufficient evidence in that regard. The respondent had filed a document from a quantity surveyor which among other things purports to give the value of the properties in question. The claim has been for RS9.6 million. The Court decided that it was largely unsupported by admissible evidence. The respondent had claimed loss of rent in Victoria for parcel 5319 for 15 years from 1995 to 2009 at the rate of R15,000 per month which made a total of R2,700,000. He also claimed rent for the 6 blocks of flats for 15 years for a total amount of R3,780,000. With inflation taken into account, the figure has reached R12,960,000.

The Court found difficulty in accepting the figures on the ground that they had been merely dropped from mid-air, as it were. It also stated that interest could only be claimed in special circumstances as per section 14(3) of Schedule 7 of the Constitution. It, therefore, ordered that monetary compensation be paid: (a) for the portions of PR13 which had been transferred to third parties; (b) for parcel V5317 to be agreed between the parties, and, in case it is not, with the assistance of respective valuers or a team of three valuers on a majority decision basis; (c) at the market rate as at the time of the coming into force of the Constitution. It dismissed the claim for interest and for loss and damages claimed.

It is the contention of the respondent in this case that the figures were admitted by the appellants in the pleadings. We would agree with the decision of the Court that any claim for compensation which relies on the market value of the acquired properties is best resolved with the assistance of experts in the field and reliable comparables. In this case, there was no such evidence brought by either party. It is easy to be easy with other people's money.

Our Decision

For the reasons above, we decide as follows:

On the appeal by the Government and the Attorney-General:

(a) we order the return of plots such parts of PR13 as have been agreed, with the payment of full compensation for such parts as shall not be returned;
(b) we order full compensation of property V5317 which cannot be returned for having in the hands of third parties today;
(c) we order the return of parcel V5318;
(d) for plot V5319, we order that the option be given to the respondent as to whether it will undertake the development or take compensation for same;
(e) for V5320, we take the view that it is a small development but beneficial to the community with a small but useful multi-purpose sports complex as the photographs show. Since it is completed, full compensation should be paid for same. We so order.

On the cross-appeal by the respondent as regards the amount of compensation to be paid, we order that since the sums which are involved are not negligible and are to be borne by the taxpayer, there should be due expertise and a professional approach in their assessment and award.

Implementation of our Orders

We have been seriously concerned with the delay which has occurred in giving effect to the rights of the divested owner. The compensation should have been paid as early as reasonably possible, as rightly submitted by Mr Boullé who invoked Schedule 2 of the Constitution which requires that where no time is prescribed or allowed within which an act shall or may be done, as the case may be, it shall be done with all the convenient speed and as often as the occasion requires. As much as 19½ years have elapsed since the Government undertook constitutionally to address the issues of past injustices.

We invite the Executive to set up an administrative tribunal or board comprising of members knowledgeable in the field of law and evaluations for the purposes of resolving all unfinished business with regards to Part III of Schedule 7 of the Constitution.

Because of the fact that the alarm bell has been ringing for a while now, we are adopting a constitutional solution to a constitutional issue. We shall call this case at the next sitting to ascertain what progress has been achieved in the disposal of cases under Part III of Schedule 7 of the Constitution.

We remit the case back to the Constitutional Court for the determination of the quantum of compensation. That should not prevent parties from negotiating in good faith for a settlement of outstanding issues on quantum on an exchange of documents from the relevant experts or through mediation.

We make no order as to costs.

GOVERNMENT OF SEYCHELLES v ROSE

MacGregor P, Domah, Msoffe JJ
7 December 2012 Court of Appeal 14/2011

Fault – Quantum of damages

The deceased was arrested, detained and killed in a police station. At trial the appellant admitted liability but contested the quantum of damages. The Supreme Court had ordered the appellant to pay damages to the respondents of R 940,000 with interest and costs.

JUDGMENT Appeal dismissed.

HELD

1 A court must consider the circumstances of the particular case and its special nature when determining the quantum of damages.
2 Damages in wrongful death cases are designed to compensate for losses resulting from the death of a victim.
3 Before interfering with an award of damages, the appeal court must be convinced that –
    a. The trial court acted on some wrong principles of law; or
    b. The amount awarded was so high or so very small as to make it an entirely erroneous estimate of the damage to which the plaintiff was entitled.
4 In assessing damages, each case must be decided on its own facts. Changes in society require a fresh approach to assessing damages in personal injury cases.

Legislation
Constitution, arts 15, 16

Cases
David v Government of Seychelles (2008) SLR 46
Jouanneau v Government of Seychelles (unreported) SCA 4/2007, LC 308
Ventigadoo v Government of Seychelles SCA 20(a)/2006, LC 293
Ventigadoo v Government of Seychelles (unreported) SCA 28/2007

Alexandra Madeline for appellant
Anthony Derjacques for respondents

Judgment delivered on 7 December 2012

Before MacGregor P, Domah, Msoffe JJ

MSOFFE J:

This appeal arises from the decision of the Supreme Court (Renaud J) which condemned the appellant to pay the respondents damages of a total sum of R940, 000 with interest and costs in an action based on fault.

At the trial the appellant admitted liability and only contested the action on the issue of quantum of damages.

The respondents' case was that on 25 July 2009 at 1900 hours the Seychelles Police force through its officers arrested Mr Mervin Pierre (the deceased), detained him at Beau Vallon Police station and eventually killed him while acting in the course of their duties. The plaint particularized fault as follows:

PARTICULARS OF FAUTE

(i) Arresting the deceased, Mervin Pierre, unlawfully and without cause.
(ii) Falsely and unlawfully detaining and imprisoning the deceased Mervin Pierre, without cause, at the Beau Vallon Police Station.
(iii) Killing Mervin Pierre.
(iv) Causing the death of Mervin Pierre.
(v) Negligently and unlawfully causing the death of Mervin Pierre.
(vi) Assaulting Mervin Pierre.
(vii) Failing to follow proper and or lawful police procedures for arrest, detention and imprisonment.
(viii) Being drunk and disorderly in a police station.
(ix) Failing to conduct themselves and exercise powers in a humane, civilized and proper manner.
(x) Acting brutally and inappropriately.

The plaint also set out the particulars of loss and damages as follows:

PARTICULARS OF LOSS AND DAMAGES

i.	1st Plaintiff (Administer to the estate), false arrest	50,000
ii.	1st Plaintiff (Administer to the estate), unlawful detention and imprisonment from 1900 hours on the 25th of July to 1100 hours on the 26th July 2009	100,000
iii.	1stPlaintiff for assault to Mervin Pierre	50,000
iv.	1st Plaintiff distress, anxiety, shock, pain and knowledge of impending death	300,00
v.	2nd Plaintiff, distress, shock, pain, psychological pain, humiliation for death	1,000,000
vi.	3rd Plaintiff, distress, shock, pain, psychological pain, humiliation, emotional trauma for death	1,000,000

vii.	3rd Plaintiff for economic loss and maintenance For 10 years at R3,000/- monthly	360,000
viii.	2nd Plaintiff economic loss and maintenance for life as common law, at R2,000/- monthly	600,000
ix.	Special damages reflecting culpability of Defendant in these special circumstances	2,000,000
	TOTAL	5,460,000

The judge carefully analysed the particulars of loss and damages under the respective items. In the process, he also cited a number of authorities in support of his assessment of the matter. In the end, he did not sustain the total figure of R5,460,000 claimed by the respondents but reduced it and assessed the quantum of damages in respect of the parties to the suit as under:

1st Plaintiff Mervyn Pierre – Deceased	
a) Damages for false arrest	40,000
b) Damages for unlawful detention and imprisonment from 1900 hours on 25 July to 1100 hours on 26 July 2009,	50,000
c) Damages for assault to Mervin Pierre,	50,000
d) Damages for distress, anxiety, shock, pain and knowledge of impending death,	90,000
	230,000
2nd Plaintiff Marie Michel Solana Rose	
a) Damages for distress, shock, pain, psychological pain, humiliation for the death,	70,000
b) Damages for economic loss and maintenance for 5 years as common law wife, at R1,500 monthly	90,000
	160,000
3rd Plaintiff Master Romio Michel France Pierre	
a) Damages for distress, shock, pain, psychological pain, humiliation, emotional trauma for the death of his father	100,000
b) Damages for economic loss and maintenance For 10 years at R2,500 monthly	300,000
	400,000
Special Damages	
Special damages reflecting culpability of Defendant in these special circumstances	150,000
Total	940,000

The appellant has raised seven grounds of appeal. They are as follows:

1) The award of damages to the 1st plaintiff for false arrest, unlawful detention and imprisonment from 1900 hours on 25 July 2009 to 1100 hours on 26 July 2009 and the assault of the deceased was wrong in principle given that
   i. The 1st plaintiff was not the victim of the said acts and

ii. The causal link between false arrest, unlawful detention and imprisonment of the deceased and the death of the same deceased has not been established and at any rate manifestly excessive in all circumstances of the case and having regards to comparable awards made by the Courts for false arrest, unlawful detention and imprisonment and assault.

2) The award of damages in the sum of R90,000 to the 1st plaintiff for distress, anxiety, shock, pain and knowledge of impending death is manifestly excessive in all circumstances of the case given that time of death was not established.
3) The award of damages in the sum of R70,000 to the 2nd plaintiff for distress shock, pain psychological pain, humiliation for the death is arbitrary and is manifestly excessive in all circumstances of the case and having regard to comparable awards of damages made by the Courts.
4) The award of damages in the sum of R90,000.00 to the 2nd plaintiff for economic loss and maintenance for 5 years as common law spouse is manifestly excessive in all circumstances of the case given that the amount that the deceased normally extended on the said 2nd plaintiff was not established.
5) The award of damages in the sum of R100,000 to the 3rd plaintiff for distress, shock, pain psychological pain, humiliation for the death is arbitrary and manifestly excessive in all circumstances of the case and having regard to comparable awards of the damages made by the Courts.
6) The award for damages in the sum of R300,000 to the 3rd plaintiff for economic loss and maintenance for 10 years at R2,500 monthly is manifestly excessive in all circumstances of the case given that the monthly contribution made by the deceased and 2nd plaintiff towards the maintenance of the 3rd plaintiff was not established and further the award does not take into account the different levels of maintenance required for children of different age groups.
7) The award for special damages in the sum of R150,000 reflecting culpability of defendant in these special circumstances was wrong in principle as special damages were not proved.

It is important to note here that in this appeal the appellant is essentially advancing the same points that were canvassed at the trial in which the bottom line here is that in the circumstances of the case the awarded sums of money are wrong in principle and manifestly excessive. Indeed, the above grounds of appeal lay out the reasons why the appellant thinks the awarded sums of money are on the high side.

Article 15 of the Constitution of the Republic of Seychelles recognizes the right to life and that no one should be deprived of life intentionally. Under clause (3) thereto the right is not infringed if there is a loss of life:

a) by an act or omission which is made not punishable by any law reasonably justifiable in a democratic society; or
b) as a result of a lawful act of war.

In similar vein, article 16 thereof recognizes the right of every person to be treated with dignity worthy of a human being and not to be subjected to torture, inhuman or degrading treatment or punishment. Actually, articles 15 and 16 should be read together with the Preamble which recognizes the inherent dignity and the equal and

inalienable rights of all members of the human family as the foundation for freedom, justice, welfare, fraternity, peace and unity.

In effect, this means therefore that the Constitution of Seychelles recognizes not only the right to life but also its dignity and sanctity so much that it can only be lost under circumstances which are enumerated under clause (3) of the above article. In this sense, the foremost and fundamental constitutional right is life. Henceforth, life is so precious that it should not be lost under circumstances which are inappropriate. So, in a case involving damages for loss of life the amount to be awarded as compensation should reflect this reality. In the end, a reasonable person looking at the awarded sum should be in a position to look at the sum in question and sigh with a sense of relief, content and satisfaction that justice has not only been done but has manifestly been seen to be done.

It should not be forgotten also that in this case the deceased was arrested, assaulted and killed in a police station. In this regard, the judge was correct in asserting that the authority entrusted with the responsibility to oversee the security of a citizen itself turned against him and caused a *faute* on the said citizen leading to death. It is on record that the killing caused revulsion throughout the nation and necessitated a public enquiry upon the Order of His Excellency the President. It is also on record that this was the first time ever in the history of this country that a killing of the above nature took place in police custody. In view of the foregoing, the judge was therefore correct in saying that a different consideration has to be given to this particular case when determining the quantum of damages in view of its special nature.

In *Marie-Andre Jouanneau and Others v Government of Seychelles and Others* SCA No 4 of 2007 the deceased was shot by police officers and left suffering and bleeding on the ground for more than one hour. The shooting was at around 8:30 am and the deceased was guarded by policemen who would not let the relatives go near or assist the deceased. All this time the relatives and the deceased's relatives watched the deceased suffer and die. After considering all the relevant factors in the case this Court overruled the sums awarded to the appellant by the Supreme Court totalling R77,000, replaced them and accordingly entered judgment in the total sum of R152,500 with interest and costs. This court, in the process, also ruled that the deceased's concubine of a long and stable relationship was entitled to claim compensation for moral damages and for the loss of maintenance and support. In the present case, the concubine and the relatives did not suffer the same trauma of seeing the deceased suffering and dying and being prevented from assisting him but at stake here is, as stated above, the undenied fact there was a loss of human life under circumstances which were inappropriate.

In *Charles Ventigadoo v Government of Seychelles* SCA No 20(a) of 2006 the appellant had been taken to Victoria Hospital on 2 June 1998 with an oblique gaping deep laceration of the upper limb of his right arm. Four days later the arm was amputated following the occurrence of gangrene in the wound. He sued the Government of Seychelles for vicarious liability claiming a total sum of R918,000. The Supreme Court dismissed the suit. On appeal this court entered a judgment in his favour and ordered the trial court to assess damages and costs. In its judgment, the Supreme Court (Karunakaran J) assessed the damages at R500,000 with interest on the said sum at 4% per annum - the legal rate – as from the date of the

plaint, and with costs. On appeal, this court in SCA No 28 of 2007 sustained the award but amended the last sentence of the above judgment to read in part - "as from the date of the service of the plaint until the final payment of the total award, and with costs".

It is generally accepted that damages in wrongful death cases are designed to compensate for losses resulting from the death of a family member. Of course, if we may digress a bit here, whatever sum of money is awarded as compensation for the loss of a loved one, really the sum will never heal the loss of a loved one because once human life is lost it can never be returned or paid back. Anyhow, the losses come in different varieties. For example, direct expenses such as medical bills and funeral expenses are easy to calculate because their records may easily be obtained from hospitals, funeral homes, etc. However, other damages under the general category of future damages ie loss of pension or retirement benefits and loss of future wages, etc may not be easy to calculate. However, it is settled law in Seychelles as per this court's decision in *Ventigadoo* SCA No 28 of 2007 (supra) that the fundamental principle of law by which this court is guided when considering the adequacy or otherwise of an award for damages by an inferior court is -

> Before interfering with an award of damages, the Appeal Court must be convinced that:-
>
> (i) the trial court acted on some wrong principle of law; or
>
> (ii) the amount awarded was so high or so very small as to make it, in the judgment of the Appeal Court, an entirely erroneous estimate of the damage to which the plaintiff was entitled.

It is also a general principle of law in Seychelles that in awarding damages the circumstances of each case have to be taken into account. In the process, due consideration is also taken of the rate of inflation, the socio-economic situation reflected in the increase in the cost of living, etc.

After laying out the above background and introductory remarks, the crucial question at this stage of the judgment will be whether or not there is basis for interfering with the total award of R940,000 awarded to the respondents by the Supreme Court. Without hesitation, our answer to this question is in the negative for reasons which will emerge hereunder.

The starting point will be the proceedings of the trial court dated 9 February 2010, 18 February 2010 and 12 July 2010. It is evident from those proceedings that the parties agreed on certain material facts and decided to proceed with the case by way of written submissions on quantum of damages only. If so, it is now too late in the day for the appellant to come up with a number of suggestions in the grounds of appeal that some matters needed proof by way of evidence. For example, under ground 2 it is asserted that the time of death was not established, under ground 4 that the amount the deceased expended on the said second plaintiff was not established, under ground 6 that the monthly contribution made by the deceased and the second plaintiff towards the maintenance of the third plaintiff was not established, and under ground 7 that there was no proof of special damages. With respect, these were matters that ought to have been canvassed by way of evidence at the trial. Since the parties agreed not to lead evidence on the above matters it follows that

technically they left upon discretion of the trial judge to determine the quantum based on the submissions before him and the principles governing the award of damages in a case of this nature.

A number of authorities were cited at the trial. Indeed, in this appeal several authorities have been cited too. In general, the authorities lay out the principles that have to be followed in assessing damages in a case of this nature. After looking at some of those authorities and after addressing our minds to them, we wish to make the following points –

One, the appellant has cited to us ten or so authorities relating to comparative awards in the assessment of damages. In principle, we have no serious quarrels with those authorities in view of the context in which they were decided. However, in those authorities, except *David v Government of Seychelles* (2008) SLR 46 and *Jouanneau* (supra), it will be noted that these were cases which were decided before the year 2003 or thereabout. Our view is that since then there have been many changes in society such that there is now a need to approach the issue of damages for personal injury cases with a new, fresh and different view point and outlook. We think that although finally each case has to be decided on the basis of its own facts time is now ripe to award damages which reflect the socio-economic situation of the day and the seriousness of the injury in question. In this sense, there is need to ensure that damages reflect this reality of life and hence be on the higher side in order to redress losses for personal injuries, particularly where death is involved. Generally speaking therefore, and without appearing to re-open the matter, if it were to happen that *Jouanneau* (supra) was being decided today perhaps a different consideration and approach might have to be taken into account in assessing damages in view of the changed circumstances and the undenied fact that the death in that case too was an inappropriate one.

Two, without prejudice to our view on one above, we note that in *Ventigadoo* (supra) a sum of R500,000 was awarded for an amputated limb. That was on 25 April 2008 - vide this court's decision in SCA No 28 of 2007. The point to note here is that a sum of R500,000 was awarded for the loss of a limb. Surely, that loss cannot be equated or compared to the loss of human life, as happened in this case. In this sense, the sum of R940,000 awarded in this case on 25 March 2011, which was about four years or so after *Ventigadoo* (supra) is not manifestly excessive. It is a very fair sum in the circumstances of the case.

We have carefully looked at the judgment of the Supreme Court. Generally the judge correctly applied the principles governing compensation in cases of personal injury. In the circumstances, we are satisfied that the award of R940,000 is reasonable in the justice of the case. There is no material basis upon which we could disturb or vacate that sum. For this reason, there is no merit in this appeal. We hereby dismiss it with costs.

SAMORI v CHARLES

Fernando, Twomey, Msoffe JJ
7 December 2012 Court of Appeal 38/2009

Matrimonial property – Non-financial contributions

The Supreme Court made orders under the Matrimonial Causes Act for the respondent to pay R 115,000 to the petitioner and for the petitioner to vacate the matrimonial property and hand over possession to the respondent. The respondent appealed.

JUDGMENT Appeal allowed. Appellant awarded R 350,000 and ordered to vacate the matrimonial house and hand over vacant possession to the petitioner.

HELD

In matrimonial property cases, the court should consider not only financial contributions to a marriage, but also contributions of love, friendship, security, commitment, moral and emotional support. This includes assisting a spouse's business (for example, with paperwork).

Legislation
Matrimonial Causes Act, s 20(1)(b)

Joel Camille for the appellant
Charles Lucas for the respondent

Judgment delivered on 7 December 2012

Before Fernando, Twomey, Msoffe JJ

FERNANDO J:

The appellant being dissatisfied with the judgment of the Supreme Court dated 16 of November 2009 has appealed against the said judgment which ordered –

> in terms of section 20(1)(b) of the Matrimonial Causes Act, the respondent to pay a lump sum of R115,000 to the petitioner [appellant in this case] as settlement of matrimonial property and financial adjustments

And ordered the appellant to vacate the matrimonial house and hand over vacant possession to the respondent when the full sum of R115,000 is paid to her. The said sum consisted of R65,000 "to be paid back to the appellant in respect of the purchase of the land" and "a sum of R50,000….as a lump sum." The ownership of the house and property was ordered to be with the respondent.

The appellant, a French national, and respondent, a Seychellois were married on 30 May 2006 and on application made by the appellant, an order absolute granting the divorce had been issued by the Supreme Court on 16 February 2009. According to

the appellant she had been in cohabitation with the respondent for about 7 years prior to their marriage. According to the respondent the cohabitation started about two years prior to the marriage and prior to that they were only “lovers”.

The grounds of appeal are:

1) The order that the appellant be paid a lump sum of R115,000 as settlement of matrimonial property and financial adjustments is manifestly inadequate as regards the amount payable and is incomplete.
2) The Judge erroneously omitted to make an order for monthly payments or a lump sum payment, by the respondent as his contribution towards the domestic expenses.
3) In the premises, the Judge failed to have made any or a proper award as regard the appellant’s share of contributions in the matrimonial property, in the face of the evidence before the court.

By way of relief the appellant had sought an order reversing the Judge’s evaluation of the appellant’s share in the matrimonial property and an order declaring the appellant’s share in the property.

In her application as petitioner before the Supreme Court for property and financial adjustments under the Matrimonial Causes Act, the appellant had sought the following orders:

i. *an order, as the Court thinks fit*, for the benefit of the petitioner in respect of any of the respondent’s property and of any interest or right he has in any property including the matrimonial home;
ii. an order that the respondent makes monthly payments starting from the date of presentation of the petition 169/08 for the benefit of the petitioner
iii. an order that the respondent makes monthly payments from the date of the presentation of the petition 169/08 or a lump sum payment, to the petitioner, being the respondent’s contribution towards domestic expenses;
iv. an order that the respondent secures to the satisfaction of the Court the payments ordered under paragraphs i, ii, and iii above;
v. an order that the petitioner be made to continue to occupy the matrimonial home. [emphasis by us]

It is clear from the above application that the appellant had not asked for any specific amounts or a percentage of the value of the properties but left the determination of all amounts to the court. In her affidavit attached to the application she had however stated that she believes that she is entitled to a fair share in the matrimonial properties.

In her affidavit she lists land parcel PR 2590 and the house built thereon, motor car bearing registration number S 7434 and a fishing boat bearing the name *Lady Mary* as properties acquired during the 10 period she was in cohabitation and the 2 years of marriage with the respondent. In setting out her contribution towards the matrimonial property the appellant had stated that she had advanced a total sum of R65,000 for the purchase of land parcel PR 2590 on which the matrimonial house was built and a further sum of R20,000 for the purchase of motor car bearing registration number S7434. She had claimed that she contributed towards the

upkeep and maintenance of the matrimonial home and had helped in the fishing business without drawing a salary during this period.

The respondent in his affidavit in reply states that the appellant had lent him only R20,000 for the purchase of land parcel 2590 and that he had refunded that amount to her "as at that time they were only lovers". It had been his position that the appellant had a free hand with his earnings and had converted his money into foreign exchange and deposited it in her bank account in France meant for their use in their retirement. He had stated that he does not have a bank statement of this account to produce to Court but had seen a balance of Euro 200,000 when the appellant had shown him the statement sometime back. The tespondent had averred that the matrimonial home became the base for holiday of the family and friends of the appellant who had "full board lodging free of charge at his expense". The fishing boat was procured by him on a loan. The matrimonial home had been solely occupied by the appellant since December 2008 and the appellant was in the habit of letting rooms in it for tourists and collecting the money. He had also claimed that the appellant had sold off some of the items in the matrimonial home. It had been his position that the appellant is not entitled to any of his money in view of the fact that she had misappropriated his savings to the amount of Euro 200,000 which she had banked in an account in France.

On 7 October 2009, about 8 months after the filing of the application for property and financial adjustments under the Matrimonial Causes Act, counsel for the appellant had agreed to settle the case for a sum of R100,000. It must also be emphasized that as stated earlier the appellant had left the determination of the amount due to her to court, claiming however that she is entitled to a fair share of the matrimonial properties. It is clear that such determination was entirely a factual issue based on the evidence led by the appellant and respondent. The trial judge was in the best position to determine whose evidence was creditworthy, having had the opportunity to see both the appellant and respondent testify in relation to the financial contributions towards the matrimonial properties, for the evidence in this regard, consisted of claims and denials.

On the issue of the construction of the matrimonial house the trial judge had stated:

> When one considers the evidence of the respondent Melton Charles it is clear that he was in receipt of an income throughout his relationship with the petitioner [appellant], the most lucrative being the sea cucumber business which he did in collaboration with Timothy Morin. According to the evidence of the respondent which is corroborated by Mr Morin it is clear that the respondent was to get a minimum of R37,000 on each trip and would do a minimum of 3 trips for a period of two months which would mean the respondent earned a minimum of R52,000 a month on the said cucumber business. Furthermore the petitioner [appellant] admittedly states that he had been doing this business since July 2002. Hence this court is satisfied that he would have had sufficient funds to construct his house which according to the valuation report P23 is valued at R511,000.

However as regards the contributions towards land parcel PR 2590 on which the matrimonial house was constructed the trial judge having fully analysed the evidence of both the appellant and the respondent has stated: "Therefore this court is satisfied that the petitioner did contribute a sum of R65,000 for the purchase of the said land."

As regards the fishing boat and the car the trial judge has stated:

> ….it is clear that the boat Lady Marie was paid for by the respondent. This fact is corroborated by the evidence of Mr Timothy Morin and an advance of R100,000 was paid by mortgaging the property to the bank. This fact is admitted even by the petitioner. Although the petitioner claims that she contributed towards the purchase of the car there is no documentary proof of same and the respondent denies this fact…

At the hearing before us the appellant's counsel did not contest these findings.

The trial judge had not accepted the respondent's claims of the appellant renting out rooms in the matrimonial house and of her converting and transferring his savings to a bank account in France which the respondent had reason to believe was about Euro 200,000, due to lack of any documentary proof.

As regards other expenses borne by the appellant the trial judge had said:

> When one considers the evidence of the petitioner [appellant], that she has on and off made payments for rent, household expenses payment of utility bills purchase of house appliances. She has also shown that she has transferred sums of money regularly from her bank account in France. No doubt a portion of this money would have been spent on her travelling and holiday expenses.

We have no reason to interfere with any of the above findings of fact made by the trial judge as regards the financial contributions made by the two parties to the marriage. But a marriage is not only about financial contributions, it is also about love, of friendship, of security, of commitment, of moral and emotional support, which combine together to make a success of the lives of the two people to the marriage. These are matters that cannot easily be measured in monetary terms and also cannot be ignored when a court is called upon to make a determination on matrimonial property. We are surprised to find that the trial judge had failed to give any consideration to any of these matters.

It is clear from the respondent's evidence that the appellant had a role to play in the success of his business whether as boat charterer or in his sea cucumber business. The respondent's evidence in this regard verbatim from the brief needs to be noted -

> I am not so well educated when it comes to academics; she was better educated than me so she took care of the monies and paperwork for the business.
> She was the one handling the paperwork because I am not so good at dealing with the paperwork, I know nothing of papers.
> She would get access to the money I bring home, and these money I hand it to her she would do what I tell her to do with it, just like a secretary would

> When I come from out at sea, I give her the money and she is the one who takes the money to bank and do whatever needs to be done with the money because after that I depart to sea.

It is clear from the respondent's evidence that it was the appellant who had even introduced him to the concept of banking his money. His evidence in this regard is to be noted -

> Q. Now tell me Mr Charles at the time that you went with Ms Samori did you have any bank account here in Seychelles
> A. No I did not have one.
> Q. So you had a bank account after you had met Ms Samori?
> A. Yes, because she told me that you have to put money in a bank and money should not be kept unlocked in a house, because I am not wise where paper work is concerned so I listened to her and I placed all the money in the bank.

The trial judge has not taken these matters into consideration in considering "the appellant's share of contributions in the matrimonial property in the face of the evidence before the court," as argued by the appellant in her third ground of appeal.

We are of the view that the trial judge was in error in awarding only R 65,000 to the appellant in November 2009, towards the purchase of the land parcel PR 2590 for which she had paid the said R65,000 about 10 years back. The trial judge had come to the finding that the petitioner did contribute a sum of R65,000 for the purchase of the land. The appellant's contribution towards the purchase price when taken into consideration with the respondent's testimony as to the price paid by him for the purchase of such land had been more than 86%. The trial judge had also failed to take into consideration that according to P23 land parcel PR 2590 had been valued at R221,000 in August 2005. We are of the view that the appellant is entitled to the full amount of R221,000 in respect of her contribution to the purchase of the land parcel PR 2590, bearing in mind that the value of such land as at the date of divorce would have been much more than in August 2005.

We also take the view that the lump sum of R50,000 that had been awarded is inadequate taking into consideration the assistance rendered by the appellant to the respondent towards his business as referred to at paragraphs 12 and 13 above and determine that a sum of R129,000 be awarded in this regard.

We therefore allow the appeal, reverse the trial judge's valuation of the appellant's share in the matrimonial property and award her a total sum of R350,000. We also order that the appellant vacate the matrimonial house and hand over vacant possession to the respondent when the full sum of R350,000 is paid to her.