

11

IN THE SEYCHELLES COURT OF APPEAL

GENERAL INSURANCE COMPANY

Appellant

Versus

DANIEL BONTE

Respondent

Before A.M. Silungwe, E.O. Ayoola and L.E. Venchard J.J.A.

Mr. Pardiwalla for Appellant

Mr. Boulle for respondent



RULING

This is an application for an order to admit further evidence.  
The application is resisted.

In terms of an affidavit sworn by the Chairman of the Appellant's company to support this application it is averred that:-

- (a) in the course of the trial of the case giving rise to this appeal, a document was produced and admitted as exhibit P4;
- (b) that exhibit was signed by Mr. W.R. Mills;
- (c) in spite of diligent searches to find Mr. Mills the latter has been untraceable until very recently but after judgment had already been delivered by the trial court;
- (d) the evidence of Mr. Mills would have an important influence in the appeal lodged by the Appellant against the Respondent;
- (e) in the interest of justice and fairness it would <sup>be</sup> just and equitable for this court to hear the fresh evidence of Mr. Mills.

In a further affidavit sworn by Mr. Mills and which accompanied this application, Mr Mills gave detailed information of the circumstances in which he signed exhibit P4, the purposes for which it was signed and the reason for specifying in sterling the amount mentioned therein.

We are grateful to Counsel for the exposition of the law governing the admission of further evidence at the appellate stage. Their valuable contribution has enabled us to give our ruling more expeditiously than it would otherwise have been possible. It is however unfortunate that they were unable to agree as to the application of the relevant principles to the facts of this case.

The instant application is governed by Rule 71 of the Seychelles Court of Appeal Rules 1978. The two relevant paragraphs of the Rule provide as follows:-

- (1) Appeals to the Court shall be by way of rehearing and the Court shall have all the powers and duties, as to amendment or otherwise, of the Supreme Court, together with full discretionary power to receive further evidence by oral examination in Court, by affidavit, or by deposition taken before an examiner or commissioner.
- (2) Upon appeals from a judgment, decree or order, after trial or hearing of any cause or matter upon the merits, such further evidence, save as to matters which have occurred after the date of the decision from which the appeal is brought, shall be admitted on special grounds only and not without leave of the Court.

These provisions have been borrowed from the Supreme Court Rules of the United Kingdom and are set out in Order 59 Rule 10 (1) and (2). It is therefore permissible for this Court to seek guidance from English Law the more so as there are no decided cases in Seychelles on this issue in civil matters. It was however raised in two criminal cases in 1966 (Payet v. R and Melville Ally v. R) but the application to admit further evidence was refused. We agree with

Counsel that the principles applicable to criminal matters apply equally to civil matters and that it would be proper to seek guidance from criminal cases, where applicable.

The conditions to be fulfilled in determining whether or not further evidence should be admitted have been propounded by Denning L.J. (as he then was) with his usual clarity and forcefulness in the case of *Ladd v. Marshall* (1954) 3 ALL ER at page 748 as follows:-

"The principles to be applied are the same as those always applied when fresh evidence is sought to be introduced. To justify the reception of fresh evidence or a new trial, three conditions must be fulfilled; first, it must be shown that the fresh evidence could not have been obtained with reasonable diligence for use at the trial; second, the evidence must be such that, if given, it would probably have an important influence on the result of the case though it need not be decisive; third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need be incontrovertible."

The first condition to be fulfilled relates to the non-availability, after reasonable diligence, of the further evidence for use at the trial. In the instant application, it is reasonable to infer from the affidavit sworn by the chairman of the Appellant company that the further evidence could not be available as Mr. Mills was not in Seychelles and, despite diligent efforts to trace him, was only traced after the trial.

The second condition to be fulfilled relates to the fact that the further evidence, if given, would probably have an influence on the result of the case. We have entertained grave doubts as to whether this condition could be said to have been fulfilled in this case since inferences could be drawn, without reference to the further evidence intended to be given, that exhibit P4 may not necessarily constitute a contract of employment for future services. However, after mature consideration we have reached the conclusion that as



exhibit P4 formed the basis of the findings of the trial judge the further evidence which seeks to shed light on exhibits P4 will probably have an influence on the result of the case. We hasten to add, by way of caution, that the further evidence need not be decisive since such evidence should be examined in the light of the whole evidence in the case.

The third condition presents some difficulty, as we are not in a position to comment on the credibility of Mr. Mills whom we have not seen and whose evidence has not been subjected to cross-examination. We do not therefore think we can say more except that the further evidence should be given before this court. It is after such evidence has been given that its quality would be evaluated and the options available in accordance with the following guidelines set out by Widgery J in R. v. Flower (1965) 50 Cr. App. R. 22 (and with which we agree), are considered and the appropriate one adopted.

"When this court gives leave to call fresh evidence which appears at the time of the application for leave to be credible, it is still the duty of the court to consider and assess the reliability of the evidence when the witness appears and is cross-examined, and this is particularly true when evidence is called in rebuttal before this court. Having heard the fresh evidence and considered the reliability of the witness, this court may take one of three views with regard to it. If satisfied that the fresh evidence is true and that it is conclusive of the appeal the court can, and no doubt ordinarily would, quash the conviction. Alternatively, if not satisfied that the evidence is conclusive, the court may order a new trial so that a jury can consider the fresh evidence alongside that given at the original trial. The second possibility is that the court is not satisfied that the fresh evidence is true but nevertheless thinks that it might be acceptable to, and believed, by a jury, in which case as a general proposition the

court would no doubt be inclined to order a new trial in order that the evidence could be considered by the jury, assuming the weight of the fresh evidence would justify that course. Then there is a third possibility, namely that this court, having heard the evidence, positively disbelieves it and is satisfied that the witness is not speaking the truth. In that event, and speaking generally again, no new trial is called for because the fresh evidence is treated as worthless and the court will then proceed to deal with the appeal as though the fresh evidence had not been tendered."

We are alive to the fact that fulfilling the three conditions as propounded by Denning, L.J., in the Ladd's case does not necessarily open the door to the admission of the further evidence which is sought to be adduced in view of the provisions of paragraph 2 of Rule 71 which prohibit the admission of such evidence if it does not arise ex improviso or was theoretically available at the time of the trial unless there exist special grounds. In the instant application, we find that:-

- (a) Exhibit P4 has been regarded as a contract of employment between the parties to this appeal notwithstanding the fact that it is not addressed to one of the parties to the contract but to third parties.
- (b) The exhibit has been construed as a contract for future services although when viewed in isolation and in the absence of explanation such a construction would not be justified;
- (c) The exhibit expresses the remuneration in sterling, the currency of the country to which the Respondent has sought refuge, and not in Rupees.

The above reasons do, in our view, constitute special grounds and the interests of justice would be better served by admitting the

further evidence. On the other hand to deny the Appellant the opportunity to provide explanations on exhibit P4 may amount to a miscarriage of justice.

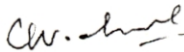
We accordingly grant the Appellant's application to adduce further evidence.



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A.M. SILUNGWE  
JUSTICE OF APPEAL



E.O. AYoola  
JUSTICE OF APPEAL



.....  
L.E. VENCHARD  
JUSTICE OF APPEAL

Dated this ....<sup>12</sup> day of August 1994