

**MORIN v POOL**

**(2012) SLR 109**

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 possessionem. 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 possessionem 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argument in sufficient time pursuant to rule 24(i) (sic) of the Seychelles Court of Appeal Rules, the appeal is deemed withdrawn.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 or 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 Volume 1 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.