

**IN THE SEYCHELLES COURT OF APPEAL**

**[Coram:** A. Fernando (J.A), B. Renaud (J.A), F. Robinson (J.A)]

**Civil Appeal SCA13/2018**

**(Appeal from Supreme Court Decision CS 95/2016)**

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Charles Lucas

Appellant

Versu  
s

Marie Rosine Georges

Respondent

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Heard: 30 April 2019

Counsel: Mr. C. Lucas as Appellant

Mr. F. Chang-Sam with Ms Edith Wong for the Respondent

Delivered: 10 May 2019

**JUDGMENT**

**A.** Fernando (J.A)

1. The Appellant has appealed against the judgment of the Hon. Chief Justice wherein she made the following orders:
  - i. “I Order the First and Second Defendants to jointly and severally to pay the Plaintiff the sum of SR 20,000 for inconvenience caused and SR 60,000 for moral damage and the whole with cost.
  - ii. I Order that the Grant of Easement dated 16 September 2015 and registered on 17 December 2015 be cancelled, with this Order to be served on the Land Registrar for compliance.
  - iii. I Order that this judgment be served on the Judicial Committee on Legal Practitioners set up by the Office of the Chief Justice and consisting of three senior judges of the Supreme Court, and who shall at their next convention notify the Second Defendant of a hearing of the matters

complained of regarding his notarial duties and obligations. He will be given an opportunity to be heard. The Committee shall after the hearing recommend to the Chief Justice any measures if any, to be taken against the Second Defendant.” (verbatim).

It is noted that order (iii) was not based on the pleadings in the case nor was such an order sought by the Respondent in her relief prayed for in the Plaint as set out in paragraph 2, (a) to (d), below.

2. The Respondent herein had filed Civil Side case numbered CS 95/86 as Plaintiff, before the Supreme Court against Clifford Benoit, as 1<sup>st</sup> Defendant (the ex-husband of the, the Respondent) the 2<sup>nd</sup> Defendant, the Appellant herein, and the Land Registrar, as the 3<sup>rd</sup> Defendant; seeking by way of relief:
  - a) “An order preventing the 1<sup>st</sup> Defendant and any person claiming under him from using the right of way until the court finally determines this matter and requiring the 3<sup>rd</sup> Defendant to comply with the order of the court;
  - b) An order requiring the 1<sup>st</sup> and 2<sup>nd</sup> Defendant, jointly and severally, to compensate the Plaintiff in full for the loss and damage, as specified under paragraph 14, she has suffered;
  - c) An order declaring the Grant of Easement to be fraudulent and cancelling and ordering the Land Registrar to forthwith cancel the Grant of Easement; (emphasis added by me)
  - d) Such other order as the Court may deem fit in the circumstances including but not limited to an order for costs in favour of the Plaintiff.
3. The 1<sup>st</sup> Defendant had not filed a statement of defence despite legal aid having been granted and the lawyer assigned by the Court having drafted and given the Defence to the 1<sup>st</sup> Defendant. He had not appeared at the trial and had been content with trying to reach a settlement by a judgment by consent with the Plaintiff (*Respondent herein*), which judgment had been rejected. Therefore the case had proceeded ex-parte against him. The learned Chief Justice had made an order dismissing the case against the 3<sup>rd</sup> Defendant as there was no cause of action made out against or any relief prayed for against the 3<sup>rd</sup> Defendant. Further according to the learned Chief Justice, since the 3<sup>rd</sup> Defendant is an agent of the Government, the party who should have been sued in accordance with section 165 of the Seychelles Code of Civil Procedure should have been the Attorney General

and not the Land Registrar. It is only the case against the 2<sup>nd</sup> Defendant, the Appellant herein, that had proceeded inter-partes to a finality.

4. According to the Plaint filed in case numbered CS 95/86, the Respondent and the 1<sup>st</sup> Defendant were married from 8<sup>th</sup> December 1979 until the dissolution of their marriage by absolute order of divorce certificate dated 17<sup>th</sup> May 2012. The two of them were joint owners of parcels V 3849 and V 6494, ‘the matrimonial land’. The 1<sup>st</sup> Defendant was the registered owner of parcel V 16827, which borders the matrimonial land. Following the order for divorce the Respondent had applied to the Supreme Court for division of the matrimonial land referred to earlier. While this was pending the Respondent had become aware that the 3<sup>rd</sup> Defendant, namely the Land Registrar had on the 17<sup>th</sup> of December 2015 registered a grant of easement of right of way to the 1<sup>st</sup> Defendant as owner of land parcel V 16827, against the matrimonial land, purportedly signed by the Respondent and the 1<sup>st</sup> Defendant.
5. The grant of easement of right of way which was produced as P4 reads as follows:

“THE LAND REGISTRATION ACT CAP 107

GRANT OF EASEMENT OF RIGHT OF WAY

**TITLES :V3849** (Three, Eight, Four, Nine)

**V6494** (Six, Four, Nine, Four)

We, **Marie Rosine Benoit and Clifford Sibert Benoit**, of Plaisance, Mahe, Seychelles, acting as Fiduciaries for our own selves (hereinafter referred to as the “**Grantor**”) the proprietors of the above-mentioned Title, hereby grant an easement of a three metre wide motor vehicular right of way in favour of **Title V16827** registered in the name of **Clifford Sibert Benoit** (hereinafter referred to as the “**Grantee**”) and his successors in Title, subject to the following conditions:

1. Whilst the Grantee has at his own cost previously constructed a concrete driveway from the entrance of Title V16827 at the common boundary with Title V3849, more particularly from beacon GD85 along its boundary to the edge of the property and was making use of the same to access title V16827, the Grantor hereby formally condones the previous use thereof and requires that the Grantee and his successors in title maintain and keep in a clean and tidy state the whole area comprising the right of way.

2. That the Grantee or his next successor in title builds and maintains at their own cost a fence or wall to separate the driveway which comprises this easement of right of way from the remainder of Title V3849.

Dated This 16<sup>th</sup> Day Of December 2015

**THE IMMOVABLE PROPERTY (RESTRICTION) ACT**

The Grantee is not a non-Seychellois

Signed as M. Benoit

Signed as C. Benoit

**GRANTOR**

Signed as C. Benoit

**GRANTEE**

Signed by the aforesaid **Marie Rosine Benoit** and **Clifford Sibert Benoit** who are both known to me and in my presence.

Signed as Charles Lucas

**NOTARY PUBLIC**

P4 bears the stamp of Charles Lucas, Notary Public and the stamps of the Land Registration Division indicating P4 has been registered.

6. The Respondent had denied that she signed P4 as 'M Benoit' as it appears on the grant of easement or at all. She had averred in the Plaintiff that soon after the dissolution of her marriage to the 1<sup>st</sup> Defendant, she had taken steps to change her married name BENOIT to her maiden name Georges, on her national ID on the 20<sup>th</sup> of June 2012, her official documentation with her employer, the Ministry of Education on the 26<sup>th</sup> of June 2012, her bank account with the Seychelles Savings Bank, immediately after the absolute order of divorce was delivered, her passport on the 10<sup>th</sup> of July 2012, despite the fact that there was still 11 months to go before its expiry, and her Seychelles Pension Fund, on the 31<sup>st</sup> of December 2012. She had averred that even when she was using her married surname 'Benoit', she never signed in the manner it is purported to have been signed in the grant of easement. She had also averred that she could not have signed the easement on the 16<sup>th</sup> of December 2015 as she was not available on that date.

7. The Respondent had averred in the Plaintiff that the grant of easement is false and invalid in law. According to her it was necessary for the 1<sup>st</sup> Defendant to resort to this fraudulent method of getting the grant of easement registered against the matrimonial land so that he could more easily dispose of land parcel V 16827 without her being aware of the disposal.

8. The Respondent had stated at paragraph 11 of her Plaintiff:

“In the circumstances the Plaintiff avers that 2<sup>nd</sup> Defendant is wrong when he states in the Grant of Easement that the Plaintiff signed the Grant of Easement in his presence and that either the 1<sup>st</sup> Defendant fabricated or forged a signature on the Grant of Easement and pretended it to be the Plaintiff’s and 2<sup>nd</sup> Defendant thereafter wrongly attested to the Plaintiff having signed the Grant of Easement in his presence and that the said signature was that of the Plaintiff and/or that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants jointly forged and/or connived with each other to fabricate a signature on the Grant of Easement which signature they both purported to be that of the Plaintiff.” (verbatim)

9. The Respondent in her Plaintiff had stated that as a result of the fraudulent acts of each of 1<sup>st</sup> and 2<sup>nd</sup> Defendants (Appellant herein), she had suffered loss and damage for which the 1<sup>st</sup> and 2<sup>nd</sup> Defendants (Appellant herein), are jointly and severally liable. Particularising the loss and damage the Respondent had claimed:

- (a) R 20,000 for inconvenience caused by grant of easement,
- (b) R 20,000 for expenses of seeking legal advice and getting legal representation and initiating legal action, and
- (c) R 60,000 for moral damage for pain, anxiety and hassle which the Respondent had to suffer since discovering the fraud.

10. The Defence filed by the Appellant herein before the Supreme Court was one of denial of the Respondent’s assertion that she did not sign P4 as ‘M Benoit’ that appears on the grant of easement or at all. It had been the Appellant’s position that the Respondent did sign her signature as Benoit on his advice since title was still registered in the joint names of her and her ex-husband, the 1<sup>st</sup> Defendant. The Appellant had vehemently denied the allegations made against him in paragraph 11 of the Plaintiff that is referred to in paragraph 8 above. It had been the position of the Appellant that he had known the Respondent and the 1<sup>st</sup> Defendant for almost 12 years as family friends and he had acted pro bono in their transactions with him as notary. He had always acted in their best interests and

had no reason pecuniary or otherwise to engage in any form of act in breach of his calling for a document such as P4.

11. The Appellant had also stated that he had “taken cognizance of the stance of the 1<sup>st</sup> Defendant for the cancellation and removal of the grant of easement of right of way (the subject matter of this suit) after receiving a proposed judgment by consent from him.”
12. The Appellant had averred that “There was no fraudulent act of any kind whatsoever” and that no inconvenience was caused to the Respondent nor had she suffered any loss or damage as claimed. It had been the Appellant’s position that “Since the delivery of the Court of Appeal judgment in SCA 33/2013 on the 12<sup>th</sup> April 2016, the Plaintiff (*Respondent herein*) has displayed a hostile disposition against the 2<sup>nd</sup> Defendant (*Appellant herein*) who acted as Counsel of the 1<sup>st</sup> Defendant (*Respondent’s ex-husband*) when he applied for the removal of a Restriction against Title V 16827 which she had registered, claiming an interest therein despite the finality of all her claims before the Court of Appeal.”
13. The Appellant had filed the following grounds of appeal:
  1. “The trial judge, Chief Justice Mathilda Twomey erred in law by failing to enter judgment relating to the cancellation of the right of way when the 1<sup>st</sup> Defendant at the outset of the case submitted to judgment in that respect. She instead sought the opinion of the Plaintiff’s Counsel who declared that he wished to proceed and he did not accept the 1<sup>st</sup> Defendant’s admission of that claim which was the main prayer sought in the Plaint.
  2. The trial Judge failed to warn herself sufficiently and failed to take into account that all comparative signature specimens relied on by the Plaintiff were old in excess of five years and did not represent reliable, cogent and recent specimens for comparison with the signature of the Plaintiff in December 2015. The Plaintiff failed to provide contemporaneous specimens to the court while she testified under oath. For that reason, any reasonable court ought to have declined to engage on the task of comparing signatures in the absence of an expert.
  3. The conclusion by the Judge at paragraph 42 of the judgment relating to the “full stop” (.) after the letter R in the Plaintiff’s signature is wrong. The Plaintiff’s signature does not contain the full stop on her National Identity Card which was exhibited.

4. The awards of damages as prayed are excessive and duplicated in all circumstances of the case. Inconvenience and moral damage are synonymous in the circumstances.
5. The trial judge was wrong to make biased, prejudicial and misconceived observations of the Appellant's conduct in paragraph 48 of the judgment without taking the circumstances into context, whilst the documents at all times remained in the custody, possession and control of the Appellant. There was no evidence on brief case by the Appellant.
6. The trial judge's inference was biased and prejudicial to the Appellant in paragraph 20 of her judgment by quoting page 35 of the transcript in isolation, which was an error. At pages 30, 31, 32 and 33 amidst intimidation by the judge, the Appellant maintained that he was not an expert in handwriting but a layman in that respect.
7. The trial judge failed to appreciate that the reasons for signature of the Respondent as "Benoit" on the grant of easement, relate to the fact that her married name still subsisted in the Land Register.
8. The trial judge was wrong in her assessment of corroboration of evidence and pleadings to make such findings against the Appellant in paragraphs 39 and 40 of the judgment. The Plaintiff at paragraph 10(b) of her plaint stated she was "not available to sign on that date". At paragraph 4 of his Defence, the Appellant denied her non-availability for signature. She never pleaded that she did not attend the Appellant's office in her Plaint to warrant a denial.
9. In her judgment, the trial judge erred in law by consolidating the proceedings under the Notaries Act together with a case of delict without a specific prayer for such action contrary to provisions of the Civil Procedure Code. (paragraphs 47 to 59 of the judgment).
10. In all circumstances, the procedure which the trial judge adopted in her judgment arising from the Notaries Act has yet to be formulated as rules by the Chief Justice pursuant to Section 11(8) of the Act and she was wrong in law and procedure to make such order as she did in paragraph 59.3 thereof where she referred to a committee be setup but without established rules of procedure whatsoever." (verbatim)

By way of relief, the Appellant has claimed that the judgment of Mathilda Towmey CJ delivered on the 20<sup>th</sup> of February 2018 be quashed.

14. It is clear from the pleadings of the Respondent and the Appellant and the relief prayed for in the Respondent's Plaintiff referred to above, there were only two issues to be determined in case numbered Civil Side CS 95/2016 filed before the Supreme Court from which this appeal has arisen, namely:

- a) Did the Respondent sign P4 in the presence of the Appellant?
- b) Did the Respondent suffer loss and damage for which the Appellant is jointly and severally liable with the 1<sup>st</sup> Defendant?

15. It is only if the answer to 14(a) is a definitive NO, that necessity to look into 14(b) would arise. Therefore, I shall deal with issue 14 (a) which is the basis of the 2<sup>nd</sup>, 3<sup>rd</sup>, 7<sup>th</sup> and 8<sup>th</sup> grounds of appeal. I wish to point out that there is no order by the learned Chief Justice declaring the grant of easement to be fraudulent, despite it being one of the reliefs prayed for. [Please see paragraph 2(c)] above. Without such an order, I am of the view that the orders made under (i) and (iii) against the Appellant, referred to at paragraph 1 above cannot stand. It is only in the event of an order declaring the grant of easement to be fraudulent that the liability of the 'Appellant' arises and orders could be made under (i) and (iii) against the 'Appellant'. Otherwise this is almost like recording a conviction against a person who has not been charged or not asked to plead, to a charge levelled against him.

16. At paragraph 47 of the judgment the learned Chief Justice had stated: "I am asked to make further orders deemed fit in the circumstances. I do make a finding on the evidence that the signature of the Plaintiff was forged. I cannot make a finding as to whether it was the First or Second Defendant (Appellant herein) who forged the document. I do infer from the circumstances that they individually or jointly caused the forgery." (underlined by me) The underlined part of the penultimate sentence in paragraph 47 is contradictory of the last sentence in which the learned Chief Justice states that she infers from the circumstances that the 'Appellant' individually caused the forgery. There has not been a specific finding that the Appellant had forged the Respondent's signature.

17. Order (iii) in the judgment, had been made according to paragraph 59 of the judgment on a finding that the Appellant had breached his duties as a Notary, which according to what is stated at paragraph 48 of the judgment, for having attested to signatures on official documents before parties' signatures have been



appended and not on the basis of the Appellant having forged the Respondent's signature.

18. I also wish to state that the Order (iii) made by the learned Chief Justice referred to in paragraph 1 (iii) above and which relates to the 9<sup>th</sup> ground of appeal was ultra petita in the absence of any pleadings or any relief sought in that respect. It is noted that this order was not based on the pleadings in the case nor was such an order sought by the Respondent in her relief prayed for in the Plaint as set out in paragraph 2, (a) to (d), above. To say that such an order could have been made, under paragraph 2(d) above, as argued by the Respondent's Counsel at the hearing before us, in my view is ludicrous. It is not a relief that could benefit the Respondent.
19. I am of the view that the referral of the conduct of the Appellant to the Judicial Committee on Legal Practitioners set up by the Office of the Chief Justice; with a directive to hold an inquiry regarding his notarial duties and obligations was a distinct issue, that should have been dealt with separately had the learned Chief Justice believed that the Appellant had breached any duty imposed on him as a Notary and that; after satisfying herself that there was no appeal against her judgment or in the event of an appeal against her judgment if the appeal had been dismissed. The proceedings in this case show that third order in the judgment has been made in violation of the 'Audi alteram partem' rule as the Appellant had not been put under notice of such an order. This was confirmed by the Appellant at the hearing before us.
20. One of the objects and purposes of pleadings is to ensure that each side is fully alive to the questions that are likely to be raised or considered so that they may have an opportunity of placing the relevant evidence appropriate to the issues before the court for its consideration. In the adversarial system of litigation it is the parties themselves who set the agenda for the trial by their pleadings and neither the court nor a party can unilaterally change the agenda. In such an agenda, there is no room for an item called 'Any Other Business' in the sense that points other than those specified may be decided upon without notice to the parties concerned. In his book '**The Present Importance of Pleadings**' by Sir Jack Jacob, (1960) **Current Legal Problems, 176**; the outstanding British exponent of civil court procedure and the general editor of the White Book; Sir Jacob had stated: "*...The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by their pleadings. Indeed,*

*the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice...”*

21. In **Blay v Pollard and Morris (1930), 1 KB 628, Scrutton, LJ** that: “Cases must be decided on the issues on record, and if it is desired to raise other issues they must be placed on record by amendment. In the present case, the issue on which the judge decided was raised by himself without amending the pleading, and in my opinion he was not entitled to take such a course.”

22. I allow ground 9 of appeal and ground 10, which flows from ground 9.

23. The Respondent testifying before the Court had stated that she did not agree to a granting of easement of right of way to V 16827 and did not sign P4 on the 16<sup>th</sup> of December 2015 and did not sign any document in front of the Respondent and did not even know where his office was. She had stated that on the 16<sup>th</sup> of December 2015 that she was at the Ministry of Education at Mont Fleuri marking papers from 8 to 3 and thereafter as usual went home. She had stated that had she signed P4, she would have signed it as Georges because that was her surname and that was what she had been using. She had stated that no person advised her to sign a document as M. Benoit to facilitate any person which was not for her benefit. She had testified to substantiate to the averments in her Complaint referred to at paragraph 6 above and produced copies of the documents referred to therein. She had stated that after her divorce in May 2012 that she had stopped using her name as M. Benoit and was very proud to go back to use her maiden name Georges. She had said “I don’t see the reason why I should go back after 2012 to use Benoit again”. She had produced both her old passport with the date of validity from 08 April 2008 to 08 April 2013 in which her signature appears as M. Benoit as P5 (b) and her new passport with the date of validity from 10 July 2012 to 10 July 2017 in which her signature appears as M. Georges as P5(a). She had said that the signature in P4 is “totally different” to P5(b) where she had signed as M. Benoit.

24. The Respondent had said on being asked about her reaction to finding out about P4 she was depressed because she did not expect that from her ex-husband to whom she was married for 32 years. Speaking about inconvenience, she had said that there was an Indian guy who started clearing that “little piece at the back” on

the basis that I had signed P4. When she explained matters to him he had stopped coming. The Respondent had said that it was not for her benefit to give an easement of right of way, and only would have benefitted the 1<sup>st</sup> Defendant as he could sell land parcel V 16827. To the leading question by Counsel for the Respondent that she is asking that she be paid for her inconvenience by the 1<sup>st</sup> Defendant and the Appellant, the Respondent had answered in the affirmative. In her examination-in-chief the Respondent had not given any evidence to substantiate her claim that the Appellant along with the 1<sup>st</sup> Defendant jointly forged and/or connived with each other to fabricate the signature of the Respondent on P4.

25. Under cross-examination the Respondent had admitted that she had not changed her name in the land register from Benoit to Georges. She had gone on to explain in cross-examination how she was inconvenienced as a result of the registration of the easement of right of way. According to her, people had started coming on to land parcel V 16827 to clear the land and vehicles were coming in and out and she had to keep her dogs tied as a result of this. She had said her privacy was affected. The Respondent had admitted that the amount claimed for inconvenience should be R 10,000 as it is a co-owned property. The Respondent had said that she had once challenged both the Appellant and her ex-husband, the 1<sup>st</sup> Defendant for forging people's name on documents for their benefit when the Appellant had come to her place and was talking to him. However when questioned as to when she made that utterance, whether in 2015 or 2016 the Respondent had refused to answer. The Respondent had also not led any evidence in respect of her claims referred to in paragraph 14 (b) and (c) of her Plea, which were for "the expenses of seeking legal advice and getting legal representation and initiating legal action" and "Moral damage for pain, anxiety and hassle which the Plaintiff has had to go because and since she discovered the fraud". As regards the claim of R 60,000 for moral damages the Respondent had virtually repeated what she had said in regard to her claim for being inconvenienced.
26. Mr. K Madeleine had testified that during the period 14<sup>th</sup> to 18<sup>th</sup> December 2015 the Respondent was at the Ministry of Education, Mont Fleuri from 8am to 3 pm save the tea break of 30 minutes at 10.15 and the one hour's lunch break at 1 pm. The Appellant had not cross-examined him.
27. The Appellant testifying before the court had stated that he had known the Respondent and her ex-husband, the 1<sup>st</sup> Defendant for about 15 years as of the date he testified before the Court and assisted them in their legal and personal matters. He has then gone to give a description of the three parcels of land

relevant to this case. The matrimonial home lies on V 6494 and V 3849 is the access road to that property. Both these properties are jointly owned by the Respondent and her ex-husband, the 1<sup>st</sup> Defendant. V 16827 is an enclaved property and was owned by the 1<sup>st</sup> Defendant. The access to that was over V 6494 and V 3849. The 1<sup>st</sup> Defendant had built a concrete access road to V 16827. In December 2015 the 1<sup>st</sup> Defendant had informed him that he had approached his ex-wife the Respondent and requested him to draft a right of way in favour of V 16827 over titles V 3849 and V 6494. The Appellant had then spoken to the Respondent and she had consented to it. The Appellant had then asked the Respondent whether she would be agreeable to sign as 'Benoit', as the V 3849 and V 6494 were still registered in the name of Clifford Benoit, the 1<sup>st</sup> Defendant and Marie Rosine Benoit. She had agreed to the proposal. It was thereafter that he drafted P4. Thereafter the Appellant had stated that on the 16<sup>th</sup> of December 2015 he signed P4, stamped it in his office, took it to the 1<sup>st</sup> Defendant's office where he signed P4 and then both of them had gone to Plaisance where the Respondent's wife was then residing. She had offered them drinks and around 5-5.15 pm, signed P4. The Appellant had said that she signed in his presence and that of the 1<sup>st</sup> Defendant. The Appellant had said there was no need for him to forge the Respondent's signature on P4. Since it was during Christmas vacation and he had no staff he had left P4 with the 1<sup>st</sup> Defendant to have it registered. During Christmas the Respondent and the 1<sup>st</sup> Defendant had a row and the relationship between them had ended. The Appellant had also spoken of a restriction placed by the Respondent on V 16827 which he had taken steps to remove in 2016. According to the Appellant this was when the Respondent started getting upset with him. The Respondent had vehemently refused to agree to its removal. According to the Appellant, the Respondent had brought this case against him because she has a grudge against him for appearing for the 1<sup>st</sup> Defendant.

28. The Appellant under cross-examination when asked whether the signatures of the Respondent in her Passports are the same as in P4, had stated that he is not a handwriting expert and that the signatures on the passports had been placed about 8 years before the one in P4. He had gone on to say over a period of years people's signatures slightly differ. Later on the Appellant had said "I cannot say it is the same, they look familiar". The Appellant had gone on to state since P4 was signed before him by the Respondent he takes it to be the signature of the Respondent. The Appellant had admitted that he signed P4 before it was signed by the Respondent and the 1<sup>st</sup> Defendant as there was an agreement amongst the three of them that it will be signed that day and if the parties did not sign it, he would have destroyed the document. According to him he had signed it because he did not want to walk around with his stamp. The Appellant had also in cross-

examination stated that the Respondent had told him that the 1<sup>st</sup> Defendant would give her money for granting the easement of right of way. This has however not been stated in P4 as it was between two parties who were close to each other. Counsel for the Respondent had challenged the Appellant that he did not during his cross-examination of the Respondent put to her that she signed P4. His answer had been it was stated in his defence.

29. In re-examination the Appellant had, repeating what he had stated in cross-examination stated “As far as I am concerned I cannot vouch as to how anyone signs any document. If somebody comes to me and sign a document in my presence I vouch that it has been signed in my presence and I stamp the document provided it is done in my presence.” He had also comparing the signature of the Respondent in P4 with that of P5b, the old passport of the Respondent, issued to her in 2008, i.e. about 7 years before P4, stated there can be variations in the signature. This raises the fundamental issue that has to be determined in this case as stated at paragraph 14 (a) above, namely, did the Respondent sign P4 in the presence of the Appellant?, a fact that is denied by the Respondent at paragraph 11 of the Plaint as referred to at paragraph 8 above. It is only if the answer to this question is in the negative the issue of forgery of the signature of the Respondent would arise.
30. The learned Chief Justice had answered this question as follows: “...that none of the facts relating to how he obtained the Plaintiff’s (*Respondent’s*) signature were averred in his statement of defence nor put to the Plaintiff when he (*Appellant*) cross-examined her. It was only after she corroborated the fact that she did not attend his office to sign the grant of easement by evidence that she was marking exams on the day that he testified subsequently that he obtained her handwriting not in his office but at her home after she had poured him a glass of whiskey”. The learned Chief Justice had been of the view that no regard should be had to the Appellant’s evidence in this respect as it was outside the pleadings and had disregarded that evidence. What the Respondent had averred at paragraph 10 (b) was that “she could not have signed the easement on the 16<sup>th</sup> of December 2015 as she was not available on that date”. It is only in her evidence before the Court that she had stated that on the 16<sup>th</sup> of December 2015 she was at the Ministry of Education at Mont Fleuri marking papers from 8 to 3 and thereafter as normally went home. The Appellant in his Statement of Defence, while not admitting paragraph 10 of the Plaint had averred that the “Plaintiff (*Respondent*) signed her signature as Benoit on his advice since Title was still registered in the Joint names of Clifford Sibert Benoit (*1<sup>st</sup> Defendant*) and Marie Rosine Benoit.” I am of the view there was no necessity to plead the place where the Respondent signed P4 or

how he obtained the Respondent's signature in the Statement of Defence. These were necessarily matters of evidence. The Respondent's Counsel had also not specifically challenged the Appellant's evidence that he obtained her signature not in his office but at her home after she had poured him a glass of whiskey.

31. The learned Chief Justice quoting '**Sauzier on Evidence**' and the case of **Albert V Rose (2006) SLR 140** had correctly stated that it was the burden on the party who challenges a document to prove its falsity. She had also stated that fraud cannot be presumed by the court and must be proved by adducing positive evidence and that it is trite where fraud is alleged a higher degree of probability is required but not so much as is necessary in a criminal case.
  
32. In this case it has been the Respondent's position that she did not sign P4 and her signature had been forged, whereas the Appellant had said P4 was signed by the Respondent in his presence. The learned Chief Justice had then gone on to determine whether the signature in P4 is in fact the signature of the Respondent by comparing it with the Respondent's signature in her old and new passports and in a letter written by the Respondent to the Ministry of Education and other documents produced to Court, which bears her signature and arrived at the conclusion that the signature on P4 was not that of the Respondent. In doing so the learned Chief Justice had relied on the case of **Michaud V Ciunfrini SCA 26/2005 decided on 24<sup>th</sup> August 2007**. What this court stated in that case is not definitive. Having said that a judge is permitted to proceed alone, without expert assistance, and compare genuine and disputed writings (including signatures) and come to a decision based on his own observations; it had gone on to say that "*a trial judge may not act in lieu of a graphologist*" and that "*evidence of an expert would be best*". In Michaud the Court had laid down certain guidelines before a trial Judge relies on a comparison between genuine and disputed handwriting without the assistance of a handwriting expert. They are that the Judge should warn himself of the dangers of relying solely on a comparison, that the exercise of comparison must be done during the proceedings, immediately upon the 'writing' being contested or challenged and the court should give its ruling on the objection before proceeding to admit the evidence. In Michaud the Court had noted "*this was not done as required or at all during the proceedings; there was some form of comparison carried out, but that was from the bar, between counsel and witness*". This Court in Michaud had then quoted the trial Judge who had said "*When the specimen signature is compared with all the exhibits containing the signatures of Paul Michaud, namely Exhs P2, P4 and P6 (a), only a blind person would be unable to tell that the defendant's specimen signature on Exh P6 and those on the other exhibits have been made by the same person*" and noted "*These*

*words indicate that the trial judge considered expert evidence as superfluous and could be dispensed with entirely. That would be a misdirection.”*

33. In this case too, the exercise of comparison was not done during the proceedings, save that, what was carried out from the bar, between Counsel for the Respondent and the Respondent while testifying. The Respondent had not been asked by Court to give her specimen signature when she testified, to compare that with the one in P4. There was no ruling before proceeding to admit the evidence. The learned Chief Justice in referring to P4 had stated that the purported signature of the Plaintiff (*Respondent*) on the grant of easement reads as ‘R Benoit’ with no full stop after the ‘R’. In P4 and all the sample signatures produced by the Respondent, the signature is stated as ‘M Benoit’ and not ‘R Benoit’. This itself shows how mistakes can be made when non-experts in graphology checks on the authenticity of signatures, and in this case when the Court itself was trying to make a determination on a disputed signature. Making a determination on the absence of a full stop after the letter ‘M’ in P 4 in my view is inconsequential and certainly does not amount to a determination on handwriting. Both these factors show the risks involved in not making use of an expert. In this case too, the learned Chief Justice had stated like the trial Judge in *Michaud* “It is my view that any objective person taking a  cursory look at the signature on the notarial document will notice that it is certainly not the signature of the Plaintiff (*Respondent*)” (emphasis by me) indicating that expert evidence as superfluous and could be dispensed with entirely by a  cursory look at the documents.
34. In **Alcindor V Morel [2017] SCSC 517 (CS 184/2011)** the Court in the absence of a handwriting expert, had ventured to make a determination on the comparison of genuine handwriting signed in open Court with the disputed signature on the receipt. The court had however stated that “*the court was not a handwriting expert to set out the fine distinctions between those handwritings which had certain subtle dissimilarities in the style, form, steadiness or trembling pattern and pressure used and justice would be better served by the assistance of an expert*”. These observations go to confirm that a trial Judge should not as stated in **Michaud V Ciunfrini**, treat expert evidence as superfluous and could be dispensed with entirely and that to do so would be a misdirection.
35. In the case of **W. S. Didon and another V J. J. Leveille [1983] SLR 187**, relied on by the learned CJ, the Supreme Court had after warning itself of the dangers of coming to any conclusions based on a comparison of the writing without expert guidance and the fact of the scanty examples of genuine writing had held that there is insufficient evidence before the court to prove that the defendant wrote

the disputed letter. In the cases of **Tirant V Kreckman CS 353/81** and the **Canadian case reported in the English Digest Vol 22 Evidence at page 217-1184**, referred to in the case of *Didon* there had been extrinsic evidence to prove the handwriting. This is the same in the case of **J de Commarmond V J. D. Dubal [1982] SLR 122** relied on by the learned Chief Justice. But in the instant case there was only the Respondent's word as against the Appellant and no other independent evidence. In the criminal case of **Kevin Barbe V The Republic, CR SCA 24/2009** this court stated: *"...Evidence could also have been placed before the court of someone who, although not an expert, is familiar with the handwriting of the Appellant. In case of doubt, the opinion of an Examiner of Questioned Documents should have been sought and, if not available here, from abroad. The Court cannot draw its own unaided conclusion from a comparison of P 13 with P15 and P16 without the assistance of an expert. Vide the cases of R V Tilley (1961) 1 WLR 1309 (CCA); R V Harden (1963) 1 QB 8 (CCA); R V Sullivan (1969) 1 WLR 497 (CA)."* (emphasis placed by me). In the case of **O. Bharathan V K. Sudhakaran AIR 1996, 1140** it had been held that comparing disputed signatures on counterfoils by High Court Judge without aid of expert or person conversant with disputed signatures is illegal.

36. According to **Cross & Tapper on Evidence, 12<sup>th</sup> edition (2010)**, evidence can be proved by three types of evidence, namely:

- a) Testimonial evidence: *"...the testimony of someone who saw the document executed (...an attesting witness...)..it is usually unnecessary, in the first instance, for a witness to the signature to do more than swear that he saw someone sign in a particular name...unless there are circumstances calling for investigation."*
- b) Someone acquainted with the handwriting
- c) Evidence of a handwriting expert. According to Cross, *"It is wrong for a judge to invite the jury to make a comparison without guidance of an expert..."*, and cites the New Zealand case of **R V Stephens [1999] 3 NZLR 81**.
- d) *"The alleged writer may be asked to write in court for comparison with that on the disputed document. [Cobbett V Kilminster (1865) 4 F & F 490"*.

37. I am conversant with the fact, a court, being the ultimate trier of facts should not blindly accept the handwriting expert's opinion, without making an independent assessment by itself. It can be deduced from the authorities referred to above that there are several other ways by which handwriting may be proved, without the evidence of a graphologist.



- i. Admission by the writer or by the evidence of someone in whose presence it was written. In this case it is not possible to place reliance on this test as there is a dispute between the writer, namely the Respondent and the person in whose presence it was written, the Appellant, on this very fact.
- ii. Evidence of persons familiar with the handwriting of the individual.
- iii. Comparison by the Court with a writing made in the presence of the court.

38. The reasons given by the learned Chief Justice in making a finding on handwriting without the aid of an expert are:

- i. The Respondent never attended the office of the notary,
- ii. The notary attested to the signatures by appending his own signature to the document before the Respondent purportedly signed,
- iii. The histrionics of the of the Appellant in court together with his evasiveness and the accusations he has levelled at Senior Counsel for the Respondent,
- iv. The Appellant's averment that he has "fallen victim to the Plaintiff's (*Respondent's*) wrath which gives rise to the suspicion that he has everything to hide and is being economical with the truth.
- v. That the Respondent was candid, frank, credible, straightforward witness and the Appellant "is anything but." The learned Chief Justice has not continued her sentence.

I am of the view that none of these have any relevance in making a finding on handwriting. They can only support a finding, once it has already been made by a comparison of handwriting. The dispute in this case is not whether the Respondent attended the office of the notary, but whether the Respondent signed P4, when the Appellant visited her in her house. The Appellant had given his reasons as to why he signed P4 before it was signed by the Respondent and the 1<sup>st</sup> Defendant and this is because there had been an agreement amongst the three of them that it will be signed that day. It had been the Appellant's evidence that if the parties did not sign P4, he would have destroyed the document. According to him he had signed it because he did not want to walk around with his stamp.

39. There is also merit in the Appellant's argument that there can be variations in a person's signature over a period of years and when the Respondent signed P4 before him, he did not attempt to verify whether it was signed in the same manner as the Respondent signed earlier and vouch for the fact that it was the signature of the Respondent, when attesting P4. I am certain that any person attesting that a

document was signed before him or her does not get involved in a verification process to check whether the person signing it, signs it in the exact manner he or she normally signs. All that the Appellant had vouched for was that the Respondent signed in his presence. The learned Chief Justice had not dealt with these two issues in her judgment before coming to a finding that the signature of the Respondent was forged and that the Appellant had individually or jointly caused the forgery.

40. For the reasons set out above, I am of the view that there is no clear answer to the issue raised in paragraph 14(a) above namely whether the Respondent signed P4 in the presence of the Appellant. For the reasons elaborated above, I allow the 2<sup>nd</sup>, 3<sup>rd</sup>, 7<sup>th</sup> and 8<sup>th</sup> grounds of appeal and come to the inexorable conclusion that on the evidence before the trial court, the learned Chief Justice could not have come to the conclusion that the Respondent had proved her case on a balance of probabilities against the Appellant. In view of my decision to allow the said grounds of appeal the need to look into the other grounds of appeal do not arise. Since the learned Chief Justice's decision had been based solely on a wrongful determination as to the signature on P4, I quash her judgment in its entirety and remit the case to the Supreme Court for a rehearing before another Judge.

41. I do not make an award as to costs.

A.Fernando (J.A)

**I concur:.** .....

B. Renaud (J.A)

**I concur:.** .....

F. Robinson (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 10 May 2019