

IN THE SEYCHELLES COURT OF APPEAL

Civil Appeal SCA MA 01/2019

Marie-Therese Boniface

Applicant

Versus

Maxime Marie

Respondent

Heard: 19 March 2019

Counsel: Mr. S. Rajasundaram for the Applicant

Mr. C. Lucas for the Respondent

Delivered: 28 May 2019

RULING ON MOTION

F. Robinson (J.A)

1. This is an application by way of notice of motion, dated the 4 January 2019, for leave to appeal out of time. The motion is supported by an affidavit, dated the 31 December 2018, sworn by the applicant. The application is resisted by the respondent.
2. After considering the notice of motion together with the supporting affidavit, the answering affidavit and the written submissions of both Counsel, I concluded, on the facts and circumstances of the matter, that a delay of 335 days is an unreasonable delay to grant an extension of time to appeal out of time, specifically when no cause at all has been shown, leave aside good cause. Accordingly, I dismissed the application, on the 2 April 2019, and stated that I will give reasons for my decision, on the 28 May 2019.

3. My reasons are as follows.

4. The applicant contended in her affidavit that the delay was not attributed to her. She argued that the delay was attributed to lawyers concerned with her case. In that regard, I reproduce the salient paragraphs of her affidavit:

" [...]

8. *That the secretary of Mr. Clifford Andre called me to attend the court case but I was informed that the matter has been dealt with and Mr. Clifford Andre informed that that I had 60 days to appeal in the supreme court premises but I was never made to sign any paper for filing of the appeal before this Hon'ble Court.*

9. *That I submit that I have never been informed the exact date of the hearing of my case, thus I lost the opportunity of being heard and my case on the merits.*

10. *Then I had met with Mdm Alexia Amesbury and asked for her assistance to file my appeal but this also did not materialise as I was not having enough funds at that time.*

[...]

11. *That I have thus been deprived of my chances to file the appeal within 30 days and I am now advised there is a delay of over 325 days in total and I submit that the delay is not attributed to anything on my part and I am honestly submitting that all the lawyers involve in my unfortunate case are responsible for the delay.*

12. *That I submit that this appeal I am prosecuting is out of an ex-parte judgment and if my appeal is not allowed to be filed I am*

seriously prejudiced in that I would lose my house and the Registrar of Lands and Deeds pursuant to the Judgment dated 17th January 2018, would register my title PR 4486 in the name of Maxim Marie.

13. *That I wish to therefore beg this Hon 'ble Court to allow me to file my appeal of out of time and further pray to condone the delay of over 325 days or almost an year."*

(sic)

5. I have considered the following paragraphs of the respondent's affidavit which read:

- "3. *I aver that the Applicant ought not to be permitted to abuse the process of appeal by her own volition, she neglected altogether for a period of almost one year.*

[...]

4. *Prior to the case I was approached by the Applicant for her to refund the money I paid, but I refused. She requested me to see her lawyer and she informed me that she did not care because the Court will only ask her to refund me. She told me that she was going on holiday in any event and that I have no option but to wait for her again since the case will be adjourned again because she would be absent.*
5. *On the 9th May 2017, she did not attend that previous court hearing that had been set down. The case was adjourn on four previous occasions for filing of Defence. I verily believe that the Applicant was playing delay tactics and she is presently adopting the same tactic by this application.*
6. *I aver that the Applicant is not being truthful in her averments of*

lack knowledge of the exact hearing date, given her conversation she held with me as per paragraph 5 of this Affidavit.

7. *The Applicant who is a teacher by profession ought to have known of the legal aid scheme, given her level of education and she has no excuse for any delay on that ground.*
8. *I am advised that this Application is devoid of legal merits since the Applicant has no reasonable chances to win the case which is one of specific performance of contract, supported by documents that prove the contract.*
9. *I verily believe that given all the circumstances the Applicant herself is the sole cause for the delay due to her neglect and lack of interest in pursuing any appeal whatsoever and it only at this stage when I am executing the judgment that her interest is suddenly aroused to continue the case.*
10. *All the statements contained in the are true and correct to the best of my knowledge, belief and information."*

(sic)

6. I set out the provisions of The Seychelles Court of Appeal Rules 2005, ("*The Rules*"), which apply to this matter.
7. Rule 18 (1) of The Rules provides: "[e]very appeal shall be brought by notice in writing (hereinafter called "*the notice of appeal*") which shall be lodged with the Registrar of the Supreme Court within thirty days after the date of the decision appealed against."
8. Rule 26 of The Rules provides: "[t]he times fixed within these Rules may, on good cause shown, be extended by the President or a Judge designated by the President or may be extended by the Court".
9. I am satisfied, after having considered the provisions of The Rules set out above, the facts

and circumstances giving rise to this matter and the written submissions of both Counsel, that the principal question that I have to decide is whether or not I should extend time to appeal out of time. I am also satisfied that this question involves a consideration of whether or not the reasons put forth by the applicant in her affidavit amount to good cause shown in terms of Rule 26 of The Rules. I have considered with care the authorities quoted by both Counsel on the question of what should, or should not be good cause shown.

10. In *Commissioner of Police v Antonio Sullivan*, (unreported), Civil Appeal SCA26/2015 - the judgment was delivered on the 11 May 2018 - the Court of Appeal of Seychelles observed that the term "good cause" has not been defined in law, but has been interpreted by the Court of Appeal in a number of cases. The Court of Appeal in **Commissioner of Police**, *supra*, was guided by English authorities, which provided some useful guidelines in dealing with delay. One such English authority is *Norwich and Peterborough Building Society v Steed* CA [1991] 2 AER 880, which set out the matters the court takes into account in deciding whether or not to grant an extension of time, namely: "1. the length of the delay; 2. the reasons for the delay; 3. the chances of the appeal succeeding if the application is granted; and 4. the degree of prejudice to the respondent".
11. *Wilfred Richmond v Gilbert Lesperance*, (unreported), Civil Appeal SCAMA9/2013 - the ruling was delivered on the 4 September 2013 - concerned an application to file an appeal out of time against a judgment of the Supreme Court, delivered on the 11 November 2010. The "Leave to Appeal Out of Time" application was filed on the 3 July 2013. The case before the Court of Appeal turned on the question as to whether or not the applicant had shown good cause in the context of the application. Justice Fernando in **Wilfred Richmond**, *supra*, analysed the affidavit evidence as follows —

"6) ... A mere averment in the Affidavit that a Notice of Appeal had been filed, without even specifying when it was filed and without any evidence to support that it was filed, casts serious doubts as to the genuineness of this averment. This not only establishes the first ground of objection raised to this application by the Respondent as referred to at paragraph 5 (a) above but also shows

that the Applicant has attempted to mislead the court.

- 7) *I agree with the Respondent's contention at paragraph 5 (b) that there is no satisfactory evidence that has been averred to establish that the Applicant has a strong case and that on appeal he has a good chance of success... The Affidavit of the Applicant dated 16th May 2013, annexed to the application for Leave to Appeal out of time, does not make any reference to the grounds set out in the Notice of Appeal. There is thus no evidence before this Court to even consider the Applicant's averment that he has "a very good chance of success" as correctly argued by the Respondent.*
- 8) *A delay of 2.6 years is indeed an inordinate delay to grant an extension of time to appeal out of time and especially when no cause whatsoever has been shown, leave aside "good cause".*
- 9) *There must be finality to judicial decisions and for this purpose there must be strict compliance with the procedural requirements setting out the time period for filing of appeals unless the non-compliance is shown not to be caused by the acts and omissions of the applicant or his counsel. In Lagesse and CIE Ltd V Commissioner of Income Tax 1991 MR 46, citing Dependants Pursun v Vacoas Transport Co Ltd 1969 Mr 148 and Espitalier-Noel Ltd v Serret 1980, the Court applied the well settled principle that non-compliance with the required formalities within the prescribed time limits is fatal to the hearing of an appeal unless such compliance was not due to the appellant's fault or that of his legal advisers [...]."*

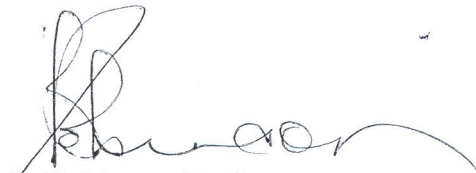
12. *Lise Church v Bernadette Boniface, (unreported), Civil Appeal SCA11/2017 - the ruling was delivered on the 27 June 2017 - concerned an application to pay security for costs of the appeal out of time. The Court of Appeal applied **Wilfred Richmond**, *supra*, and concluded that: "[21] [...] there must be strict compliance with procedural requirements setting out the time period for filing of appeals and matters connected therewith, unless*

the non-compliance is shown not to be caused by acts and/or omissions of the Applicant or his Counsel."

13. I have been guided by the approach of the Court of Appeal in deciding whether or not to allow the appeal to be entertained out of time.
14. I have considered the affidavit of the applicant with care. The applicant filed a notice of appeal containing three grounds of appeal, on the 4 January 2019, challenging the decision of the learned Judge of the Supreme Court. It is noteworthy that the applicant's affidavit does not refer to the said notice of appeal. It is not clear to me as to whether or not the said notice of appeal is to be used in combination with the applicant's affidavit. Be that as it may, I state that I did not consider the notice of appeal because it had not been exhibited to the affidavit: see, for example, *In Re Hinchliffe, A Person of Unsound Mind, Deceased, Court of Appeal*, 5 November 1894 [1895] 1 Ch. 117, in which it was held that any document to be used in combination with an affidavit must be exhibited to the affidavit, (which authority was cited by the Court of Appeal of Seychelles in *Trevor Zialor v The Republic*, (unreported), *SCA MA16/2017* - the ruling was delivered on the 17 October 2017. I also remark that other documents referred to in the affidavit, had not been exhibited to it.
15. Next, I remark that it is not clear to me as to why the time provided by Rule 18 (1) of The Rules was ignored. I note with dismay that the affidavit has been poorly drafted which has led to confusion and ambiguity. I also note that the allegations contained in the affidavit are scant and do not satisfactorily explain why the delay is stated to be attributed to Counsel.
16. In the final analysis, I am satisfied that there is no material on which I can exercise my discretion. In **Commissioner of Police**, *supra*, the Court of Appeal, guided by *Ratnam v Cumarasamy and Another* [1964] 3 All ER 933, stated:

"The rules of court must, prima facie, be obeyed, and, in order to justify a

court in extending the time during which some step in procedure requires to be taken, there must be some material on which the Court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right of extension of time which would defeat the purpose of the rules which provide a timetable for the conduct of litigation."



F. Robinson (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 28 May 2019