

IN THE COURT OF APPEAL OF SEYCHELLES

Reportable

[2021] SCCA 15

SCA 53/2018

(Appeal from C.S. No. 85/2018)

In the matter between

BERNARD MEME

(rep. by Mr D. Sabino)

Appellant

and

THE LAND REGISTRAR

(rep. by Mr J. Revera)

First Respondent

THE PLANNING AUTHORITY

(rep. by Mr J. Revera)

Second Respondent

Neutral Citation: *Meme v The Land Registrar & Anor* (SCA 53/2018) [2021] SCCA 15
30 April 2021

Before: Fernando President, Robinson, Dingake JJA

Summary: disposal of proceedings without trial – Supreme Court of Seychelles Practice Directions No. 3 of 2017 issued by the Chief Justice under sections 7(3) and 15 of the Courts Act and Rule 325¹(sic) of the Seychelles Code of Civil Procedure – Form CV1 approved by the Chief Justice for the Practice Directions No. 3 of 2017

– case called on for the first time – plaintiff (Appellant) and defendant (Respondent) appeared by Counsel – dismissal of plaint for failure to comply with case management directions under Practice Directions No. 3 of 2017 and Form CV1 – Respondent had not filed a statement of defence – The Seychelles Code of Civil Procedure does not apply – right of appeal to the Court of Appeal

– whether or not the Practice Directions No. 3 of 2017 and Form CV1 are legal: *i.e.*, whether or not they are enabled by law – the Constitution of the Republic of Seychelles does not delegate any power to the Chief Justice under neither the Seychelles Code of Civil Procedure nor the Courts Act to make practice directions – those Acts confer power on the Chief Justice to make rules which have the force of delegated legislation – the Practice Directions No. 3 of 2017 and Form CV1, including any other "*Form*"

¹ "Rule 325" should read "section 325"

approved by the Chief Justice for the purposes of the Practice Directions No. 3 of 2017 are illegal

– the Practice Directions No. 3 of 2017 and Form CV1, including any other "Form" approved by the Chief Justice for the purposes of the Practice Directions No. 3 of 2017 are declared illegal – Ruling of the learned Judge of 6 September 2018 is null and quashed in its entirety. Appeal allowed. No order as to costs.

Heard: 19 April 2021

Delivered: 30 April 2021

ORDER

- (1) The Appeal is allowed.
 - (2) The Supreme Court Practice Directions No. 3 of 2017 and Form CV1 attached to them, including any other "Form" approved by the Chief Justice for the purposes of the Supreme Court Practice Directions No. 3 of 2017, are declared illegal.
 - (3) The Supreme Court ruling of 6 September 2018 is null and quashed in its entirety.
 - (3) The case is remitted to the Supreme Court before the same learned Judge to be heard under the law.
 - (2) No order as to costs.
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JUDGMENT

ROBINSON JA (FERNANDO PCA concurring)

1. This is an appeal against a ruling of a learned Judge of the Supreme Court dismissing a plaint filed by the Appellant (the plaintiff then) on the 9 July 2018, C.S. No. 85/18. Fundamentally, the learned Judge based the dismissal of the plaint entirely on the Supreme Court Practice Directions No. 3 of 2017², issued by the Chief Justice on the 25 September 2017 and a document titled, "*DIRECTIONS FOR CASE MANAGEMENT (FORM CV1)*", hereinafter referred to as "*Form CV1*", attached to the Practice Directions No. 3 of 2017. The Chief Justice approved Form CV1 for the purposes of the Practice Directions No. 3 of 2017³.

² (Hereinafter referred to as "*the Practice Directions No. 3 of 2017*") [Practice Directions/Rules - The Judiciary of Seychelles](#) has the link to the Practice Directions No. 3 of 2017 and Form CV1.

³ Direction 23 of the Practice Directions No. 3 of 2017 provides that: "*Forms CV1 and CV2 (attached) are approved by the Chief Justice for the purpose of this Practice Direction*".

BACKGROUND TO THE APPEAL

2. The Appellant in his plaint sought the following reliefs: (i) payment of SCR 1000; (ii) *"a declaration in line with section 56 of the Land Registration Act that there is no requirement for a mutation form where there is a court order for the subdivision or partition of a parcel of land, as in the present case where there is an Order of the Supreme Court Order dated 21st September 2011 in the case of Bernard Meme & Or v/s Heirs Laurent Nicette [C.S. No. 58 of 2008]"*; and *"(iii) an order that the 1st and 2nd Defendants do all that is necessary to give effect to the subdivision of S2022 in terms of the Order of the Supreme Court dated 21st September 2011 in the case of Bernard Meme & Or v/s Heirs Laurent Nicette [S.C. No. 58 of 2008]"*.
3. The record of proceedings revealed that on the 11 July 2018, the Assistant Registrar of the Supreme Court issued Form CV1 to the Appellant and the Respondent. *Ex facie* Form CV1, a summons was enclosed informing the Respondent *inter alia* of the plaint issued against him and the date on which he was to appear at the Supreme Court to answer the plaint.
4. For the purposes of this appeal, I have reproduced direction 1 of Form CV1, which provides instructions for the Respondent as follows —

"1. Enclosed is a summons informing you of a plaint issued against you and the date on which you are to appear at Court to answer the plaint ("the return date"). In accordance with the Practice Directions 3 of 2017, you have 21 days from the date of receipt of this summons by which to file with the Registrar of the Supreme Court:

1.1. An admission of the suit; or

1.2. A statement of defence to the suit to which shall be annexed a list of documents which you intend to produce to make your defence; and/or

1.3. A counterclaim to the plaint.

NOTE Failure to file a defence in accordance with this direction may

- result in judgment being given against you.***" Emphasis supplied
5. *Ex facie* a document titled "***Triage Tick Box Form (TO BE COMPLETED BY THE REGISTRAR)***", the Respondent was required to file a defence on the 6 August 2018. *Ex facie* the said document, the action was set for a preliminary hearing for case management before the learned Judge on the 6 September 2018.
6. The disputed directions, namely directions 7, 8, 9, 10, 11 and 12 of Practice Directions No. 3 of 2017 and directions 3, 4, 5, 6, 7 and 8 of Form CV1⁴, deal with case management/ preliminary hearings. I reproduce the said directions of Practice Directions No. 3 of 2017 —

"Preliminary Hearing

"7. On the day fixed in the summons for the defendant to appear the parties shall attend before the allocated Judge / Master who will decide:

- a. What issues should be tried (and may strike out or refuse to determine any which are unsustainable or irrelevant);*
 - b. What directions should be given to enable the issues to be tried;*
 - c. How much court time should be allocated to the parties for the trial;*
 - d. How much time should be reserved for the Judge to prepare and deliver judgment at the conclusion of the trial.*
- 8. In addition to managing the suit for trial the allocated Judge will discuss with the parties the need to consider resolving the dispute by alternative dispute resolution, including mediation. The allocated Judge will explain to the parties the risks as to costs if a party unreasonably fails to consider or engage in any proposed attempt to resolve the dispute.*
- 9. At the conclusion of the Preliminary Hearing the allocated Judge will give standard form Preliminary Hearing Directions ("Form CV2") (approved by the Chief Justice from time to time).*
- 10. The parties may not agree to vary the directions without the consent or approval of the allocated Judge. An application for variation of any direction or order must be brought at the earliest possible instance with notice to the other party.*
- 11. A party may apply for variation of a direction if:*

⁴ See Practice Directions/Rules - The Judiciary of Seychelles for the said directions.

- a. *the direction was given in the party's absence; or*
- b. *circumstances have changed.*

12. A failure to comply with the directions might result in a suit being struck out, judgment entered against a defendant or some other appropriate order being made". Emphasis is mine

7. Fundamentally, Form CV1 contains a paragraph that deals with the consequences of failure to comply with the said directions as follows —

"Warning: you must comply with the terms imposed upon you by these directions: otherwise your case is liable to be struck out or some other sanction imposed. If you cannot comply you are expected to make a formal application to the court before any deadline imposed upon you expires".

8. On the 6 September 2018, when the case was called on for the first time, the Appellant and the Respondent appeared by Counsel. The Respondent had not filed a defence, and the Appellant had not complied with the case management directions under direction 3.1 of Form CV1. Direction 3 of Form CV1 instructs the parties that the claim has been listed for a preliminary hearing for case management before the learned Judge on the return date with a time estimate of 45 minutes, and that direction 3.1 applies. Direction 3.1 of Form CV1 directed the Appellant to file, not less than seven days before the preliminary hearing, by email to: registrar@judiciary.gov.sc, the following matters —

"(a) a case summary of no more than 250 words;

(b) a list of issues, setting out in separated numbered lines the principal issues of fact and law which the court will be asked to determine at trial;

(c) a schedule of the sums (if any) claimed by the plaintiff (or counterclaiming defendant as the case may be) with a breakdown of each;

(d) proposed directions (agreed if possible). Where not all the directions have been agreed, the plaintiff must indicate which directions are not agreed;

e) a draft trial timetable setting out the time which it is proposed to allocate to each of the following:

- i. *Opening statement(s)*

- ii. *Oral evidence of lay witnesses (identifying the intended witnesses on each side and the issue in the list in (b) above which each witness will address)*
- iii. *Oral evidence of expert witnesses (identifying submissions on any legal issues which are to be determined by the court)*
- iv. *Closing submissions (including submissions on any legal issues which are to be determined by the court)".*

9. On hearing the plaint, the learned Judge held the view on the construction of direction 3.1 of Form CV1 that the Appellant should have complied whether or not the Respondent should have filed a defence on the 6 August 2018. The Appellant was adamant that he could not have complied with direction 3.1 of Form CV1 because he was ignorant of the Respondent's position. The learned Judge did not grant the Appellant additional time to comply with direction 3.1 of Form CV1.

10. The learned Judge dismissed the plaint with costs. His ruling reads as follows —

"[1] The Plaintiff has filed his plaint dated the 6th of July 2018, it was received by the Supreme Court on the 9th of July 2018, the case was allocated to me, and the matter is set for preliminary hearing today on the 6th of September 2018. The Plaintiff has failed to comply with the Case Management documents namely filing the Plaintiff summary of this case, Plaintiff list of issues; schedule of sum claimed, draft proposed directions, draft trial timetable. For this reason, I am going to dismiss this plaint with cost in favour of the Defendant".

11. A plaintiff whose plaint has been dismissed under the Seychelles Code of Civil Procedure should have first applied to the trial court to set aside the judgment. Only then if the application was refused appeal from the refusal to the Court of Appeal. In the present case, the learned Judge did not dismiss the plaint under the Seychelles Code of Civil Procedure. He dismissed the plaint entirely under the Practice Directions No. 3 of 2017 and Form CV1. In the circumstances, the Court of Appeal will decide the appeal as the Appellant's right of appeal as of right to the Court of Appeal under Article 120(2) of the Constitution of the Republic of Seychelles [CAP 42], from the ruling of the learned Judge, has not been taken away by the said Constitution or any other Act.

THE GROUNDS OF APPEAL AND SUBMISSIONS OF COUNSEL FROM BOTH SIDES

12. The Appellant filed five grounds of appeal against the ruling as follows —

"1. The learned Judge failed to take into consideration that the Defendants have not filed a statement of Defence.

2. The learned Judge failed to appreciate that the Plaintiff via its representative, was present for the court appearance.

3. The learned Judge erred in the use of his discretion to dismiss the Plaintiff based on Practice Directions.

4. The learned Judge erred in failing to follow the Seychelles Code of Civil Procedure.

5. The learned Judge failed to consider referring the matter to mediation given the representation of the parties".

13. The Appellant sought the following reliefs from the Court of Appeal—

"(i) Quashing the dismissal of the Plaintiff;

(ii) Giving judgment in favour of the Plaintiff in terms of the Plaintiff, alternatively, ordering that the suit be remitted to the Supreme Court to be heard;

(iii) Quashing the costs order against the Appellant;

(iv) Any other order that the court sees fit."

14. In relation to the five grounds of appeal, Counsel for the Appellant identified the point to be argued as follows in his skeleton heads of argument. Counsel stated that sections 126, 127⁵ and 128 of the Seychelles Code of Civil Procedure [CAP 213] apply in this case.

⁵"127. If the defendant denies the plaintiff's claim or any part thereof, the court shall adjourn the case to a date to be fixed by the court and shall order the defendant to file a statement of defence on or before such date. If there are more than one defendant, with different defences, separate statements of defence shall be filed by such defendants. The court may, if it think fit, give judgment for the plaintiff for such part of the claim as is admitted by the defendant to be due:

Provided however that, if the defendant appears in person and the plaintiff's claim is for less than five hundred rupees, the court, if it think fit, may allow the defendant to make his statement of defence verbally, which statement shall be recorded by the Registrar, and may either hear the suit forthwith or fix another date for the hearing:

Provided also that the court may, at any time after the parties have appeared, proceed to hear the suit, if the parties are ready and consent thereto".

Specifically, section 127 of the said Code empowers the learned Judge to order a defendant to file a statement of defence if he denies the plaintiff's claim or any part thereof. In this respect, he pointed out that the relevant directions of the Practice Directions No. 3 of 2017 and Form CV1 are inconsistent with sections 127 and 128 of the Seychelles Code of Civil Procedure. Hence, he submitted in his skeleton heads of argument that the learned Judge erred in allowing the relevant directions of the Practice Directions No. 3 of 2017 and Form CV1 to override section 127 of the Seychelles Code of Civil Procedure, as they have no power to override the said provision.

15. The skeletons heads of argument offered on behalf of the Respondent do not adequately identify the relevant points to be argued.

ANALYSIS: WHETHER OR NOT THE PRACTICE DIRECTIONS NO. 3 OF 2017 and FORM CV1 ARE LEGAL

16. The interpretation of the background facts, the Practice Directions No. 3 of 2017 and Form CV1, and the relevant provisions of the Seychelles Code of Civil Procedure highlight a significant issue: whether or not the Practice Directions No. 3 of 2017 and Form CV1 are legal, *i.e.*, whether or not they have been enabled under the Seychelles Code of Civil Procedure and the Courts Act. I state whether or not the Seychelles Code of Civil Procedure relies on the Practice directions No. 3 of 2017 and Form CV1 for its operation seems irrelevant to me.
17. The grounds of appeal do not raise the question at issue. Given the importance of the issue, I raised it *proprio motu*. Both Counsel were apprised of and were invited to address the Court of Appeal on the question at issue. Both Counsel agreed that the Practice Directions No. 3 of 2017 and Form CV1 have no power to override the Seychelles Code of Civil Procedure. Counsel for the Appellant added that the Practice Directions No. 3 and Form CV1 are illegal. In support of his submissions, Counsel pointed out that section 325 of the Seychelles Code of Civil Procedure and section 7(3) of the Courts Act [CAP 52] do not confer any power on the Chief Justice to issue any practice directions. He

stated that the said enabling provisions confer power on the Chief Justice to make rules, which have the force of delegated legislation under the Interpretation and General Provisions Act [Cap 103].

18. I consider the question at issue in light of the submissions of both Counsel.
19. Article 85 of the Constitution of the Republic of Seychelles [CAP 42] vests the legislative power of Seychelles in the National Assembly, which is exercised subject to and in accordance with the said Constitution. The legislative power vested in the National Assembly is exercised by Bills passed by the National Assembly and assented to or deemed to have been assented to by the President of the Republic of Seychelles: see Article 86 (1) of the Constitution of the Republic of Seychelles. Article 89 of the Constitution of the Republic of Seychelles stipulates that Articles 85 and 86 of the said Constitution shall not operate to prevent an Act from conferring on a person or authority power to make subsidiary legislation (or delegated legislation).
20. I state at the outset, as correctly pointed out by Counsel for the Appellant, that rules are the form of delegated legislation referred to in the enabling provisions (sections 7(3) of the Courts Act and section 325 of the Seychelles Code of Civil Procedure). Under section 22 of the Interpretation and General Provisions Act: *""regulation" includes rule, rule of court and bye law;".* Bennion on Statutory Interpretation Seventh Edition at p. 71 describes rules as having the *"same nature as regulations except that the term rule is usually reserved for procedural matters, for example, instruments dealing with the procedure of a court, tribunal or corporation or other statutory body"*.
21. Craies On Legislation A Practitioners' Guide to the Nature, Process, Effect and Interpretation of Legislation Tenth Edition at 3.1.4 at p. 119 states that —

"The most common kind of subordinate legislation is the class referred to as statutory instruments. Strictly speaking, however, the expression "statutory instrument" does not describe a kind of legislation, but a particular method by which different kinds of secondary legislation are made".

22. The Interpretation and General Provisions Act defines the term "**statutory instrument**" to mean "**any Proclamation, regulation, order, rule, notice or other instrument (not being an Act) of a legislative, as distinct from an executive, character and having the force of law;**". Emphasis is mine. Part X of the Interpretation and General Provisions Act applies to statutory instrument, whether made before or after the commencement of the Act, except in so far as a contrary intention appears in the Act or in the other Act under which the statutory instrument is or was made. The said Act applies to the Seychelles Code of Civil Procedure and the Courts Act.
23. The principal significance of whether or not a piece of legislation takes the form of a statutory instrument is the application of the provisions for printing and publication. Sections 63 of the Seychellois Interpretation and General Provisions Act regulates the printing and publication of statutory instruments as follows —

"63(1) A statutory instrument made after the commencement of this Act —

- (a) shall be published in the Gazette⁶] and shall be judicially noticed; and*
- (b) shall come into operation on the date of publication or, if it is provided that the statutory instrument is to come in operation on some other date, on that date.*

(2) A statutory instrument is in operation as from the beginning of the day on which it comes into operation."

24. Moreover, statutory instruments go through a democratic process. They are laid before the National Assembly in terms of section 64 of the Interpretation and General Clauses Act, which section provides —

"64(1) Subject to subsection (3), a statutory instrument made under an Act after the commencement of this Act shall be laid before the People's Assembly.

⁶Under section 22 of the Interpretation and General Provisions Act: "*Gazette*" means the official Gazette of the Government and includes any Government Gazette Extraordinary, any supplement to the Gazette and any matter referred to in the Gazette as being published with the Gazette;"

(2) *If the People's Assembly passes a resolution, within three months after a statutory instrument is laid before it, to the effect that the statutory instrument is annulled, the statutory instrument shall thereupon cease to have effect, but without prejudice to the validity of anything previously done under the statutory instrument.*

(3) *Subsection (1) does not apply to a statutory instrument a draft of which is laid before, and approved by resolution by, the People's Assembly before the making of the statutory instrument."*

25. The Chief Justice made the Practice Directions No. 3 of 2017 in the exercise of the powers conferred on her under sections 7(3) and 15 of the Courts Act and section 325 of the Seychelles Code of Civil Procedure. I observe that the term "*practice directions*" is not defined for the purposes of the Seychelles Code of Civil Procedure and the Courts Act. The Practice Directions No. 3 of 2017 took effect from the first day of October 2017 and apply to all complaints filed on or after that date. As I am considering the issue of whether or not the Practice Directions No. 3 of 2017 are legal, I need not, I think, read further.
26. As mentioned above, section 325 of the Seychelles Code of Civil Procedure empowers the Chief Justice to make rules, with the approval of the Minister, for more effectually carrying out the provisions of the Seychelles Code of Civil Procedure, and may amend or cancel rules made in virtue of the powers conferred by the said section. That is the very purpose for which Article 89 of the Constitution of the Republic of Seychelles has delegated the power under the Seychelles Code of Civil Procedure to the Chief Justice. This power is exercisable by statutory instrument to have the force of law. The statutory instrument is subject to annulment by the National Assembly under the Interpretation and General Provisions Act. The Practice Directions No. 3 of 2017 do not fall within the definition of delegated legislation.
27. I turn to section 15 of the Courts Act. The said section 15 speaks about the practice and procedure to be followed in the Supreme Court. Section 15 stipulates: "*15. The practice and procedure in all the jurisdictions of the Supreme Court shall be such as are now in force or as may thereafter be provided by law*". It suffices to state that section 15 does

not confer any power at all on the Chief Justice to issue any practice directions.

28. I have considered the enabling power under section 16 of the Courts Act under which rules may be made by the Chief Justice to regulate the practice and procedure of the Supreme Court in its civil or its admiralty jurisdiction. By the same reasoning that I have adopted with respect to section 325 of the Seychelles Code of Civil Procedure, I conclude that section 16 of the Courts Act does not confer any power on the Chief Justice to make any practice directions.
29. Section 7⁷(3) of the Courts Act confers power on the Chief Justice to make rules to modify and adapt the Administration of Justice Act, 1956 of the United Kingdom Parliament to such an extent as may appear to the Chief Justice to be necessary to allow the said Act to have effect in Seychelles. The Admiralty Jurisdiction Rules, S.I. 60 of 1976, are made under section 7(3) of the Courts Act and have the force of delegated legislation. By the same reasoning that I have adopted with respect to section 325 of the Seychelles Code of Civil Procedure and section 16 of the Courts Act, I conclude that section 7(3) of the Courts Act does not confer any power on the Chief Justice to make any practice directions.
30. I pause there to look at the source of some practice directions under the laws of England and Kenya to understand the question at issue better.
31. Under section 1(1) of the English Civil Procedure Act 1997, the Civil Procedure Rule Committee is empowered to make Civil Procedure Rules that govern the practice and procedure to be followed in the Civil Division of the Court of Appeal, in the High Court (except in relation to its jurisdiction under the Extradition Act 2003), and in the County Court.

⁷ "7(1) The Supreme Court shall have the Admiralty jurisdiction of the High Court of Justice in England as stated in section 1 of the Administration of Justice Act, 1956 of the United Kingdom Parliament (hereinafter in this section called "the Act").

(2) Subject to subsection (3), the Act shall have force and effect in Seychelles.

(3) The Chief Justice may make rules modifying and adapting the Act to such an extent as may appear to him to be necessary to allow the Act to have effect in Seychelles".

32. Halsbury's Laws of England, paragraph 6⁸, "*Provision to be made by Civil Procedure Rules*", informs that the Civil Procedure Rules are a form of delegated or subordinate legislation. Paragraph 8⁹, "*Exercise of power to make civil procedure rules*", informs that the rules must be contained in statutory instrument¹⁰, subject to annulment in pursuance of a resolution of either House of Parliament¹¹. The English Statutory Instrument Act 1946¹² applies to such a statutory instrument as if it contained rules made by a Minister of the Crown: see the Civil Procedure Act 1997 section 3(1)(b) (prospectively substituted).
33. The Civil Procedure Rule Committee is empowered to make rules only within the strict limits defined by statute, whether contained in the Civil Procedure Act 1997 or any other Act: see **Re C (legal aid: preparation of bill of costs) [2001] 1 FLR 602, C.A.** Halsbury's Laws of England, paragraph 6, goes on to state that: "*[l]ike the Rules of the Supreme Court and the County Court before them, the rules are mere rules of practice and procedure, and their function is to regulate the machinery of litigation; they cannot confer or take away or alter or diminish any existing jurisdiction or any existing rights or duties*".
34. Concerning practice directions, for the purposes of the Civil Procedure Act 1997, "*practice directions*" are defined as directions as to the practice and procedure of any court within the scope of Civil Procedure Rules: section 9(2). **Re C ((legal aid: preparation of bill of costs) [2001] 1 FLR 602, C.A)** states that practice directions (including those that supplement the Civil Procedure Rules) do not take effect so as to amend or revoke any rules or regulations made by statutory instrument.

⁸ CIVIL PROCEDURE (VOLUME 11 (2015), PARAS 1-503; Volume 12 (2015), Paras 504-1218; Volume 12A (2015) PARAS 1219-1775. Consultant Editor Adrian Zuckerman Emeritus Professor of Civil Procedure, University of Oxford, University College, Oxford.

⁹ Op. cit. 8.

¹⁰ See the Civil Procedure Act 1997 section 3(1)(a) (prospectively substituted).

¹¹ See the Civil Procedure Act 1997 section 3(2) (prospectively substituted).

¹² Section 2(1): "*Definition of "Statutory Instrument"*

"(1)Where by this Act or any Act passed after the commencement of this Act power to make, confirm or approve orders, **rules**, regulations or other subordinate legislation is conferred on His Majesty in Council or on any Minister of the Crown then, **if the power is expressed—**

(a)in the case of a power conferred on His Majesty, to be exercisable by Order in Council;

(b)in the case of a power conferred on a Minister of the Crown, to be exercisable by statutory instrument, any document by which that power is exercised shall be known as a "statutory instrument" and the provisions of this Act shall apply thereto accordingly". Emphasis supplied

35. Practice directions for the Civil Courts may be given under Part 1 of Schedule 2 to the Constitutional Reform Act 2005 (see the Civil Procedure Act 1997 section 5(1) as substituted)¹³ or otherwise (see the Civil Procedure Act 1997 section 5(2) as substituted)¹⁴.
36. In *Bovale Ltd v Secretary of State for Communities and Local Government [2009] EWCA Civ 171*, the Court of Appeal (Civil Division) on appeal from the Queen's Bench Division considered *inter alia* a point which concerned section 5 of the Civil Procedure Act 1997 as substituted by the Constitutional Reform Act 2005. The Civil Procedure Act 1997 provides under section 5(1), for a procedure for making what are called "*designated directions*" made by the Lord Chief Justice (or his nominee) with the agreement of the Lord Chancellor, and under section 5(2) for practice directions given otherwise than under section 5(1) not to be given "*without the approval of (a) the Lord Chancellor, and (b) the Lord Chief Justice*".
37. I am not here concerned with the argument made on appeal concerning section 5 of the 1997 Act. In *Bovale Ltd*, *supra*, Lord Justice Waller and Lord Justice Dyson gave an overview on the Act, rules and practice directions. I can do no better than to reproduce the relevant parts of their judgment, so far as relevant —

*"10 The full historical position is very helpfully set out in an article of Professor Jolowicz published in March 2000 in the Cambridge Law Journal at page 53. What he there explains is that the judges had an inherent power to control their own proceedings, and did so by the making of general rules the precise force of which before the 19th century it is unnecessary to debate. **During the 19th century, Acts of Parliament were passed, giving rules statutory force.** Although that was so before 1875, for present purposes one need go no further than recognise that the first rules of court following the Judicature Act 1875 were scheduled to the Act itself. But not long after the passing of that Act judges began once more to make use of their extra statutory inherent power. **During the late 19th and 20th centuries thus there were rules which had statutory force and practice directions which did not.***

¹³ Section 5 substituted by the Constitutional Reform Act 2005 section 13(2), Schedule 2 Part 2 paragraph 6.

¹⁴ Op. cit. 13.

11. By the end of the 19th century there had been set up the Rules Committee composed of judges and practitioners for making rules. The Rules Committee continued to exercise that function and indeed its successor, the Civil Procedure Rule Committee, continues to exercise that function. Prior to the CPR brought in by the 1997 Act, the relevant statutory provisions relating to the High Court and the Civil Division of the Court of Appeal were sections 84 and 85 of the Supreme Court Act 1981, granting the power to make rules to the “Rules Committee”, such rules to be made by statutory instrument (see section 84(8)). Thus, by virtue of being laid before Parliament and being subject to the negative resolution procedure, the rules had the force of delegated legislation. **Until the 1997 Act the position was clear in at least one respect. Many practice directions were issued but if there was a conflict between a rule and a practice direction, since the rule was made by statutory instrument the rule would prevail.**

[...]

17. The position as at December 2000 is summarised helpfully by Hale LJ (as she then was) in [Re C \(Legal Aid : Preparation of Bill of Costs\) \[2001\] 1 FLR 602](#):-

"[...]

(16) Section 5 of the 1997 Act is headed 'Practice Directions'. Under s 5(1), 'Practice Directions may provide for any matter which, by virtue of para 3 of Sch 1, may be provided for by Civil Procedure Rules'...

(17) Section 5(2) inserts a new s 74A in the County Courts Act 1984 dealing with Practice Directions in county courts. Section 74A(1) gives power to the Lord Chancellor to make directions as to the practice and procedure of county courts...

[...]

(19) [...] Section 9(2) defines 'Practice Directions' as 'directions as to the practice and procedure of any court within the scope of the Civil Procedure Rules' thus taking the present matter no further.

[...]

(21) Unlike the Lord Chancellor's orders under his 'Henry VIII' powers, the Civil Procedure Rules 1998 themselves and the 1991 Remuneration Regulations, the Practice Directions are not made by Statutory Instrument. They are not laid before Parliament or subject to either the negative or positive resolution procedures in Parliament. They go through no democratic process at all, although if approved by the Lord Chancellor he will bear ministerial responsibility for them to Parliament.

[...]

(24) In my view, therefore, there is no need to consider whether or not the Practice Direction about Costs is inconsistent with the Remuneration Regulations 1991, because the Practice Direction has no power to override the Regulations. The question of implied amendment or repeal simply does not arise. In fact, however, it is comparatively easy to reconcile them as the judge did. The costs of preparing a bill are now to be considered allowable, because the general practice has now changed, but only up to the maximum permitted by the Regulations, which is to be taken as setting the 'reasonable cost' in the context in which the Regulations apply."

[...]

20. The 2005 Act moved matters on a further stage. This followed the major constitutional changes under which the Lord Chancellor ceased to be a judge and followed the making of the concordat. As was made clear by the then Lord Chancellor in Parliament the 2005 Act was intended to reflect the concordat. **That Act repealed section 74A (see the 2005 Act section 15(1) and Sch.4, part 1, para 169) and substituted section 5 of the 1997 Act so as to provide as follows:**

"(1) Practice directions may be given in accordance with Part 1 of Schedule 2 to the Constitutional Reform Act 2005.

(2) Practice directions given otherwise than under subsection (1) may not be given without the approval of

(a) the Lord Chancellor, and

(b) the Lord Chief Justice

(3) Practice directions (whether given under subsection (1) or otherwise) may provide for any matter which, by virtue of paragraph 3 of Schedule 1, may be provided for by Civil Procedure Rules.

(4) The power to give practice directions under subsection (1) includes power –

(a) to vary or revoke directions given by any person;

(b) to give directions containing different provision for different cases (including different areas);

(c) to give directions containing provision for a specific court for specific proceedings or for a specific jurisdiction.

[...]

28. How far is a practice direction binding? In our view a judge is bound to recognise and has no power to vary or alter any practice directions, whether brought in under the section 5(1) procedure or under the Section 5(2) procedure or indeed any existing practice directions issued pre-2005 Act. There are powers under the rules, as we have already indicated, to apply case management powers in particular cases but otherwise, practice directions must, as it seems to us, be binding on the court to which they are directed".

38. I have briefly considered the position obtained in Kenya concerning practice directions made under the Supreme Court Rules 2020 and the Civil Procedure Act.
39. Article 163 (8) of the Constitution of Kenya and section 31 of the Supreme Court Act 2011 confer power on the Supreme Court of Kenya to make Supreme Court Rules. The Rules apply to proceedings under the Supreme Court's jurisdiction and includes petitions, references and applications. The overriding objective of the Rules is to ensure that the Court is accessible, fair and efficient.
40. Rule 64 of the Rules confers power on the President of the Supreme Court to make practice directions for the better carrying out of the provisions of the Rules. Under rule 65 (1), where any provision in the Supreme Court Rules 2020 or any relevant practice direction is not complied with, the Supreme Court may issue such directions as may be appropriate, having regard to the gravity of the non-compliance, and generally to the circumstances of the case. Rule 65 (2) provides for the effect of non-compliance with the Rules. It states that any direction given under rule 65 may include the dismissal of the petition, reference or application.
41. I observe that the Supreme Court General Practice Directions 2020 made, by the Chief Justice and the President of the Supreme Court, under the Supreme Court Act No. 7 of 2011 and rule 64 of the Supreme Court Rules 2020 (L. N. 6 of 2020), were gazetted (Kenya Gazette Notice No. 9586). The Practice Directions are to be observed by and are binding upon parties to the proceedings.

42. I also note that Part X of the Kenya Civil Procedure Act, which provides for "rules", provides for a Rules Committee (see section 81 (1) of the Civil Procedure Act), the function of which is to —

"(a) *propose rules not inconsistent with this Act or any other written law to provide for any matters relating to the procedure before courts and tribunals; and*

(b) *advise the Chief Justice on such rules as may be necessary under this section*".

43. Section 81(3) confers the power on the Chief Justice, in consultation with the Rules Committee, to issue practice notes or directions to resolve procedural difficulties arising under the Kenya Civil Procedure Act to facilitate the overriding objective of the Act in section 1(A)¹⁵.

44. The above laws show that practice directions may only be made if the law enables them.

45. Halsbury's Laws of England¹⁶ explains the objectives of procedural law —

" [...] The civil process not only exists for the resolution of individual disputes but also for the protection of rights, for the enforcement of rights, and for remedying breaches [...]. Civil procedural law has been categorised according to the character which it assumes as the indispensable instrument for the attainment of justice, namely: (1) its complementary character; (2) its protective character; and (3) its remedial or practical character. [...]. In its protective character, civil procedural law represents the orderly, regular and public functioning of the legal machinery and the operation of the due process of the law. In this sense, the protective character of procedural law has the effect of sustaining and safeguarding every person in his life, liberty, reputation, livelihood and property and ensuring that he does not suffer any deprivation of his rights except in accordance with the accepted rules of procedure. In its remedial or practical character [...] it deals with the actual litigation process. What the practitioners seek for their clients when they resort to the courts is to use the machinery of justice to obtain a just result, and what the clients seek, in addition to vindicating their rights, is to avoid unnecessary expense, delay, and excessive technicality in the process of attaining that result [...]".

46. The Supreme Court has not dealt with this case under the Seychelles Code of Civil

¹⁵ Section 1(A) stipulates: *"The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act"*.

¹⁶ Op cit 8. "[Paragraph] [2] NATURE AND OBJECTIVE OF CIVIL PROCEDURAL LAW 3. Objectives of civil procedural law. [I have reproduced the objectives so far as relevant].

Procedure. It has dealt with it entirely under the Practice Directions No. 3 of 2017. The overriding objective of Practice Directions No. 3 of 2017 is that civil cases be dealt with justly and expeditiously. Nonetheless, a just result was not obtained in this case.

47. The above analysis has led me to conclude that the Chief Justice has not acted within the law. Consequently, the Practice Directions No. 3 of 2017 and Form CV1 attached to them, including any other "*Form*" approved by the Chief Justice for the purposes of the Practice Directions No. 3 of 2017, are illegal. For this reason, I accept the submission of Counsel for the Appellant. It follows that whether or not the Practice Directions No. 3 of 2017 and Form CV1 attached to them are inconsistent with the Seychelles Code of Civil Procedure does not arise for consideration. In light of my conclusions, the five grounds of appeal do not arise for consideration.
48. Hence, I declare the Practice Directions No. 3 of 2017 and Form CV1 attached to them, including any other "*Form*" approved by the Chief Justice for the purposes of the Practice Directions No. 3 of 2017, to be illegal. I allow the appeal for that reason. Consequently, I hold that the learned Judge's ruling of 6 September 2018 dismissing the plaint is null. I quash all the orders of the learned Judge and remit the case to the Supreme Court to be heard by the same learned Judge under the law.
49. I make no order as to costs.

Signed, dated and delivered at Ile du Port on 30 April 2021.

Robinson JA

I concur

Fernando President