

IN THE COURT OF APPEAL OF SEYCHELLES

Reportable

[2022] SCCA 13 (29 April 2022)

SCA 63/2019

(Appeal from CS 128/2018)

In the matter between

Rosita Tarroza Parcou

Also known as Mrs. Rose Parcou

Acting as Executrix for the Estate of the Late

Julien Kaven Parcou

(rep by Mr. Serge Rouillon)

Appellant

and

Jill Cecile Laporte

(rep by Mr. Bernard Georges)

Respondent

Neutral Citation: *Parcou v Laporte* (SCA 63/2019) [2022] SCCA 13
(Arising in CS 128/2018) (29 April 2022)

Before: Fernando President, Tibatemwa-Ekirikubinza, Andre, JJA.

Summary: Appeal against a decision of the Supreme Court in an action for simultaneous declaration of *recherche de paternite* and *desaveu de paternite*- Articles 312,321-340 Code Civil – Power of the Court on Appeal – Production of fresh evidence – Rule 31 of the Court of Appeal Rules S.I 13 of 2005.

Heard: 14 April 2022.

Delivered: 29 April 2022

ORDER

- (i) The appeal fails in its entirety.
- (ii) The judgment and the orders of the Supreme Court are upheld.
- (iii) Costs are awarded in favour of the Respondent

JUDGMENT

DR. L. TIBATEMWA-EKIRIKUBINZA, JA.

Background

- [1] The respondent (Jill Cecile Laporte) brought an action in the Supreme Court wherein the defendant was the Estate of Julien Parcou.
- [2] She averred that Mr. Donald Laporte whose name was registered on her birth certificate was not her father but rather that Julien Kaven Parcou was her biological father. She prayed that the court declares that Donald Laporte was not her biological father and declares that Mr. Kaven Parcou (who is now deceased) was her father. She further prayed for an order that the Chief Officer of the Civil Status amends her Birth Certificate accordingly. In the written submissions of counsel for the plaintiff, it was submitted that, it was “a case in *recherché de paternite* and as a corollary, effectively a *desaveu de paternite*.”
- [3] At the hearing in the Supreme Court, the respondent testified that she was born on 9 May 1973 and produced her birth certificate (Exhibit P1) in which her mother's name is entered as Daphne Laporte and her father as Donald Laporte. She stated that at the time of her birth, her mother - Daphne Sanders was married to Donald Laporte but the latter was not her father.
- [4] Furthermore, that she had known Mr. Parcou from a very early age and she visited him regularly at his office on Victoria House. He was a businessman and operated a car hire business. She was first taken to the premises by her mother when she was very young and Mr. Parcou spent hours with her as they sat and talked. He took a keen interest in her education. The respondent testified that when she was older she would go to visit Mr. Parcou at his office without her mother. She described Mr. Parcou as a very kind and generous man who provided for her everything so that she never lacked. That each time she went to visit Mr. Parcou, he would leave the security guard or his work partner at his office with money for her ranging from SR 500 to SR 2000.
- [5] The respondent further testified that after completing her education in Seychelles she went to Australia to study for her degree, came back to Seychelles, then went back to Australia for her masters and subsequently moved to England. During that time, she

corresponded with Mr. Parcou. She testified that all the correspondence had not been kept because she had moved around a lot but she had a letter which Mr. Parcou faxed to her and signed off- "with best wishes and love Kaven, Your Dad." She asserted that Mr. Parcou was her father and she had every right to be known as his daughter. She however admitted during cross examination that she had not met any person from Mr. Parcou's family or his friends and did not have any pictures of him.

[6] In support of her claim, the respondent called three (3) witnesses. The first witness was Jourdan Laurence who testified that he was the manager of Avis Car Hire for forty years until he retired in 2013. Mr. Parcou was his director and the business was started in 1973 at Victoria house. He knew the respondent as she used to come and see her father at the office. That Mr. Parcou had told him that the respondent was his daughter. After her studies in the UK, the respondent returned to Seychelles and she would time and again come to visit Mr. Parcou.

[7] The second witness was Janel Lalande who worked as a security officer at Victoria House. She testified that she used to see the respondent when she was a little girl coming to visit Mr. Parcou together with her mother. That when she was older, the respondent used to come by herself. At times, Mr. Parcou would leave an envelope with her for the respondent.

[8] The third witness -Daphne Sanders - was the respondent's mother who testified that she met Mr Parcou at the time she working as a barmaid at Seychelles Yacht Club. They had an intimate relationship and she conceived the respondent. She stated that Mr. Parcou told her he would maintain her and the child. The respondent was eventually born in 1973. She also admitted that she was married to Donald Laporte but divorced him in 1975. The witness further stated that at the time the respondent was conceived, Mr. Laporte was no longer living with her. She also maintained that the respondent used to visit Mr. Parcou alone when she came of age.

[9] The appellant (Rose Parcou) who is the executrix and widow of Mr. Parcou contested the respondent's claim. She testified that she married Mr. Parcou in 1999 and they lived together for 19 years but she had never met the respondent until the paternity suit. She

stated that as the executrix of her husband's estate she had gone through all his paperwork and had seen nothing relating to the respondent.

[10] Furthermore, the appellant brought a medical report dated 6 September 2002 which showed that Mr. Parcou had a poor semen count and she had a fibroid uterus which made it impossible for them to conceive a child during their union. Following which, Mr. Parcou opted to adopt a child. He never at any time mentioned having another child. The appellant however admitted in cross examination that Mr Parcou was 57years old when he first met her.

[11] In support of her defence, the appellant called Peter Moncherry - "Mr. Parcou's best friend" - who testified that he had known Mr. Parcou for 46 years as they were both freemasons. He testified that he had never heard his best friend mention the respondent as his daughter. He further testified that Mr. Parcou spoke and wrote English very well and would not make grammatical mistakes as those evident in the fax letter adduced in evidence by the respondent.

[12] The appellant therefore did not believe that Mr. Parcou introduced the respondent to different people as his daughter. That he left the details of the beneficiaries to his estate in the will which made no mention of the respondent.

[13] In dealing with the matter, the Supreme Court Judge noted that the verbal avowals that Mr. Parcou made to different people at his work place were not sufficient and conclusive evidence to establish paternity.

[14] However, the Judge held that the fax letter adduced by the respondent in which Mr. Parcou signed off as "dad" provided basis for judicial acknowledgment of paternity. Since the writing was never disproved, it was admissible as evidence to prove paternity and is supported by Article 340 (3) of the Civil Code. In that respect the Supreme court judge referred to the authority of **Mathiot v Mathiot Executor of the Estate of Jupiter and Others**¹

¹ (CS 70/2012) [2013] SCSC 103 (20 September 2013).

[15] The Judge further held that the acknowledgment coupled together with the testimonies of the respondent's witnesses that Mr. Parcou provided for the respondent establish unequivocally that the respondent is a daughter of Mr. Parcou.

[16] The Judge therefore declared Mr. Parcou as the father of the respondent and ordered the Chief Officer of Civil status to rectify the respondent's Act of Birth accordingly.

Grounds of Appeal.

[17] Dissatisfied with the decision of the Supreme Court, the appellant appealed to this Court on the following grounds:

- 1. The learned judge erred in law in allowing two different causes of action to be heard in the same Plaintiff.**
- 2. The learned judge wrongly assimilated issues relating to the dissolved relationship between the deceased Laporte and the mother of the Respondent to confirm the paternity of the deceased.**
- 3. The Learned Judge erred in her approach to the facts and law in failing to consider judiciously the evidence in respect of Respondents family history, skin colour and genealogy of the Respondent; the original father; her mother and her siblings.**
- 4. The learned judge erred in fact and law and was biased in her decisions on the evidence produced by the parties.**
- 5. The learned judge erred in not going ahead with the order for DNA testing prior to the start of the trial and the Plaintiff had plenty of time to prove her case conclusively with DNA evidence with the daughter of the brother of the deceased.**

Reliefs sought on appeal:

(a) a declaration that the said judgment was subjective, defective in several respects, not a proper judgment of the court; and following the discovery of new facts it is unsafe and

unsatisfactory and the learned judge failed to take cognizance of several important issues of fact and law when making her judgment and it is in the interests of justice for the whole case to be retired;

(b) to order that pending the final adjudication after a new trial the documents of status in relation to the respondent be cancelled and restored to their original status from before this trial before the Supreme Court; and

(c) with costs to the appellant.

Submissions by Counsel

Ground 1

[18] Counsel for the **appellant** argued that the respondent should have instituted a suit of disavowal of paternity first before bringing the suit of paternity. In counsel's view, the two suits could not be conveniently heard together because in each of the suits the parties were different. That whereas the disavowal suit would be against Laporte - the father who appeared on the respondent's birth certificate, the paternity suit would be against Mr. Parcou.

[19] In support of the above submission, counsel relied on **Sections 105 and 106** of the **Code of Civil Procedure** which provide as follows:

Section 105:

Different causes of action may be joined in the same suit, provided that they be between the same parties and that the parties sue and are sued respectively in the same capacities, but if it appear to the court that any of such causes of action cannot be conveniently tried or disposed of together, the court may, either of its own motion or on the application of the defendant, order separate trials of any of such causes of action, or may make such other order as may be necessary or expedient for the separate disposal thereof, or may order any of such causes of action to be excluded, and may make such order as to costs as may be just.

Section 106:

If more than one suit has been entered by the same plaintiff against the same defendant or if more than one suit has been entered by different plaintiffs against the same defendant in respect of claims arising out of the same transaction or series of transactions or if cross suits have been entered between the same parties, and the parties sue and are sued respectively in the same capacities, the court may either of its own motion or on the application of any of the parties order such suits or any of them to be consolidated and tried as one suit, if it appear to the court that they can be conveniently tried or disposed of together, and the court may make such other order as may be necessary or expedient for the purpose of trying such suits together, and may make such order as to costs as may be just.

[20] On the other hand, **Counsel for the Respondent** submitted that there was no misjoinder of causes of action. That the case brought before court was only one - a suit brought under Article 340 seeking paternal descent which necessitated that an action be lodged against the estate of Mr. Parcou. That the declaration that the registered father was not the biological father was not brought by way of an action but was merely an inevitable action, a precursor to the only action brought – the one in *recherche de paternite*. That an action in *desaveu* strictly speaking lies only in the gift of a father who seeks to disavow a child as his under article 313.1 which states that the husband shall be allowed to prove facts tending to show that he is not the father.

[21] It was submitted further that had the respondent wished to seek a declaration that her registered father was not her legal father in terms of Article 325 without seeking that someone else be declared a father, it would have constituted a separate cause of action. In support of the submissions above, Counsel for the Respondent relied on the case of **Mary Quilindo vs. Sandra Moncherry and Barbara Moncherry**² where the Court held:

“Although it is correct that the case brought by the 1st respondent is one for declaration of natural paternal descent, it is not correct to conclude that the 1st respondent is precluded from rebutting the presumption under Article 312 (1) unless and until she has undone her status as appears on her birth certificate. The court can in this case pronounce against an official document as proof contrary to what is stated in the document ...”

² SCA 20 of 2009

Ground 2

[22] **Counsel for the appellant** argued that the learned trial Judge followed the line of the divorce between the respondent's mother and Mr. Laporte to displace Laporte's name from the respondent's birth certificate. That the courts in the land have erroneously used very weak evidence to establish paternity. By way of example, the appellant's counsel referred to the court's decision in the case of **Quilindo vs. Moncherry (Supra)**.

Grounds 3 and 4

[23] **The appellant's counsel** argued the two grounds together. The crux of the submissions on these grounds was against the evidence relied on by the trial Judge in establishing the respondent's paternity. According to counsel, the evidence of the fax letter was so weak and the trial Judge should not have given weight to such evidence.

[24] Furthermore, counsel faulted the trial Judge for failing to compare the physical features and skin colour of the respondent with those of the alleged father to trace resemblance between the two individuals.

Respondent's submissions on grounds 2, 3 and 4

[25] Counsel argued the grounds together on the premise that they all faulted the trial Judge for not properly evaluating the evidence adduced.

[26] Counsel first and foremost addressed the appellant's argument to the effect that because a declaration of paternity has the possibility of inserting a new member into an established family, then a high standard is required to prove paternity. Counsel submitted that this was not a correct position of the law. That establishment of status only requires proof of sufficient coincidence of facts indicating the relationship. To buttress this argument, counsel cited the holding of this Court in the **Quilindo case (supra)** that: "*even weak evidence against legitimacy must prevail if there is no other evidence to counter balance it.*"

[27] The respondent's counsel argued that the evidence adduced at the trial was sufficient and well corroborated to establish the respondent's paternity.

Ground 5

[28] **Counsel for the appellant** argued that in an era where DNA test procedures are available, the court should not resort to using of flimsy evidence in adjudicating paternity suits as witnessed in the case of **Derek Marimba vs. Sheryl Nicette**³ where court relied on text messages exchanged between the appellant and respondent to confirm a minor's paternity. That the low standard accepted in establishing paternity other than DNA should not be accepted. Counsel added that in the present case which involved altering of a birth certificate strict evidence was required before the Court could go ahead to make declarations to alter the document.

[29] In support of the above argument, counsel relied on an article by Karl W Cavanaugh on *Action En Desaveu- Challenging the Presumption of the Husband's Paternity*⁴ . However, save for the cover page of the article, counsel did not go ahead to point Court to the relevant paragraphs of the article referred to.

[30] In conclusion, counsel reiterated the prayers which I have already reproduced earlier in this judgment.

[31] **For ground 5, Counsel for the Respondent** submitted that at the time the Supreme Court handled the dispute in issue, the law did not allow the Court to order for mandatory DNA evidence as is now required under Article 375 (2). The option for a DNA test could therefore only be effected if there was agreement between the parties. That in the matter before Court, Counsel for the parties agreed that the trial would proceed without DNA procedures. That it was therefore illogical for the appellant who acquiesced to the trial proceeding without DNA evidence to fault the trial Judge for not making the order for DNA tests.

Court's Analysis and findings:

³ Civil Suit No. 20 of 2018

⁴ The Louisiana Law Review Volume 23 Number 4, June 1963.

[32] Before delving into the merits of this appeal, I will first address the appellant's application for leave to adduce additional evidence.

Application for additional evidence

[33] At a sitting of this Court held on Tuesday 1 March 2022, the appellant through his Counsel -Mr. Serge Rouillon- brought an application vide MA 5 & 6/2002 before Fernando, PCA to adduce fresh evidence. After hearing the oral submissions of counsel on the application, Fernando, PCA stood over the matter to be heard by a full bench.

[34] After the full bench heard the viva voce arguments and considered the written submissions, this Court reserved the detailed Ruling to be given during the determination of the appeal which this Court now proceeds to do.

[35] The application was supported by the affidavit of the applicant/Appellant-Rosita Parcou.

[36] On the other hand, Counsel for the respondent stated that the application did not make out a case for leave to be granted to adduce new evidence at appeal and the application for leave to adduce additional evidence be dismissed.

Court's consideration of the application for additional evidence.

[37] In dealing with the application, Court has been guided by the well-established principles under which additional evidence can be admitted.

[38] The general rule is that an appellate court will not admit fresh evidence or retry the matter based on different and better evidence. However, where new evidence is to be admitted, the Court has to satisfy itself whether the evidence sought to be adduced is relevant and helpful.

[39] In **General Insurance vs. Bonte**⁵ and **Charles vs. Charles**⁶ the Court held that the following conditions must be fulfilled before new evidence is admitted:

⁵SCA 12 August 1994.

⁶ Civ A 1/2003, 3 December 2004.

- (1) The evidence must not have been obtainable at trial despite reasonable diligence;
- (2) The evidence must have an important influence on the result of the case.
- (3) The evidence must be prima facie credible.
- (4) Whether or not the new evidence will be prejudicial to the other party.

[40] The application was based on 3 issues and each will be dealt with separately.

[41] The essence of the first issue presented in the affidavit was that after the appeal had been filed the applicant/appellant - Rosita Parcou learnt from a third party that Derick Tirant, a man who the respondent said died before the case was tried in the Supreme Court, in fact died on a date after the commencement of the trial. The appellant/applicant referred to the man in issue as a potential witness. A copy of the death certificate was attached to the affidavit.

[42] It is on record that at the hearing of 29th July 2019, while the Respondent was testifying in her case, without being asked or prompted, she told the court three times that Derick Tirant had died before the case. Drick Tirant was mentioned by the Respondent alongside the security guard Ms. Lalande Janely and Mr. Laurence Jourdan as individuals who worked with Mr. Kevin Parcou and with whom Parcou would sometimes leave money with for the respondent to pick. Ms. Lalande and Mr. Laurence were called by the Respondent as witnesses to support her claim.

[43] The applicant averred that she believed that by saying that Derick was dead when he was alive, the Respondent had thereby perjured herself by telling a lie under oath three times, showing her dishonesty and complete lack of credibility in her paternity claim. That therefore, the trial Judge should not have believed her evidence. That in her view the lie of the Respondent was for purposes of adding credence to her case.

[44] It was the case for the appellant that since this evidence came to her attention after the trial, it was just and necessary for this to be taken into consideration with all the other matters in appeal as it goes towards the credibility of the Respondent in her case and

therefore it is in the interests of justice that the appellant be allowed to adduce the new evidence to reflect the full state of affairs in the suit.

[45] On the other hand, the Respondent argued that the credibility of the Respondent could be ascertained by court without the “new evidence” being adduced. And furthermore, the existence of Mr. Tirant - a long time worker of Mr. Parcou - was something which with the exercise of due diligence the applicant would have ascertained while preparing for the trial. The respondent argued furthermore, that the respondent’s reference to Derrick was not made with absolute certainty. The respondent only stated what she perceived to be true. The statement could only amount to perjury if it could be proved that the respondent knew Mr. Tirant had not died but chose to deliberately mislead the court.

[46] On the face of what is before the Court, I opine that were Drick Tirant to be called as witness, it would have been by the Respondent – alongside Ms. Janely Lalande and Mr. Laurence as individuals who worked with Mr. Kevin Parcou. The applicant has averred that she did not know Drick Tirant. I cannot therefore, by any stretch of imagination assume that it would have been the applicant to call him to support her case. It was the respondent who mentioned Mr. Tirant as a potential person who knew of her link with Mr. Parcou and her statements regarding him appear to regret that he had passed; otherwise he would have been called as a witness.

[47] I, therefore, see no possible relevance of the evidence of the date of death of Drick Tirant to the case before us.

[48] I do not see any possible purpose for the Respondent to deliberately tell a lie as to the date of death of Drick Tirant.

[49] I would therefore not grant the appellant leave to adduce this as additional evidence for purposes of determining the appeal.

[50] A second reason for the application to adduce further evidence was that it was during the course of the trial, that the appellant’s lawyer noticed that the Respondent was darker in complexion than both her mother and the Mr. Parcou. That however, the trial court twice

interrupted the appellant's counsel in cross examination of the witness when he tried to point this out.

[51] That it was only after the trial that the appellant found out - through a third party – that the man registered as the respondent's father was of dark complexion.

[52] The applicant averred in conclusion that the lack of DNA evidence; the perjury of the Respondent and the failure of the court to discern the characteristics of my late husband with those of the originally registered father of the Respondent have caused me great prejudice.

[53] The issue regarding DNA evidence and what the law required of the court will be dealt with exhaustively in the judgment and it need not be linked to the application.

[54] Regarding the issue of skin colour, it is on record that the issue was brought up by the Appellant's Counsel in his cross examination of Ms. Lalande Janely - the security Guard at the premises where Parcou's offices were stationed. Counsel asked the witness whether Kevin Parcou could be "proud of having somebody who is not his colour", the witness answered: "He was proud because it was himself that told me that Jill was his daughter".

[55] Counsel then followed up with another question related to skin colour and that was: what was the climate around Seychelles around that time, for people having children who were not white.

[56] The Trial Judge intervened and stated that the witness was no expert on the issue and it was only the court which could take judicial knowledge of the matter. Counsel then stated that he had no further questions. It is thus clear that Counsel was not prevented from canvassing the issue of skin color but was guided by the court as to what the particular witness could appropriately testify about.

[57] I do not call that interruption by the court. It is guidance by the court.

[58] Counsel for the appellant also brought up the issue of skin colour when cross examining the respondent's mother. He said: "You seem to be of a light colour and Mr. Parcou was a white man so how explain the fact that Jill is dark?"

- [59] The Trial Judge reacted thus: “I would qualify her as being dark. She is the same colour as... Mr. Parcou was not white either.” This was followed by an exchange between Counsel for the appellant and Counsel for the Respondent. Counsel for the Respondent said: “He was our colour.” Counsel for the Appellant answered: “He was your colour not mine.” The Court said: “He was Seychellois colour.” Counsel for the Appellant answered: “In those days it was very important.” He then went on to ask the witness a question un-related to the issue of colour.
- [60] It is this that the appellant perceives as a second interruption of her Counsel by the Trial Judge. It is this that the Appellant perceives as the failure of the court to discern the characteristics of Mr. Parcou with those of the originally registered father of the Respondent (Mr. Laporte).
- [61] As seen from above, at the trial the line of argument by Counsel for the appellant regarding skin colour was in connection with the skin colour of the Respondent on the one hand and the colour of Mr. Parcou on the other. The colour of the registered father was never canvassed by the appellant as an issue to be considered by the court. I therefore see do not see how the court would have considered as relevant the colour of Mr. Laporte and compared him with Mr. Parcou.
- [62] What the appellant is attempting to do is perhaps make the appellate court re-try the matter based on what the appellant considers ‘better evidence’. And even then, the appellant was at the time of the trial aware that one of the Respondent’s prayer was a declaration that Mr. Parcou was not the father of the Respondent. Prudence should have made the appellant find out as much as possible about the registered father of the Respondent before coming to court. The evidence of the colour of Mr. Laporte could have been obtained with reasonable diligence.
- [63] I would therefore not grant the appellant leave to adduce evidence pertaining to the registered father of the Respondent, as additional evidence for purposes of determining the appeal.
- [64] Thus, this Court declines to grant the application for leave to adduce new evidence.

Merits of the Appeal:

[65] I now turn to the merits of the appeal. In resolving the merits, I will deal with Grounds 3 and 5 together. Grounds 1, 2 and 4 will be handled separately.

Ground 1

[66] This ground is in essence a plea in *limine litis* on misjoinder of causes of action. The appellant through his counsel argued that the trial Judge erred in entertaining two (2) claims under one plaint which she ought to have dismissed. It was the argument of the appellant that the gross error of procedure should be sufficient to win the appeal without considering the other grounds.

[67] The authority of **Mary Quilindo vs. Sandra Moncherry and Barbara Moncherry (supra)** has been referred to by both parties and bears similar facts as in the present appeal. The respondent cites the authority as supporting his case whereas the respondent considers it bad law. The brief facts of that case are that the respondents, two sisters, filed an action *en recherché de paternité naturelle* in the Supreme Court. They averred in their petition that Gerald Maxime Quilindo (deceased) was their father.

[68] One of the issues at the trial was that the 1st respondent whose birth certificate originally bore the name of her mother's husband (Valentin) as a result of the operation of Article 312 of the Civil Code (which establishes the presumption that a child conceived in marriage is that of the husband) should have begun a suit in *desaveu de paternité* against Valentin before being able to start on action for filiation or ascertainment of paternity by the deceased.

[69] The trial judges made a finding, based on the (uncontroverted) evidence by Sandra and documentary evidence adduced that Sandra was a child of the late Maxine Quilindo.

[70] The decision of the trial judge was appealed against. One of the grounds of appeal was that the learned trial judge erred in law and failed to properly apply the provisions of article 322 of the Civil Code in declaring Sandra (the 1st Respondent) as the daughter of Mr. Maxine Gerald Quilindo.

[71] The appellants argued that the 1st Respondent who was conceived during marriage and had the surname of her mother's husband (Valentin) entered on her birth certificate cannot escape the presumption created by Article 312 that she is indeed Valentine's legitimate child whilst simultaneously claiming that Maxine Quilindo is her father- since one cannot be acknowledged as the child of two fathers.

[72] In answer to the arguments of the appellants, the Court of Appeal said:

“.....no provision of the code precludes an action to prove paternity which may have the result of annulling the status on the birth certificate. Article 312(2) does not specify or limit who may bring an action to rebut the presumption under article 312(1). Although it is correct that the case brought by 1st respondent is one for a declaration of natural paternal descent, it is not correct to conclude that the 1st respondent is precluded from rebutting the presumption under article 312(1) unless and until she has undone her status as appears on her birth certificate. The court can in this case pronounce against an official document as proof contrary to what is stated in the document.....if the result of the granting of the remedy sought, in this case a declaration that Maxime Quilindo is the father of the 1st Respondent, is to change the status stated on the declaration of birth then so it should be.” (My emphasis)

[73] I note that in the matter before us, Jill Laporte (the Respondent) brought an action before the Supreme Court in which she prayed for two declarations in her plaint:

- (i) That her father is not Donald Laporte.
- (ii) That her father is Julien Kaven Parcou.

[74] In the **Quilindo case**, this court held that a party can bring an action to prove paternity which may have the result of annulling status on a birth certificate. In that case the party (the first respondent) who sought a declaration that she was the biological child of a deceased father (Maxime Quilindo) already had the name of her mother's husband on her certificate. She did not bring a case against the heirs of the registered father. The parties to the suit were members of the family of the deceased who the applicant/plaintiff/petitioner claimed as her biological father.

- [75] The appellant has attempted to distinguish the present case from the case of Quilindo. A previous case is only binding in a later case if the legal principle involved is the same and the facts are similar. To be considered binding precedent, a prior case must address the same legal questions as applied to similar facts. Both the **Quilindo case** and the case before us deal with a situation where court is dealing with an applicant seeking a declaration that a registered father is not her biological father on the one hand, and also a declaration that the person whose estate is the sole party against whom the case is brought (defendant) is her father.
- [76] To argue as Counsel for the appellant has, that the authority of **Quilindo** must be distinguished from the present case because in the **Quilindo case** there was substantial documentary and photographic evidence to support the applicant in her assertions that she was Mr. Quilindo's daughter, whereas what is available in the matter before us is "dubious" evidence, is an indication of possible failure to appreciate what constitutes distinguishing of an established authority/a binding precedent from another case.
- [77] It is therefore my finding that counsel for the appellant has dismally failed in his attempt to distinguish the two cases.
- [78] Arising from the analysis above and noting further that there is no provision of the Civil Code precluding an action to prove paternity which may result in annulling the status on the relevant birth certificate, ground **1 fails**.

Ground 2

- [79] Under this ground, the appellant's counsel faulted the learned trial Judge for considering the divorce between the respondent's mother and Mr. Laporte in dealing with the paternity suit.
- [80] I have carefully studied the judgment of the trial Judge on the aspect of the dissolved relationship between the respondent's mother (Daphne Sanders) and Mr. Laporte. The trial Judge considered the evidence of Daphne Sanders which was geared towards proving the factual issue that: *The man she was legally married to (Mr. Laporte) at the time of conception of the respondent was not the father of her daughter. To this end,*

Daphne Sanders testified that she was physically separated at the time of conception. She adduced in evidence a certificate of divorce indicating that the reason for the legal separation (divorce) was due to her adultery.

[81] The judge was satisfied with the uncontested evidence of the Respondent's mother that at the time of the Plaintiff's conception her presumed father was not living with her mother although she was married to him. It is within this context that the persuasive English decision of *SvS*⁷ cited in *Quilindo* (supra) becomes applicable: "*even weak evidence against legitimacy must prevail if there is no other evidence to counterbalance it.*"

[82] It was incumbent on the Judge to consider and evaluate whatever evidence was adduced in court in its entirety. This cannot be interpreted as an "assimilation" of the divorce between the respondent's mother and Mr. Laporte as a basis to confirm the respondent's paternity. Indeed, before arriving at her finding that the plaintiff had satisfied the hurdle of proving her case on a balance of probabilities, the Judge evaluated not only the testimony of the plaintiff's mother but also that of other witnesses called to support her case as well as the evidence adduced by the plaintiff herself. The judge also evaluated the testimony of the executor of the Estate of Parcou and the one witness she called to support her case.

[83] I therefore hold that the appellant's arguments under this ground are without merit.

Thus, ground 2 fails.

Grounds 3 and 5

[84] Under ground 3, the appellant's counsel faulted the trial Judge for not taking into account the respondent's dark skin complexion compared to that of her other siblings as well as that of her alleged father.

[85] Under ground 5, the appellant's counsel faulted the trial Judge for not considering the option of ordering for a DNA test and instead relied on weak evidence of writings.

⁷ [1970] 3 All ER 107

[86] In support of the foregoing submissions, counsel relied heavily on the case of **Mary Quilindo & Ors. vs. Sandra Moncherry (supra)**. Counsel argued that in the aforementioned case, the Court specifically referred to the colour and the physiology of the deceased father as well as similarity of physiognomic features to establish paternity. Therefore, this Court should also juxtapose the respondent's physical features with those of the person he claims to be his father. Counsel also relied on the case of **Lucille Labaleine & Anor vs. Patrick Belle**⁸, where the trial Judge ordered for DNA tests to be carried out to provide conclusive proof that the respondent was a son to the deceased Phillippe Labaleine.

[87] Paternity can be scientifically proven through DNA and blood tests. **Article 313 (2) of the Civil Code Act** gives courts the power to either grant or decline an order for blood testing as follows:

The Court may give a direction for the use of blood tests to ascertain whether such tests show that a party to the proceedings is or is not thereby excluded from being the father of that person and for the taking, for the purpose of those tests, of blood samples from that person, the mother of that person and any party alleged to be the father of that person. The Court may at any time revoke a direction previously given by it under this paragraph.

[88] In exercise of its discretionary power, court is guided by the fact that the order is sought in good faith, is not actuated or designed to economically exploit or embarrass and is not an abuse of the process of court.

[89] Be that as it may, I note that the trial court at page 16 of the record asked the respondent's lawyer whether her client was willing to submit herself to a DNA test. The lawyer responded that he believed that there will be no objections.

[90] Counsel for the appellant also agreed that one of Mr. Parcou's nieces would be brought to provide DNA samples. However, the respondent objected to this arrangement. Through a

⁸ SCA 42/2017.

letter marked exhibit E from Georges & Co. Attorneys dated 4th March, 2019 addressed to the Registrar of the Supreme Court, the respondent indicated that she had serious doubts as to the paternity of Mr. Parcou's niece who was to provide the DNA sample. Consequently, the respondent advised her counsel that she would not be providing a blood sample and indicated that the case will proceed without DNA evidence.

[91] Subsequently, when the parties returned to court on Wednesday 27th March 2019, the plaintiff's (now respondent) lawyer informed court that the case will proceed without the DNA samples. **The appellant's lawyer did not object.**

[92] It is therefore illogical for the appellant to fault the trial Judge for not making an order for the parties to submit themselves to a DNA test yet the court availed the parties an opportunity to avail themselves for the test but the respondent declined to proceed with the DNA and the appellant raised no objection. In such circumstances, the trial Judge was left with no option but to resort to the other evidence adduced by the parties to establish their claims. It must be noted that at the time when the case was heard by the Supreme Court, the law did not allow the court to order DNA evidence as it does now under Article 375 (2). As a matter of fact, the Learned Trial Judge bemoaned the state of the law thus:

... with respect to paternity suits, without the introduction of DNA evidence into Seychellois legislation the court has only arcane and outdated tools at its disposal to help it in its enquiry, namely the provisions of Article 321 and 340 of the Civil Code ... (paragraph 20 of the impugned judgment)

[93] Every paternity action mainly concerns itself with the evidence to prove the claim to the satisfaction of the court. In proving paternity, the standard of proof required is on a balance of probabilities which means that it must be shown that it was more likely than not that the man is the father of the child.

[94] The appellant argued that the evidence of the respondent's physical features which were dissimilar from the man she claimed to be her father should have been considered by the court. I note that Article 340 of the Civil Code does not include juxtaposing physical

features of a person who institutes the paternity suit with the putative father as a factor to be considered by the court for purposes of determining paternal descent. All that the court concerns itself with are the tools provided by the law, i.e. Article 312 and 340 of the Civil Code.

[95] Therefore, the appellant's counsel was misdirected in his submissions that the Judge ought to have made reference to the respondent's physiology in her decision.

[96] From the foregoing analysis, I hold that **grounds 3 and 5 of the appeal fail.**

Ground 4

[97] The appellant's counsel faulted the trial Judge for according undue weight to the evidence of the fax letter to come to the conclusion that such a letter established paternity. That this evidence was inadequate and could not have led to the finding that the respondent had, on a balance of probability (the standard required to prove such a claim) proved her case.

[98] The respondent adduced a fax letter addressed to her by Mr. Parcou and in which he signed off with the words-: "*with best wishes and love Kaven, Your Dad*". It is on record and marked exhibit P2. The appellant on the other hand contested the document saying it was not authentic because it did not bear the known features of a fax letter, was not signed and it contained grammatical errors to which Mr. Parcou was not susceptible to make. She further argued that the trial Judge erred in shifting the burden to her to prove that the fax was not an authentic document. The trial Judge held as follows:

"There was some attempt by the Defendant to show that this was forged. The proof offered was the evidence of Peter Moncherry that the Deceased would not make grammatical mistakes and a letter written by the Deceased to the court in 2011 to support Mr. Moncherry's evidence and the Defendant's closing submissions that a freemason is word perfect. I beg to disagree and the proof is in the letter of 2011 itself which contains several grammatical mistakes including the spelling of the word inpack as opposed to impact.

In fact, the 2011 letter does nothing but bolster the authenticity of the letter produced by the Plaintiff as the font and structure in both are identical.”

[99] The trial Judge then concluded:

I find that the letter produced by the Plaintiff can provide the basis for a judicial acknowledgment of paternity. The Deceased's writing has not been disproved. While the Defendant has claimed that the Deceased did not sign the letter the Court notes that there is no signature on the letter ...”

[100] From the above holding, it is clear that the trial Judge found that the appellant failed to disprove the authenticity of respondent’s letter. It is trite law that a party who alleges a fact must prove it. Once the fact is proved, the onus is on the other party to counter the proved fact. In the present matter, once the respondent who was the plaintiff in the lower court adduced evidence to support her claim that Mr. Parcou was her father, it was the onus of the appellant to disprove the respondent’s evidence. It was the finding of the trial judge that the appellant had failed to disprove the evidence adduced by the respondent.

[101] However, a more important aspect to be noted about the fax letter, once accepted as authentic, is that Mr. Parcou unequivocally stated in the document that he was the respondent’s father. **Article 340 (1) (d) of the Code** is to the effect that paternity can be proved by letters or other writings emanating from the alleged father containing an unequivocal admission of paternity.

[102] It is thus clear on a careful reading of the judgment of the learned judge that she analyses what was averred and proved thereof by the respondent. She was sure to reject arguments and evidence that, in her opinion, was not sufficient and conclusive enough for the court to establish paternity.

[103] In the circumstances, I find no reason to depart from the finding of the Trial Judge that the respondent proved on a balance of probabilities that Parcou was her father.

[104] It must however be noted that the case was not solely based on the letter. The court accepted the testimonies of witnesses called by the respondent to support her claim of

provision of maintenance by Mr. Julien Parcou. The Judge then stated “This testimony together with the letter she produced lead me to the view that the Plaintiff has satisfied the hurdle of proving her case **on a balance of probabilities ...**” (**Emphasis mine**)

[105] The standard of proof which was applied in evaluating the evidence adduced before court is what is the law requires in civil disputes: balance of probabilities.

[106] In the premise, the findings of the trial Judge on this aspect are also upheld. It thus follows that **ground 4 also fails.**

Conclusion:

[107] Since all the grounds of the appeal fail, the appeal is dismissed. Consequently, the Judgment and Orders of the Supreme Court are upheld.

[108] Costs are awarded in favour of the Respondent.

.....

Dr. Lillian Tibatemwa-Ekirikubinza, JA.

I concur:

.....
Fernando, President

I concur:

.....
Andre, JA

Signed, dated and delivered at Ile du Port on 29 April 2022.