

**IN THE COURT OF APPEAL OF SEYCHELLES**

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**Reportable**

[2023] SCCA 14 (26 April 2023)  
Civil Appeal SCA 16/2021  
(Arising in CS 133/2019 SCSC 281)

In the matter Between

**James Lesperance**  
(rep. by Mr. Frank Elizabeth)

**Appellant**

And

**Allan Ernestine**

**1<sup>st</sup> Respondent**

**Marie Alise Ernestine**

**2<sup>nd</sup> Respondent**

(rep. by Ms. Manuella M. Parmantier)

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**Neutral Citation:** *Lesperance v Ernestine & Anor* (Civil Appeal SCA 16/2021) [2023] SCCA 14 (Arising in CS 133/2019) SCSC 281 (26 April 2023)

**Before:** Robinson, Dr. L. Tibatemwa-Ekirikubinza, Andre JJA

**Summary:** form of grounds of appeal - ruling delivered in the absence of a hearing – ruling declared null - Ruling quashed in its entirety

**Heard:** 12 April 2023

**Delivered:** 26 April 2023

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**ORDER**

- (I) The ruling delivered by the learned Judge on the pleas in *limine litis* is null
  - (II) The ruling is quashed in its entirety and the case is remitted to the Supreme Court to be heard before another Judge of the Supreme Court
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**JUDGMENT**

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**ROBINSON JA** (Dr. L. Tibatemwa-Ekirikubinza JA concurring)

1. This appeal comes before the Court of Appeal from a judgment of a learned Judge of the Supreme Court delivered on the 7 June 2022. The learned Judge dismissed the plaint of the Appellant (then Plaintiff) after upholding the pleas in *limine litis* raised by the Respondents (then Defendants).
2. The pleas in *limine litis* raised by the Respondents were as follows —

- "1. *the plaintiff does not disclose any reasonable cause of action against the 1st and 2<sup>nd</sup> Defendants and should be struck out.*
2. *The plaintiff is res judicata.*
3. *The plaintiff constitutes an abuse of process of the court in that the issues giving rise to the said plaintiff have been fully and finally determined by the Supreme Court in CC69/2015 James Lesperance v Allan Ernestine, Marie-Alise Ernestine and Eden Entertainment (Pty) Ltd and the said plaintiff tries to re-litigate the said case CC69/2015."*
3. The detailed facts of the case are set out in our learned sister Andre's judgment. For this reason, they do not bear repeating.
4. The Appellant has appealed the judgment on the following grounds —

  - "1. *The learned Judge erred in law when she gave her ruling without giving the Appellant the opportunity to address the Court on the points of law raised by the Respondent thus breaching the Appellant's Constitutional right to a fair hearing.*
  2. *The learned Judge erred in law when she ruled that the Appellant's action is res judicata.*
  3. *The learned Judge erred in law when she ruled that the Appellant's action amounts to an abuse of process."*

*Consideration of the grounds of appeal*

**Grounds two and three**

5. It is very clear that grounds two and three of the grounds of appeal are general in terms. These two grounds of appeal do not set forth the basis on which it was to be contended that the learned Judge erred. This Court is not permitted by rule 18 (3) and (7)the

Seychelles Court of Appeal Rules, 2005, as amended, to entertain such grounds of appeal.

6. Hence, we strike out grounds two and three of the grounds of appeal, which stand dismissed.

***Ground one***

7. We now turn to ground one, in which it is contended that the learned Judge erred in not giving the Appellant the opportunity to address the trial court on the pleas in *limine litis*. The parties' submissions are set out in our learned sister Andre's judgment.
8. In this case, the learned Judge, with the consent of both parties, ordered that the pleas in *limine litis* would be heard before the hearing on the merits; and that the hearing would be done by way of written submissions.
9. The record at the appeal revealed that both parties did not file any written submissions on the pleas in *limine litis*.
10. The learned Judge, in her judgment, stated that —"*[t]he parties were given time to file submissions however up to today neither side have filed any submissions whatsoever*", at paragraph [12] of the judgment.
11. At the sitting of the trial court on the 7 June 2021, the learned Judge stated — "*[a]t the end of the day nobody filed submissions so I did my own research and hence it is the ruling.*"
12. Counsel for the Appellant emphasised in his submissions that he could not have filed any written submissions since the Respondents, who have raised the pleas in *limine litis*, did not file any written submissions. For her part, Counsel for the Respondents argued essentially that the proceedings did not cause any injustice to either party.
13. Against this background, we consider whether it was permissible for the learned Judge to consider and determine the pleas in *limine litis* in the absence of a hearing.

14. Suffice to state that it was not permissible for the learned Judge to proceed to determine the pleas in *limine litis* since "*nobody filed submissions*" to address the issues raised by the said pleas. It was also irregular in the present case for the learned Judge to deliver a ruling based on her "*own research*". The Appellant was correct to complain that he had not been heard on matters decided by the trial court. We find that the learned Judge had failed in her duty to do justice between the parties when she determined the pleas in *limine litis* in the absence of a hearing.
15. This ruling does not address the course the case should have taken in view of the fact that Counsel for the Respondents did not tender written submissions.
16. For the reasons given above, we conclude that the ruling delivered by the learned Judge is null.
17. Hence, we quash the ruling in its entirety and remit the case to the Supreme Court for the plaint and counterclaim to be heard before another learned Judge.

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F. Robinson, JA

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Dr. L. Tibatemwa-Ekirikubinza JA

Signed, dated, and delivered at Ile du Port on 26<sup>th</sup> April 2023.

**ANDRE, JA**

**Summary:** Appeal against a decision of the Supreme Court – Fair hearing – *Res judicata*– Abuse of process.  
**Heard:** 12 April 2023  
**Delivered:** 26 April 2023

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### **ORDERS**

The Court makes the following Orders:

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- (i) The appeal is allowed on grounds 2 and 3.
  - (ii) The impugned judgment of the Supreme Court is set aside and the matter is remitted back to the Supreme Court for a fresh hearing in line with the provisions of Rule 31 (5) of the Court of Appeal Rules 2005 (as amended). Further, noting the evident conflict of interest that may arise in this matter as it stands remitted, the fresh hearing shall be held before another court and another Judge of the Supreme Court other than learned Judge Pillay.
  - (iii) No order is made as to costs for it was not prayed for.
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### **JUDGMENT**

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**ANDRE JA**

#### **Introduction**

1. This is an appeal arising out of the notice of appeal filed on 22 June 2021 by James Lesperance (Appellant) against Allan Ernestine and Marie Alise Ernestine (Respondents), being dissatisfied with the decision of learned Judge Pillay given at the Supreme Court on the 7 June 2022 in Civil Side No. CS No. 133 of 2019 dismissing the plaintiff of the Appellant after upholding a plea in limine raised by the Respondents on the basis firstly, ‘that CC29/2015 and the current matter share identity of parties, subject and cause therefore the matter is *res judicata*’ and secondly, that the matter in the court below is an abuse of process of the court.

2. The Appellant further seeks the relief set out in paragraph 3 of its notice of appeal namely, setting aside the judgment of the Supreme Court and ordering a fresh hearing before another court and another judge of the Supreme Court other than Her Ladyship Judge Laura Pillay.

### **Background**

3. The Appellant (Plaintiff in the lower court) sold his shares in Eden Entertainment Ltd to the Respondents (Defendants in the lower court). According to the Appellant, there was a shares transfer agreement between himself and the Respondents, such an agreement had an implied term that created an obligation on the part of the Respondents to provide their assets as security to the mortgages of the business i.e. Eden Entertainment Ltd. That in honouring this implied term, the Appellant's properties would be released as the security to the mortgage of the business. Notwithstanding the agreement, the properties were not released. This prompted the Appellant to file the suit SC 133/19 asking the court seized with the matter to find that there has been a breach of contract and as a result of that breach, the Appellant suffered a loss amounting to SCR 20 million and damage amounting to SCR 5 million.
4. Faced with the claim as articulated in the Complaint in SC 133/19, the Respondents filed a defence on 10 December 2021 wherein three points of law were raised. These were (i) the complaint does not disclose any reasonable cause of action and must be struck out; (ii) the complaint was barred by res judicata; and (iii) abuse of process given similar claim was made which resulted in the judgment of *Lesperance v Ernestine & Ors* CC 69/2015 [2018] SCSC 802 (04 September 2018). The Defence further addressed the Complaint on its merits and simultaneously filed a Counterclaim.
5. The plea in limine was considered first and a Ruling on the same was delivered on 7 June 2022. It is the said Ruling which is now the subject of the present appeal.
6. It is against this background that this appeal arises.

7. The Appellant raises three grounds of appeal which state verbatim as follows:

*“1. The learned Judge erred in law when she gave her ruling without giving the Appellant the opportunity to address the Court on the points of law raised by the Respondent thus breaching the Appellant’s Constitutional right to a fair hearing.*

*2. The learned Judge erred in law when she ruled that the Appellant’s action is res judicata.*

*3. The learned Judge erred in law when she ruled that the Appellant’s action amounts to an abuse of process.”*

### **Appellant’s arguments in support of the appeal**

8. In accordance with Rule 24 (a) of the Court of Appeal Rules of 2005 (as amended), the Appellant filed their main heads of arguments through his counsel Mr Frank Elizabeth on 27 February 2023.

9. The Appellant submits that the Respondents indicated to the Court of their preference to proceed to hear the points of law by way of written submissions. The Court permitted the same and gave the Respondents time to file by the 10th of December 2020. Counsel of the Appellant has referred this Court to the proceedings of 3 December 2020.

10. The Appellant contends that the counsel of the Respondents did not file the written submissions on the 10th of December 2020 and other dates in 2021. That failure to file written submissions on the point of law raised despite numerous chances and an undertaking by counsel to do so, the court a quo ought to have dismissed the points of law.

11. It is the further argument of the Appellant that the Court has to bear in mind that the Appellant could have not filed their submissions until and when the Respondents had filed theirs to expand on the points they had raised. In the circumstances, the learned Judge should have dismissed the points of law as opposed to proceeding as she did to give a ruling upholding the points of law and dismissing the case of the Appellant.
12. In respect of ground 2, the Appellant argues that the learned judge erred when she concluded that the matter was res judicata. In support of this, the Appellant directs this court to CC 29/2015 which was relied on by the trial judge. The Appellant states that the suit did not have the same parties as in the present suit CS 133/19. It is the further argument of the Appellant that in CC 29/2015, the matter was not adjudicated on its merits and thus left the door open to bring a fresh action.
13. Finally, the Appellant argues for ground 3 as follows. The Appellant contends that the learned judge erred when she concluded that the suit of CS 133/19 was an abuse of process. This is because in CC 29/2015, the learned judge gave a judgment that left the door open for a fresh action against the Respondents and therefore the Appellant so doing cannot amount to an abuse of process.

#### **Respondent's arguments against the appeal**

14. The Respondents resist this appeal and have so far filed their main heads of argument through their counsel Ms Manuella Parmantier dated 21 March 2023.
15. In respect of ground 1, learned counsel has referred this Court to its judgment in *Muller v Benoiton Construction* (SCA 78/2022) [2022] SCCA 79 (16 December 2022). Learned counsel submits that this Court in *Muller* (supra) decided that where a party is represented and their counsel has not submitted their submissions or raised objections when the presiding judge wished to read her judgment, the party is estopped from claiming that he has not had a fair hearing. At this juncture, I wish to state en passant that this is not what this Court said in *Muller* (supra).



16. The Respondents argue that counsel for the Appellant should have raised his objections and insisted he is given to respond to the plea in limine litis before the court delivered its Ruling especially if there was a risk of the right to a fair hearing being breached.
17. The Respondents also refer this Court to the case of *Marzocchi v International School* (CS 90 of 2020) [2022] SCSC 708 and quote from it the following:

*“..it is important that inherent powers of the Court to manage proceedings should be vectored in this process. In other words, the process set out in article 90 is not cast in stone. The Court has ample discretion to determine and manage the procedures to be followed in each case so long as such do not cause an injustice to either party and is not specifically prohibited by law.”*

18. It is the Respondents’ submission that the learned Judge Pillay exercised the inherent powers of the Court as laid out in *Marzocchi v International School* (supra) and proceeded to give her Ruling as she did with no objections from either of the parties. That in so doing, there was no injustice done to either of the parties.
19. Finally, it is the position of the Respondents that the presiding judge was of the opinion that the point of law substantially disposes of the suit and therefore dismissed the suit. It is their further submission that this Court may delve into the merits of the ruling by virtue of Article 120 (3) of the Constitution and in so doing, determine whether the plea in limine litis could have succeeded had the Appellant submitted on the points raised.
20. In respect of ground 2, the Respondents argue that the learned Judge did not err in making a finding on res judicata. Counsel for the respondents referred this Court to the case of *Attorney-General v Marzorocchi* (1996 – 1997) SCAR 225 wherein four things are considered essential to prove for the claim of res judicata to succeed. These are: the same subject matter, the same cause of action, the same parties, and the previous judgment should be a final judgment.

21. The Respondents argue that the first and second suits were premised on a share agreement and the same factual transaction, i.e. the subject matter.
22. In respect of the same cause of action, Respondents argue that both the 1st and 2nd suits emanate from a breach of share agreement and thus the same cause of action on breach of contract. That on the reliance of the cases of *Gabriel v Government of Seychelles* (2006) SLR 169 and *D'Offay & Ors v Louise & Ors* SCR 34/2007, the Appellant cannot seek an additional or alternative remedy to the one sought.
23. With regards to the requirement that parties should be the same, the Respondents are of the view that the parties are the same because, in both suits, they were brought in their personal capacity. Counsel for the Respondent has directed this Court to the pleadings and state that both pleadings identify the Respondents in identical descriptors and thus it cannot be said that they are not the same parties being sued.
24. In respect of the fourth requirement for proving res judicata, the Respondents argue that the first suit was decided on its merits by the presiding judge and a final determination was given.
25. Finally, the Respondents submit on ground 3 and argue on the reliance of *Gomme v Maurel* (2012) SLR 342 that abuse of process has a wider scope than the requirements of res judicata. Further, and on the reliance of the authority in *R v Yuan Mei Investment* (1999) SLR 14, abuse of process must involve more than a simple unfairness to the accused. That in consideration of this, the facts of the present case do qualify to be considered an abuse of process on part of the Appellant because he is filing a fresh suit to re-litigate the same cause of action, on the same grounds that were previously unsuccessful. On this, counsel for the Respondents has relied on the case of *Mein v Chetty* (No. 1) (1975 SLR 184).

## **Analysis of the grounds of appeal**

### ***Ground 1: Fair hearing***

26. The first ground of appeal is premised on the fact that the Appellant was not given the opportunity to address the Court on the points of law raised. Having gone through the proceedings, the following needs to be noted to determine the merits of ground 1. Upon a point of law being raised by the Respondents, both parties agreed that the same would be awarded a hearing before going into the merits and that the same would be done by use of written submissions.<sup>1</sup> Mr Bonte, learned counsel for the Appellant (Plaintiff in the lower court) did not object to this proposed approach. In view of the consensus among the parties' respective counsels, learned Judge Pillay directed each of them to submit their written submissions. For Ms Madeline, learned counsel for the Respondents (Defendants in the lower court) her submissions were to be filed by 25 March 2021.<sup>2</sup> For Mr Bonte, his written submissions were to follow and to be filed by 8 April 2021.<sup>3</sup> The learned Judge further indicated that a Ruling on the points of law will be given on 11 May 2021. This follows after the filing of written submissions by both parties. Neither of the counsels was able to tender their written submissions as directed by the learned Judge.
27. On 11 May 2021, learned Judge Pillay was unable to appear due to the COVID-19 quarantine she had to undertake. As such, the learned Chief Justice Govinden took a mention of the day for the purposes of setting another date.<sup>4</sup> At this juncture, neither of the learned counsel on record had filed their written submissions. A sitting was scheduled for 7 June 2021.<sup>5</sup>
28. It is the argument of learned counsel for the Appellant Mr Elizabeth, that written submissions by his colleague Mr Bonte, learned counsel of record in the Supreme

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<sup>1</sup> The Sitting of the Supreme Court of Seychelles on Thursday 11 March 2021 before Her Ladyship Judge Pillay, p. 1.

<sup>2</sup> The Sitting of the Supreme Court of Seychelles on Thursday 11 March 2021 before Her Ladyship Judge Pillay, p. 2.

<sup>3</sup> The Sitting of the Supreme Court of Seychelles on Thursday 11 March 2021 before Her Ladyship Judge Pillay, p. 2.

<sup>4</sup> The Sitting of the Supreme Court of Seychelles on Tuesday 11 Mat 2021 before His Lordship Chief Justice Govinden, p. 1.

<sup>5</sup> The Sitting of the Supreme Court of Seychelles on Tuesday 11 Mat 2021 before His Lordship Chief Justice Govinden, p. 1.

Court, could have not been filed in the absence of written submissions by learned counsel for the Respondents. The Respondents disagree and rather insist that the Appellant is estopped from claiming that he has not had a fair hearing by virtue of this Court's decision in *Muller* (supra). I am unpersuaded by the argument and authority submitted by the Respondents, and I explain why below.

29. In *Muller* (supra), the Appellant appeared for the date fixed for summons but later failed to appear on the date fixed for the hearing because he was unwell and his counsel withdrew from the matter. The Supreme Court heard the matter in his absence and came to a decision. The decision was challenged on the basis that the Appellant's absence from the hearing was justified and therefore proceeding to hear the matter in his absence impinged on his right to a fair hearing. The court a quo disagreed with the arguments presented and similarly, this Court was unpersuaded by the same arguments. This is because the Appellant sought to rely on Section 69 of the Civil Procedure Code to which he did not meet the criteria. At the same time, this Court observed why equity could have not come to the aid of the Appellant.
30. The facts in *Muller* differ from the facts in the present case and therefore cannot assist the Respondents.
31. Another argument presented by the Respondents to demerit ground 1 is that the court a quo has inherent powers to manage proceedings as it so wishes, and the learned Judge did so by proceeding as she did and gave a Ruling. That the proceedings did not cause any injustice to either of the parties. I partially agree with the Respondents' submissions in this regard.
32. The procedure adopted by the court a quo, with no objections from especially the Appellant, was that written submissions were to be filed for the presiding Judge to consider the arguments presented and make a determination on the points of law raised. Thus, no one was caught by surprise in respect of the procedure. This notwithstanding, neither of the parties filed written submissions as directed by the learned Judge. It

brings to the fore the role and place of written submissions in the civil practice and procedure of our courts.

33. I am aware that written submissions do not form part of the procedure laid out in the Seychelles Code of Civil Procedure. However, the tendering of written submissions is a practice that has been consistently practiced in our Courts, requested by both learned Judges and attorneys alike. In the present case, counsels on record for the parties in the court a quo preferred to proceed by written submissions, and made undertakings to tender the same as directed by the learned Judge. Despite these undertakings, neither of the parties filed their written submissions.
34. The role of written submissions has been a subject of discussion in both academic and law practice spheres. I rely mainly on writings and opinions shared by other English common law jurisdictions that are adversarial, much like what we have in Seychelles.
35. In 2014, Justice Susan Glazebrook learned Judge in the Supreme Court of New Zealand, gave an address to the New Zealand Bar Association's Appellate Advocacy Workshop at the World Bar Conference in Queenstown, Australia. The address was mainly on written submissions and Justice Glazebrook said the following which I note with approval:

*“The written submissions have a dual role. They should introduce the judges to your client’s case and they should persuade them to accept it. Or at least start that process.*

*Do not forget the importance of the first step: of introduction to the case. To get the judges into your camp and keep them there, they must first understand what your client’s case is. They have not lived with it like you and your client. They are coming to it fresh. They are busy and have other cases. You will not persuade if you do not make sure that they understand the factual and legal background of the case and the issues that arise.*

*As to the second step of persuasion, the judges must be brought to understand the reasons the court should find in your client's favour on the issues and (not necessarily the same thing) why the court should not find in favour of your opponent.”<sup>6</sup>*

36. At the time when she was Senior Counsel at the New South Wales Bar, learned Judge Christine Elizabeth Adamson outlined the purpose of written submissions as follows:

*“The purpose of written submissions is to save court time and to assist the judge. Written submissions must be factually accurate, and contain references to the evidence so that the judge can return to the source (the evidence) readily (for example, tr. 36.22 or page 4 of Exhibit D). They must contain a correct statement of the applicable law. If the submissions are lengthy, include a table of contents at the outset so that the judge can follow the structure of your submissions. If you are in doubt, try to put yourself in the position of the judge and decide what you would want by way of assistance from counsel if you had to decide the case.”<sup>7</sup>*

37. I agree with both quoted texts above. A combination of the relevant facts, the evidence relied on, and the applicable law is best encapsulated in written submissions. This guides the Court in making a determination. With this understanding, it is easy to see why written submissions are an important tool in the toolbox of an advocate.
38. Going back to the issue at hand, it is the argument of counsel for the Appellant that in the court a quo, written submissions could have not been filed because the Respondents who raised the points of law, had not tendered any written submissions. Suffice to say, I

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<sup>6</sup> Justice Susan Glazebrook 'Effective written submissions' paper is based on an address given to the New Zealand Bar Association's Appellate Advocacy Workshop, World Bar Conference, Queenstown on 7 September 2014, available at <https://www.courtsofnz.govt.nz/assets/speechpapers/ehjg.pdf>

<sup>7</sup>Christine E Adamson SC (as she was then) Bar Practice Course for the New South Wales Bar Association: Written Submissions available at [https://nswbar.asn.au/docs/professional/prof\\_dev/BPC/course\\_files/Written%20Submissions%20-%20Adamson%20SC.pdf](https://nswbar.asn.au/docs/professional/prof_dev/BPC/course_files/Written%20Submissions%20-%20Adamson%20SC.pdf).

am not persuaded by this argument because nothing prevents counsel to file written submissions on behalf of his client where the opposing counsel has not done so.

39. Filing written submissions is essential to arguing a client's case and forms part of the industry of counsel in their work. It is also important for learned counsels to file written submissions where they have undertaken to do so, as this demonstrates their due regard and respect for their client's right to be heard and the Court's direction in this regard. The Court can only hear, cogitate and determine on that which has been put to it. If counsels employed to argue a case fail to do so by, *inter alia*, not tendering written submissions, it reflects poorly on five things: (i) the commitment to their role as the advocate of choice by a party to a suit; (ii) their commitment to advance their client's constitutionally protected right to be heard; (iii) the sense of duty as officers of the Court; (iv) the value attached to undertakings made to the Court; and (v) the overall quality of legal representation and advocacy.
40. Therefore on consideration of the purpose of written submissions, the role of learned counsels in litigation, the fundamental right at stake for a party in a suit, and an undertaking made to the Court, I find difficulty accepting that counsel for the Appellant would have failed to tender written submissions simply because the opposing side had not filed any written submissions. Even if the written submissions by the opposing learned counsel were tendered at a later stage, such a circumstance would be remedied, if need be, by seeking leave of the Court to file additional submissions.
41. On consideration of the above, I find no merit in ground 1.

***Ground 2: Res judicata***

42. As counsel for the Respondents has correctly pointed out, *res judicata* requires four essential elements to be proven. These are: same subject matter, same cause of action, same parties in the same capacity, and the previous judgment should be a final judgment (see *Nourrice v Assary* (1991) SLR 80 and *Attorney-General v Marzorcchi* (1996-1997) SCAR 225).

43. The learned Judge in the impugned Ruling said the following at paragraphs [24] and [25]:

*On a cursory reading of the prayer in the current matter and the facts on which it is based it is clear that the basis for the current claim is the share transfer agreement signed on 10th December 2014. This same agreement was the basis of the matter in CC29/2015. The parties were the same in CC29/2015 as in the current matter with the exception that in CC29/2015 there was a third Defendant, the company to which the share transfer agreement related.*

*On the basis that CC29/2015 and the current matter share identity of parties, subject, and cause therefore the matter is res judicata.*

44. In essence, the learned Judge found that the parties were the same and the only difference was that there was a third defendant.
45. On appeal, Counsel for the Appellant argues that the parties were *not* the same because there was a third defendant – namely, Eden Island Entertainment Ltd. To refute this, counsel for the Respondents argues that the parties are the same to the extent that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were sued in the same capacity in both suits.
46. In the suit CC 69/2015, which I note the learned Judge refers to as CC 29/2015, the Appellant (Mr Lesperance, the Plaintiff in that instance) filed a plaint against 4 defendants. These were the Respondents in the present case as the 1<sup>st</sup> and 2<sup>nd</sup> defendants, Eden Island Entertainment Ltd as the 3<sup>rd</sup> defendant, and Seychelles International Mercantile Banking Corporation as the 4<sup>th</sup> defendant. In 2013, the 3<sup>rd</sup> defendant took a loan from the 4<sup>th</sup> defendant with a charge registered on Title No. B1298 as security. Title No. H6353 which belonged to the Appellant was also put up as security for the same loan. In December 2014, the shares of the 3<sup>rd</sup> defendant were sold to the 1<sup>st</sup> and 2<sup>nd</sup> defendants who became directors in the said company through a share transfer agreement. One of the terms of the share transfer agreement was that SCR 1,000,000 was to be paid to Mr Lesperance. Another term was that the 3<sup>rd</sup> defendant



had to remove all mortgages on Title No. B1298 and Title No. H6353. Due to the impending insolvency of the 3<sup>rd</sup> defendant at the time, Mr Lesperance was of the view that the further delay in honouring the obligations would cause prejudice and great risk to himself.

47. Mr Lesperance prayed for three things. First, the Court orders specific performance of the share transfer agreement on part of the 3<sup>rd</sup> defendant. Second, and this is in the event that the 3<sup>rd</sup> defendant is unable to perform, the corporate veil must be lifted and it is subsequently ordered that the 1<sup>st</sup> and 2<sup>nd</sup> defendants discharge the obligations of the 3<sup>rd</sup> defendant. Third and finally, it was prayed that the Court orders the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> defendants to be jointly and severally liable to pay the damages as particularised.
48. In the CS 133/19 suit, the Appellant repeats the same background as I have outlined in the above paragraphs. The prayer in SC 133/19 was that the Court finds that the 1<sup>st</sup> and 2<sup>nd</sup> defendants were in breach of the shares transfer agreement and as a consequence made Mr Lesperance suffer a loss of SCR 15 million which they are liable to make good and pay.
49. It is clear to me that the first suit is premised on what was argued to be a contract between the Appellant and the 3<sup>rd</sup> defendant, Eden Island Entertainment, despite enjoining the directors of the company, who are the Respondents in the present appeal. However, suit CC 69/2015 failed mainly because of the learned Judge's finding on the agreement and how it does not bind the company. At paragraph [17] the learned Judge said:

*“[17] To my mind the agreement the Plaintiff signed with the 1st Defendant was a Share Transfer Agreement as is indicated, which is a private agreement between two shareholders. **The 1st Defendant on signing the agreement signed in his personal name and not as a Director of the 3rd Defendant and in so doing could not bind the 3rd Defendant.**”*

*[18]I am strengthened in this view by the Plaintiff's averment in paragraph 9 of his Complaint – "The Plaintiff avers that it was a further implied term of the said agreement that the 1st and 2nd Defendant will provide his own assets as security for the loan from the 4th Defendant and release the Plaintiff's assets by the end of February 2015 and 30th April 2015 respectively."*

*[19]In the circumstances, it cannot be said that the 3rd Defendant is liable for the balance of SCR 1 million."*<sup>8</sup> [Emphasis mine]

50. In saying the shares transfer agreement was not binding on the 3<sup>rd</sup> defendant because it was signed by the 1<sup>st</sup> defendant in his personal name and not in his capacity as the Director of Eden Entertainment, it opened an avenue for the Appellant to peruse the route of suing the 1<sup>st</sup> Respondent in his personal capacity – the party who entered into the agreement as per learned Judge's finding. In filing suit CS 133/19 which is the subject of this appeal, the Appellant is going against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in their personal capacity.
51. Therefore, I disagree with the arguments advanced by the Respondents that the capacity in which they are sued in CS 133/19 is the same as that in CC 69/2015. It is clear to me that in the former, they are being sued in their personal capacities, and in the latter, it was in their capacities as directors. Thus, it cannot be said that the suits have the same parties.
52. On consideration of the above, Ground 2 succeeds.

***Ground 3: Abuse of process***

53. The essence of ground 3 is that the learned Judge erred when she found that the Appellant was abusing the process of the Courts. According to the Appellant, the opportunity for a fresh suit was provided by virtue of the judgment in CC 69/2015 where the learned Judge dismissed the case on the basis that the case was wrongly

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<sup>8</sup> *Lesperance v Ernestine & Ors* (CC 69 of 2015) [2018] SCSC 802 (04 September 2018).

sued against the 3<sup>rd</sup> defendant. The Respondents argue that the present case is an abuse of process because the Appellant filed a fresh suit re-litigating the same cause of action on the same grounds as previously unsuccessful.

54. I am inclined to agree with counsel for the Appellant in this regard. As previously indicated, the learned Judge in the above-cited paragraphs made a finding on how the share transfer agreement was not binding on the 3<sup>rd</sup> defendant and further dismissed the case against the on that basis. In my opinion, and provided that the case is not res judicata, it is not an abuse of process where a party who deems himself to have suffered loss peruses a fresh suit where there is an opportunity to do so. The Appellant considers himself to have suffered a loss. In suit CC 69/2015 he failed because according to the learned Judge, the sued party was not bound by the agreement because the same was signed by the 1<sup>st</sup> Defendant in his personal capacity. Thus, in bringing suit CS 133/19 on the failure of suit CC 69/2015, the Appellant is simply making use of the avenues available to him.

55. On the consideration of the above, ground 3 succeeds.

#### **Decision and order of the Court**

56. The appeal is allowed on grounds 2 and 3.

57. It is the Appellant's prayer that this Court remits the case back to the Supreme Court for consideration on its merits. Having found that the learned Judge erred in her findings on res judicata and abuse of process, it is only just to set aside the impugned judgment of the Supreme Court and remit the matter back to the Supreme Court for fresh hearing as prayed for and in line with the provisions of Rule 31 (5) of the Court of Appeal Rules 2005 (as amended).

58. Noting the evident conflict of interest that may arise in this matter as it stands remitted, the fresh hearing shall be held before another court and another Judge of the Supreme Court other than learned Judge Pillay.

**Further observations on Written Submissions**

59. In a parentheses, I wish to make further observations on the place earned by written submissions in our civil procedure and practice in Seychelles. As earlier mentioned, written submissions assist the Court to understand the respective cases made by each party. It also assists the parties in that it supplements their pleadings (where the fact relied on are pleaded) and oral submissions made to the Court. Written submissions present an opportune time to state the law and precedents relied on. They also offer up an opportunity to cite academic writings that may also assist the trial judge to dissect the issues at hand. Despite their obvious importance, written submissions have still not earned their place in the law of civil practice and procedure of Seychelles.
60. Written submissions are key practice in the civil practice and procedure of our courts. In my opinion, it would be a step in a positive direction if they are to make part of statutory procedural law of the jurisdiction. This however, I leave in the much capable hands of the legislature to decide. Until then, I implore learned counsels to continue filing clear and concise written submissions to supplement their pleadings and assist the courts in coming to a determination on the legal issues before it. I also implore that such must be done within the agreed timelines to avoid wasting time and with due regard to the undertaking made to the Court in this regard.

Signed, dated, and delivered at Ile du Port on 26<sup>th</sup> April 2023.

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S. Andre JA

Signed, dated, and delivered at Ile du Port on 26<sup>th</sup> April 2023.