

## IN THE COURT OF APPEAL OF SEYCHELLES

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### **Reportable**

[2023] SCCA 34 (25 August 2023)

SCA 22/2022

(Arising in CS 14/2018)

**Barbara Mathilda Karen Poiret**

**1<sup>st</sup> Appellant**

**Sylvia Elizabeth Piera Poiret**

**2<sup>nd</sup> Appellant**

*(rep. by Mr. Joshua Revera)*

and

**Christine Clarisse**

**Respondent**

*(rep. by Ms. K. Domingue and Mr. Darel Uranie)*

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**Neutral Citation** *Poiret and Anor v Clarisse (SCA 22/2022) SCCA 34 (25 August 2023)*  
(Arising in CS 14/2018)

**Before:** Fernando President, Robinson JA, Tibatemwa-Ekirikubinza JA

**Summary:** Appeal against a dismissal of an action for want of prosecution.

**Heard:** 8<sup>th</sup> August 2023

**Delivered:** 25<sup>th</sup> August 2023

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### **ORDER**

Appeal allowed. The case remitted back to the Supreme Court to continue with the hearing before another Judge.

### **JUDGMENT**

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**FERNANDO PRESIDENT** (Robinson JA, Tibatemwa-Ekirikubinza JA concurring)

1. The Appellants have appealed against the decision of the Supreme Court dismissing their action on the 17<sup>th</sup> of October 2022, for want of prosecution.
2. The Appellants have raised the following grounds of appeal:

- “1. The Learned trial Judge erred when he omitted to take into account the fact that the Appellants previous Counsel withdrew his appearance in Court on the hearing date and thereafter handed over the file to a new Counsel.
2. The Learned trial Judge erred when he omitted to appreciate that there was a legitimate cause for adjournment of hearing.
3. The Learned trial Judge erred when he omitted to appreciate that the request for an adjournment was through no fault of the Appellants.
4. The Learned trial Judge erred when he dismissed the plaint while no objections to adjourn the hearing date were raised by the Respondent.
5. The learned trial judge erred in law by dismissing the plaint proprio motu and for the reason of want of prosecution,
6. Ground No.6: The learned trial judge erred in law by failing to consider the balance of convenience and the right of fair hearing of the Appellant.”  
(verbatim)

Application by Appellants seeking an Extension of Time to file Heads of Arguments out of time and Objections to such application by the Respondent.

There is undoubtedly a delay of 5 days by the Appellants to file their Heads of Arguments as per the Seychelles Court of appeal Rules. The Respondent had however filed her Heads of Arguments on time. This Court having considered the manner the Appellants’ action had been dismissed by the Trial judge as set out in the judgment below and more specifically at paragraphs 7 & 8, and coming to the finding that there has been a clear denial of the Appellants’ right to a fair hearing, by the Trial Judge, determined to permit the Appellant, to proceed with the appeal, to prevent an injustice.

Background to the appeal:

3. The Plaintiff in this case had been filed by the Appellants on the 7<sup>th</sup> of February 2018. The Defence by the Respondent had been filed on the 28<sup>th</sup> of May 2018. The Respondent had not wanted to mediate when the learned Trial Judge queried on the 4<sup>th</sup> of June 2018. On the date fixed for the Pre-hearing, namely on the 6<sup>th</sup> of December 2018, Counsel for the Respondent was absent. On the 31<sup>st</sup> of January 2019 the case was fixed for hearing on the 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> of December 2019.
  
4. **On the 2<sup>nd</sup> of December 2019**, the first date fixed for hearing Attorney Mr. Bonte had informed Court that he was to appear for the Respondent but Attorney Ms. K. Domingue had been retained by the Respondent and that he was therefore moving out of the case. Ms. K. Domingue had then informed Court that she was unable to proceed with the hearing as Attorney, Ms. Aglae, who had been appearing for the Respondent, had told the Respondent that she had made arrangements with Attorney Domingue to appear. Attorney Domingue had informed Court that the file pertaining to the case with the pleadings had been sent to Attorney Mr. Bonte and that she had seen the file only that morning and moved for time. Attorney Domingue, had also informed Court that she was on medical leave. Both Appellants who had come from abroad for the hearing were present in Court on the 2<sup>nd</sup> of December 2019. Attorney Mr. Rouillon, who had been appearing for the Appellants had requested of Court to explain the position to the Appellants and the learned Trial Judge had done so, stating that he understands that they had come from overseas, had incurred expenses and apologized stating that what has happened was unfortunate and beyond control. Attorney Mr. Rouillon had also informed Court that the exhibits he seeks to produce before the Court in this case, had been produced in another connected case, namely Mrs. Barbara Poiret and Sylvia Poiret (Appellants in this case) VS Seychelles Pension Fund and Marie-Ange Waye-Hive and he will need those exhibits to proceed with the instant case. Court had then ordered that they will await the exhibits and once received copies will also be made for the Court

record. Attorney Rouillon had also requested that there be a fresh exchange of documents to which the learned Trial Judge had agreed. Attorney Domingue had then moved for a hearing date as well as a mention date so that all new matters, if any, are dealt with before the hearing date. Attorney Rouillon had informed Court that the case be heard on Skype because the Appellants had been in Seychelles for the case two or three times. The learned Trial Judge had then remarked: “Yes, we can do it via skype, I don’t have a problem.” Attorney Domingue had also informed Court that she too has no problem with a hearing on Skype. The learned Trial Judge had however informed Attorney Rouillon that he will have to make an application to the Chief Justice to take evidence on Skype. The learned Trial Judge had then fixed the case for **mention on the 15<sup>th</sup> of January 2020** and the **hearing for the 8<sup>th</sup> of June and 2<sup>nd</sup> of July 2020**. The learned Trial Judge had apologized again for not being able to have the hearing due to the fact that Attorney Domingue had got the docket of the case from Attorney Bonte only that morning and also because she was on medical leave. The learned Trial Judge had gone on to state: “Arrangements can be made that your evidence is taken via skype, so your lawyers will liaise with us and will make the necessary applications, if you feel that you would not be able to come to Seychelles on the hearing dates, then your evidence will be taken via Skype.”

5. On the **8<sup>th</sup> of June 2020**, hearing was not taken up due to covid restrictions and thus had been re-fixed for **11<sup>th</sup>, 12<sup>th</sup> and 18<sup>th</sup> of November 2021**. Again on **29<sup>th</sup> of October 2021** on the basis of a motion filed the case was re-fixed for hearing for four days, namely from the **17<sup>th</sup> to the 21<sup>st</sup> of October 2022, excluding Wednesday**.
6. On the **17<sup>th</sup> of October 2022**, at the commencement of the proceedings, Attorney Mr. Rouillon had moved to withdraw from the case as he felt he was emotionally involved with his clients and that Attorney Mr. Revera was going to take over the case. He had informed Court that his clients the Appellants had arrived from England especially for the case and were in Praslin. The Respondent too was not present in Court on the advice of her Attorney Ms. K. Domingue. Attorney

Revera had then informed Court that he had been instructed by the Appellants but had not sight of the documents. The learned Trial Judge had then said that the case had been before him for a long time, since 2018 and that he wants to complete the case. Attorney Rouillon had then gone on to inform Court that the reason for the delay of the instant case was because there had been a connected case, namely Mrs. Barbara Poiret and Sylvia Poiret (Appellants in this case) VS Seychelles Pension Fund and Marie-Ange Waye-Hive; referred to at paragraph 4 above and an appeal from the judgment in that case to the Court of Appeal and also a connected constitutional case. On being informed by Court that the Appellants should have been present in Court, at 9.30 am, Attorney Rouillon had said that he could get them down from Praslin in the afternoon. Attorney Rouillon had informed Court to adjourn the case for an hour but the learned Trial Judge had said: “I would give 30 hours. (erratum – should be 30 minutes) Up till 10 o’clock” and if they are not interested in the case he would dismiss the case. At 10 o’clock Attorney Rouillon had informed Court that the 2<sup>nd</sup> Appellant (2<sup>nd</sup> Plaintiff) was present in Court and the case could commence with her evidence. Attorney Rouillon had thereafter renewed his application to withdraw from the case, which had been granted. Attorney Revera had then said he was appearing for the Appellants. Attorney Revera had then informed Court that he had not discussed in detail the case with the 1<sup>st</sup> Appellant and also has had no time to go through the documents and moved for an adjournment. His application had been denied and the learned Trial Judge had insisted that he wants to start the case. I reproduce herein pages 9 and 10 of the proceedings of 17<sup>th</sup> October 2022 as they are pertinent:

“Mr. Revera: May I have the hearing dates my Lord?

Court: Mr. Rouillon should have given those to you. Is it today and tomorrow? Okay today, tomorrow, 20<sup>th</sup> and 21<sup>st</sup> October.

Mr. Revera: Is it a whole day.

Court: Actually it was whole day.

Mr. Revera: As the other dates I have several submissions

Court: Mr. Revera, let us not get there because I have made a Ruling and I want to start this case. You have an option you withdraw the case or I dismiss the case if you do not start.

Mr. Revera: I believe I would withdraw. I would be able to refile it once my client is ready based on the fact that it is-

Court: Let us start. I have waited. Call your first witness.

Mr. Revera: May I go through plaint so that –

Court: Mr. Revera, I say call your first witness and your second witness should be ready as well. I mean I do not know how many witness you have got. Mr. Revera I am waiting.

Mr. Revera: May I discuss an issue with Mr. Rouillon.

Mr. Rouillon: Mr. Rouillon is out of the case. I have given leave for his to withdraw. I am waiting for you to call your witness.

Mr. Revera: Unfortunately my Lord-

Court: Who is your 1<sup>st</sup> witness?

Mr. Revera: My witness would be Ms. Sylvia Elizabeth.

Court: Get in the box Ms. Elizabeth.

Mr. Revera: Her evidence is currently at her resident that she would require to produce.

Court: She comes to Court and she thinks I am going to go at her residence to get her documents.

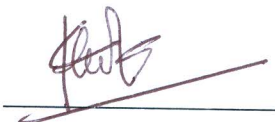
Mr. Revera: My Lord, this is why are asking the Court for an adjournment so that can-

Court: This BS is not going to happen Mr. Revera, okay. She gets in the box or she does not depone. Mr. Revera, the case is dismissed for want of prosecution.”

7. It is clear that the case has had an abrupt ending with the learned Trial Judge stating “This BS is not going to happen Mr. Revera.....Mr. Revera, the case is dismissed for want of prosecution.” As to what the learned Trial Judge meant by “BS” is not known to me in legal parlance.
  
8. It is very clear on a perusal of the case that the Appellants right to a fair hearing guaranteed under article 19(7) had been denied. Despite the learned Trial Judge’s observation that the case had been with him since 2018, it is clear that the delays cannot be attributed to the Appellants alone. On the 2<sup>nd</sup> of December 2019 on the first hearing date the case had not proceeded, partly for the same reasons as happened on the 17<sup>th</sup> of October 2022, and on that occasion as a result of change of Counsel of the Respondent. It is to be noted that on the 2<sup>nd</sup> of December 2019 the Appellants had come for the hearing from England. The learned Trial Judge had in fact apologized to the Appellants for not being able to proceed with the hearing. But strangely the same consideration extended to the Respondent on the 2<sup>nd</sup> of December 2019, had not been extended to the Appellants on the 17<sup>th</sup> of October 2022. I fail to understand the hurry with which the learned Trial Judge had wanted to dismiss the case at 10 o’clock on the 17<sup>th</sup> of October 2022, refusing an adjournment even until the afternoon, when the case had also been fixed for the 18<sup>th</sup> 20<sup>th</sup> and the 21<sup>st</sup> of October 2022, in addition to the 17<sup>th</sup> of October. The learned Trial Judge had not taken into consideration that the Appellants had come from England especially for this case and certainly could have attended court if not in the afternoon of the 17<sup>th</sup> of October 2022, but on the 18<sup>th</sup> of

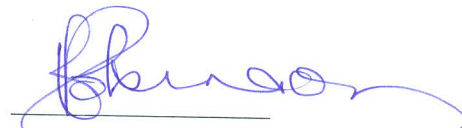
October. Further the learned Trial Judge prior to dismissing the case had not even inquired from the Appellants' Attorney, whether there was a possibility of evidence of the 1<sup>st</sup> Appellant be given on Skype, since the 1<sup>st</sup> Appellant was in Praslin; if he was so determined to start the case on the morning of the 17<sup>th</sup> of October 2022. The learned Trial Judge had stated that he had no problem if evidence of the Appellants were given on Skype, when the case came up for hearing on the 2<sup>nd</sup> of December 2019. He had also not inquired from Attorney Revera whether he wanted to pursue his application for withdrawal which he had intimated to Court.

9. In view of the circumstances stated above, I allow all the grounds of appeal and have no hesitation in allowing the appeal and ordering that the case be remitted back to the Supreme Court to continue with the hearing.
10. In view of the manner the Trial Judge had conducted himself and the use of his language in dismissing the case as referred to at paragraph 7 above I am of the view that the case should be heard before another Judge. I order costs to the Appellants.



Fernando President

I concur



F. Robinson JA

I concur



Dr. L. Tibatemwa-Ekirikubinza JA

Signed, dated, and delivered at Ile du Port on 25 August 2023.