

IN THE COURT OF APPEAL OF SEYCHELLES

Reportable

[2023] SCCA 4 (28 February 2023).
SCA MA 31/2022
Arising out of MA 303/2021
Out of MC 30/2021

In the matter Between

Ge-Geology Limited (Company Number 089621)

Applicant

(rep. by Mr. Frank Elizabeth)

And

The Government of Seychelles

Respondent

(rep. by Ms. Nissa Thompson)

Neutral Citation: *Ge-Geology Limited v The Government of Seychelles* (SCA MA 31/2022)
SCCA 4 (Arising in MA 303/2021) (Out of MC 30/2021) (28 February 2023)

Before: **Fernando President, Robinson, Andre JJA**

Summary: **Special leave to Appeal - Section 12 (2) of the Courts Act**

Heard: 21 February 2023 (Last Sitting date for clarification(s) by Bench).

Delivered: 28 February 2023

ORDERS

The Court makes the following Orders:

- (i) The application for special leave to appeal against the interlocutory order of the Supreme Court in *GOS v Ge-Geology* (MC 30/2021) [2021] SCSC 660 (15 October 2021) is dismissed.
 - (ii) No order is made as to costs.
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RULING

ANDRE, JA

INTRODUCTION

- [1] This Ruling arises out of a notice of Motion filed on 23 August 2022 by Ge-Geology Limited (the Applicant), seeking special leave to appeal an interlocutory order of the Supreme Court in *GOS v Ge-Geology* (MC 30/2021) [2021] SCSC 660 (15 October 2021). This follows after leave to appeal MC 30/2021 was refused in MA 303/2021. The present Motion is accompanied by an affidavit in support of Mr Crispin Edu Tomo Maye, director of the Applicant. The Government of Seychelles as Respondent.
- [2] The Applicant and Respondent are both litigants in the lower Court. The Respondent made an application for an Interlocutory Order pursuant to Section 4 of the Proceeds of Crime (Civil confiscation) Act (POCA) in the above-cited matter (supra). This application seeks to prohibit Ge-Geology Limited from disposing of or otherwise dealing with whole or any part of the set out in the Table to the Notice of Motion being the sum of USD 7,244,968.97 standing to credit in its account at Al-Salam Bank of Maison Espalade, bearing account number 500000001638 (the specified property). The Section 4 application further seeks the Order to apply to any other person having notice of the same, and simultaneously to appoint Mr Hein Prinsloo as receiver of the said specified property.
- [3] Upon the Section 4 application being made by the Government of Seychelles, Ge-Geology Limited, as a respondent therein, raised four preliminary objections which are as follows:
- 1) The action is bad in law as it fails to comply with the Rules.
 - 2) The action amounts to an abuse of process in law.
 - 3) The application is defective as there is no affidavit in support of the motion before the Court in law.

4) There is no evidence to support the application and it should be dismissed forthwith.

[4] In dismissing these objections, Learned Judge Burhan held as follows in respect of each. First, the challenge against the affidavit was to the effect that it does not comply with the law because it contains documents which are inadmissible as evidence and cannot be treated as belief evidence. In dismissing this objection, the Learned judge was of the opinion that the challenge of the affidavit delved into the merits of the case, and therefore anything found wanting with the affidavit could only be ascertained and pronounced on when the Court deals with the merits of the case.

[5] The second preliminary objection raised was to the effect that the Section 4 application was an abuse of process given the history of seven (7) to nine (9) similar applications by the Republic towards Ge-Geology Limited between the years of 2015 and 2017. In finding no merit in the second preliminary objection, the Learned Judge relied on *R v Derby Magistrates' Court, ex parte Brooks* [1985] 80 Cr App R 164 which set out some of the ways prosecutorial authorities can be said to participating in an abuse of process. Learned Judge Burhan proceeded to make a finding that in the case before him, and the history that has transpired between the parties, there was no attempt to deprive Ge-Geology Limited of protection under the law or take unfair advantage of a technicality. Moreover, the Learned Judge made a finding that the conduct of the Republic did not cause prejudice to Ge-Geology Limited in the preparation of its defence to the Section 4 application.

[6] The third preliminary objection raised was that there was no supporting affidavit to the application by the Republic. The arguments raised in support of this were twofold. First, it was that the Notice of Motion is not in conformity with Form 1, which provides that the name and address of the attorney is to appear on the Notice. Second, that the Jurat of the affidavit was on a separate page and therefore the affidavit should be rejected. Unpersuaded by these arguments, the Learned Judge dismissed the preliminary objection. The reasons advanced for dismissing were as follows. In respect of conformity with Form 1, the Learned Judge opined that the matter raised by Ge-Geology Limited is a

technicality which causes no prejudice. He further supported this view by relying on the decision in *Hoareau & Ano v Karunakaran & Ors* Constitutional Appeal SCA [2017] SCCA 33 where it was held that the courts cannot ‘*let justice bleed at the altar of technicality*’ among other things. In respect of the Jurat of the affidavit, the Learned Judge held the view that the objection was also a technicality that has not caused any prejudice or injustice to the Ge-Geology Limited. Moreover, the technicality in question did not create any doubt in respect of the authenticity of the affidavit.

- [7] The fourth and final objection by Ge-Geology Limited was in respect of evidence, in that there is no evidence to support the application under section 4 of POCA. It was the contention of Ge-Geology Limited that the facts set out in the affidavit of Mr Hein Prinsloo do not indicate his personal knowledge of such facts. Rather, the facts set out in the affidavit are based more on his opinion and should be disregarded as most of the documents attached are not originals and refer to news articles on the internet. In consideration of this, the learned Judge was of the view that any merits or demerits of the affidavit in support could only be determined as the Court deals with the merits of the case. As such, the preliminary objection was dismissed.
- [8] The Learned Judge dismissed the application and ordered that Ge-Geology Limited files its response to the Section 4 application. Dissatisfied with the Ruling against it, Ge-Geology Limited sought leave to appeal and this was later refused by the lower Court. Following this, Ge-Geology Limited has approached this Court to seek special leave to appeal against the decision in *GOS v Ge-Geology* (MC 30/2021) [2021] SCSC 660 (15 October 2021).
- [9] Both parties filed written submissions in support of the current application of which due consideration has been given thereto.

SUBMISSIONS BY THE APPLICANT

- [10] From the onset, I wish to highlight that this Court was put at pains to understand the written submission of counsel for the applicant.

- [11] Nevertheless, counsel for Applicant raises two main arguments. First, it is that the Respondent has not opposed the present Motion and therefore the Motion should succeed by virtue of being unopposed. Suffice it to say, I am not persuaded by this argument. An unopposed party to a matter before the court is not automatically granted their prayer. The success or failure of any suit or motion is based on the merits of the arguments raised before the Court, and the Court is guided by the law to determine the success or failure of any such suit or motion.
- [12] The second argument raised by Counsel for the Applicant is that the evidence used by the Respondent to prove ‘belief’ under Section 4 of POCA, is inadmissible in law. That in the circumstances, a court cannot compel a respondent in a Section 4 application to file an affidavit in reply without making a determination on a point of law in respect to the admissibility of the evidence.
- [13] It is the further submission of the Applicant that ruling on a point of law in respect of the admissibility of the evidence is necessary in order for the Court to determine whether the burden placed on a Section 4 of POCA has shifted from the applicant to the respondent in the said motion. According to counsel for the Applicant, when the Court has ruled on the shift in the burden of proof, only then can the respondent in a Section 4 application be called upon to file an affidavit in reply showing that the property is not proceeds of criminal conduct.
- [14] Counsel for the Applicant has relied on a plethora of legal authorities to draw in on the law relating to special leave to appeal generally, and also differentiate between the periods where there were no rules of procedure in POCA related matters. These cases include *Gangadoo v Cable & Wireless Seychelles Ltd* (SCA MA: 2 of 2013) [2013] SCCA 18 (30 August 2013); *Fregate Island Private Limited v DF Project Properties* (Civil Appeal SCA MA 4/2016) [2017] SCCA 7 (21 April 2017)); *EME Management Services Ltd v Islands Development Co Ltd* (2008-2009) SCAR 183; *Financial Intelligence Unit v Mares Corp* (2011) SLR 405; *Financial Intelligence Unit v Cyber Space Ltd* (SCA 27 of 2012) SCCA 2 (3 May 2013).

- [15] It is submitted that the Proceeds of Crime (Civil Confiscation) (Procedure) Rules, 2016 gives the court a discretionary power to dismiss a defective application made under the Act where a party materially fails to comply with any of the provisions of the Rules. That in the circumstances, the Learned Judge ought to have dismissed the application on the basis of the primary points raised.
- [16] It is also submitted that the Ruling was wrong in that it disregarded the points of law raised especially in respect of abuse of process. It is also submitted that in allowing the special leave of appeal to succeed and the appeal to be heard will dispose of both substantial and ancillary issues and save the Court's time.
- [17] In respect of treating this present motion as exceptional, it is that the Learned Judge failing to give a ruling on the points of law raised and that by virtue of this, the Applicant's right to a fair hearing was violated.¹ It is the further the submission of counsel for the Applicant that the case against the Applicant started in 2015 and property was ceased since then; that the Applicant has been unable to access the property since 2015 even though the law changed in 2017; that the Applicant has not been arrested, charged or convicted of any criminal offence, among other things.²
- [18] Finally, it is submitted that the interlocutory order is so manifestly wrong and irreparable loss would be caused if the case is to proceed without the interlocutory order being corrected.

SUBMISSIONS BY THE RESPONDENT

- [19] It is the submission of counsel for the Respondent that Rule 12 (1) of the Proceeds of Crime (Civil Confiscation) (Procedure) Rules, 2016 bars any interlocutory appeal under POCA. To support this interpretation of Rule 12 (1) counsel has placed reliance on the case of *Clive Lawry Allisop v The FIU and the AG* [2016] SCCA 1. That in the circumstances, there is no basis for any interlocutory appeal pursuant to section 12 (2) (c) of the Courts Act.

¹ Paragraph [27] of the Applicant's Written Submissions.

² Paragraph [39] of the Applicant's Written Submissions.

[20] It is further submitted that in the event that this Court considers that an appeal can be lodged in proceeds of crime proceedings, there are no grounds for special leave to appeal in the present case. That the case of *Gangadoo v Cable & Wireless Seychelles* (supra) the Court stated that before granting special leave to appeal, a court has to be satisfied that the interlocutory order disposes so substantially all matters in the issue as to leave only the subordinate or ancillary matters for the decision; and that there are grounds for treating the case as an exceptional one.

[21] That on the reliance of *Gandoo* (supra), three observations can be made.

[22] First, the Ruling by the Learned Judge does not in any way dispose so substantially of matter in issues to leave the subordinate or ancillary matters for the final decision. That the substantive issues in the matter will be determined in due course at the Section 4 hearing before the learned judge.

[23] Second, that there is nothing in the present case by the Applicant that merits the case as exceptional or novel. That the points of law raised were, at best, technical objections with the aim of delaying the proceedings.

[24] Third, that the Applicant will be entitled as of right to question the Ruling of 15 October 2021 as and when it exercises its right of appeal from the final judgement in relation to the section 4 POCA Order, should one be granted.

[25] It is further submitted that in *Clive Lawry Allisop v The FIU and the AG* (supra), the Court of Appeal warned counsel against practices bent upon dislocating the course of trial and prolonging proceedings by all means. That it is noteworthy that counsel in that case is the same in the present matter and it is disappointing to observe the same practices persisting to-date.

ANALYSIS AND DETERMINATION

[26] It is important to firstly consider the submission made by learned counsel for the Republic in respect of applicability of Rule 12 (1) of the Proceeds of Crime (Civil Confiscation) (Procedure) Rules, 2016, which reads as follows:

“For the avoidance of doubt, no independent appeal shall lie from a direction given by the Court under these Rules in a pending matter.”

Further to the above, Rule 12 (2) reads as follows:

“Where an order made under this Act is or is likely to be appealed, the Court may order a stay of execution or give any other directions necessary to preserve the status quo pending appeal.”

[27] According to Learned counsel for the Respondent, the Applicant is barred from an appeal by Rule 12 (1) supra and has further placed reliance on the Court of Appeal’s pronouncement in *Clive Lawry Allisop v The FIU and the AG* (supra) where Twomey JA (with Domah JA and Msoffe JA in concurrence) said at paragraph [26]:

“...Under new POCA procedural rules published on 15th March 2016, interlocutory appeals are no longer permitted (vide Rule 12 Proceeds of Crime (Civil Confiscation) (Procedure) Rules, 2016.”

[28] The case of *Clive Lawry Allisop v The FIU and the AG* was an appeal against the decision of the Constitutional Court after it dismissed a petition which argued that Sections 3 (1) and 9 (1) of the Proceeds of Crime (Civil Confiscation) Act of 2008 (POCA) were unconstitutional in that these provisions breached Articles 19 (1) 19 (2) and 26 (1) of the Constitution. The case did not consider Rule 12 (1) at length. I therefore attempt to do so now in view of the submissions made by the Respondent in the present case.

[29] It is important to situate the Ruling made by Learned Judge Burhan in MC 30/2021. Is this ruling one which is covered by Rule 12 (1) of the Proceeds of Crime (Civil Confiscation) (Procedure) Rules, 2016 or rather, Section 12 (2) (a) of the Courts Act?

[30] Rule 12 (1) of the Proceeds of Crime (Civil Confiscation) (Procedure) Rules, 2016 is in relation to orders made pursuant to POCA. The Applicant in the present case raised a point of law and the same was heard and ruled on before trial commenced. It seems to me that the point of law could have only been raised pursuant to Section 90 of the Civil

Procedure Code as this falls under the ambits of civil procedure. As such, the Ruling in MC 30/2021 cannot be said to have been made under POCA to further warrant the application of Rule 12 (1) as submitted by the Respondent. In the circumstance, I find that Rule 12 (1) is not applicable because raising a point of law could have only been made under Section 90 of the Civil Procedure Code. With the latter being the law relied on to raise the points of law, the Applicant is correct to have sought appeal in terms of Section 12 (2) (b) of the Courts Act, and now before this Court on the reliance on Section 12 (2) (c) of the Courts Act.

- [31] Having decided that Section 12 (2) of the Courts Act is applicable, I agree with both counsel's submissions on the authorities and factors relevant for a consideration of a special leave to appeal. An appellate court is asked to interfere with the exercise of the discretion by the Supreme Court in instances where leave to appeal is refused (see *Seychelles Hindu Kovil Sangam v Subramaniam Pillay* SCA No. 17 of 2009).
- [32] The case of *EME Management Services Ltd v Islands Development Co Ltd* (supra) is instructive to the point that it is only in exceptional circumstances that one is granted special leave to appeal. To this end, it means the Court has to be satisfied of two things: (i) that the interlocutory judgment disposed so substantially of all the matters in issue as to leave only subordinate or ancillary matters for decision; and, (ii) there are grounds for treating the case as an exceptional one to warrant the special leave to appeal (see further *Gangadoo v Cable & Wireless Seychelles Ltd* (supra); *Fregate Island Private Limited v DF Project Properties* (supra)). I consider these elements below in view of submissions by the parties.
- [33] For special leave to succeed, an interlocutory judgment must have substantially disposed of all matters in issue. This is to the extent that whatever remains to be determined by the court seized with the matter is ancillary or subordinate issues. On a closer reading of the preliminary objections raised by the Ge-Geology in the lower court, it is clear to me that the challenges were mainly against the affidavit in support tendered by the Republic, together with the supporting evidence thereafter. In cautioning against delving into the merit of the case, Learned Judge Burhan said at paragraph [6]:

“...At the very outset I wish to state that this is a matter Court has to determine when going into the contents of the affidavit and the supporting documents relied on by the Applicant when dealing with the merits of the application. It is too premature at this stage to consider the merits of an application when a plea in limine- litis has been raised. I therefore dismiss this ground of objection raised by the Respondents on the basis that it is too premature to be decided on at this stage as it concerns the merits of the case.”

[34] Further to the above, Learned Judge Burhan stated in paragraph [10]:

“Learned Counsel for the Respondent in his submissions and once again in his oral submissions submitted that the facts set out in the affidavit of Mr Hein Prinsloo do not indicate his personal knowledge of such facts but are based more on his opinion and should be disregarded as most of the documents attached are not originals and refer to news articles on internet. These matters, too, in the view of Court are matters to be taken into consideration when dealing with the merits of the case and not at the stage of a plea in limine litis.”

[35] To my mind, the Learned Judge’s decision could have only been guided by Section 91 of the Civil Procedure Code which states that:

“If in the opinion of the court the decision of such point of law substantially disposes of the whole cause of action, ground of defence, set off or counterclaim, the court may thereupon dismiss the action, or make such other order therein as may be just.”

[36] Indeed, it is not for the Court at the preliminary stage to make findings on the evidence relied on by an applicant. The weight or admissibility of evidence is an issue that can only be considered at length during trial. To allow for evidence to be assessed at the preliminary stage and a court to rule on the same, would render the interlocutory order to have dealt substantially with the issue at hand and open the same to a special leave to appeal. I therefore disagree with the submissions by learned counsel for the Applicant that a Section 4 application would dictate that the Court makes a Ruling as to the admissibility of evidence supporting an affidavit in support of a Section 4 application.

This is an issue for the respondent in a Section 4 application to impress upon in response to the application, essentially showing the weaknesses in the case made by the Republic. I also disagree with the procedure counsel for the Applicant seeks to advance before this Court, that a ruling on admissibility of evidence at a preliminary stage assists the Court in determining whether the burden shifts to the respondent in a Section 4 application. To allow this argument to hold would create an absurdity in the procedure of our courts.

[37] In the circumstances, I find that it cannot be said that the Ruling of Learned Judge Burhan disposed so substantially of all the matters in issue as to leave only subordinate or ancillary matters for decision. It is clear to me that he cautioned himself against making findings on the evidence at a preliminary stage because such issues can only be adequately dealt with at trial.

[38] The second limb that is needed for a special leave to appeal to be granted is that there are grounds for treating the case as an exceptional one to warrant granting of a special leave to appeal. It is the submission of the Applicant that the present case is exceptional because of the failure on part of the learned judge to give a ruling on the points of law raised.³ That such failure violates the Applicant's right to a fair hearing as the learned judge is "forcing the applicant to defend a case based on inadmissible evidence in law and where the respondent has failed to meet the evidentiary threshold to justify filing of the Section 4 POCA application". At this juncture, I wish to reiterate what I stated earlier – the procedure counsel for the Applicant advances would create an absurdity in the procedure of the courts of this jurisdiction.

[39] In so far as the right to a fair hearing is concerned, it is not lost to this Court that such a right is sacrosanct. However, to suggest that the Ruling of Learned Judge Burhan in MC 30/2021 violates the right to a fair trial, may be misconceived. This is because nothing in the procedure in the lower court when it considered MC 30/2021 shows that the Applicant was treated unfairly and unheard by the court seized with the matter. To me, the Applicant was heard fairly because all arguments and submissions in support of the points of law were taken into account by the Learned Judge in reaching his decision. The

³ Paragraph [27] of the Applicant's Written Submissions.

fact that a judge has not ruled in a manner that a party had anticipated does not automatically mean there is a breach of fair hearing.

[40] I therefore disagree with the Applicant that the present case is one which raised special circumstances by virtue of the likelihood that there was a breach of fair hearing.

[41] There are also further reasons advanced in paragraph [39] of the Applicant's written submissions which detail the history between the parties. Having gone through each of the seven things cited, I find nothing that merits this case as exceptional to warrant a special leave to appeal.

DECISION

[42] It follows in consideration of the above analysis and findings, that the Motion is dismissed for reasons given and no order is made as to costs.

Andre, JA

I concur

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Fernando President

Signed, dated, and delivered at Ile du Port on 28 February 2023.

ROBINSON JA

Neutral Citation: *Ge-Geology Limited v The Government of Seychelles* (SCA MA 31/2022) SCCA4 (Arising in MA303/2021) (Arising in MC30/2021) [28 February 2023]

Before: **Fernando President, Robinson, Andre JJA**

Summary: Application for an Interlocutory Order under section 4 of the Proceeds of Crime (Civil Confiscation) Act 2008, as amended — preliminary objections — defective affidavit — *jurat* overleaf — Supreme Court refused to grant leave to appeal — application for special leave to appeal to the Court of Appeal — Rule 5 of the Seychelles Court of Appeal Rules — section 12 of the Courts Act — principles in support of an application for special leave to appeal — affidavits are sworn evidence and evidential rules for their admission cannot be waived by the Court — defect in the affidavit is fatal — application for special leave is granted with costs in favour of the Applicant.

Heard: 21 February 2023

Delivered: 28 February 2023

ORDER

Application for special leave to appeal from the decision of a learned Judge of the Supreme Court is granted with costs in favour of the Applicant

DISSENTING ORDER ON MOTION

F. ROBINSON JA

[43] The Respondent made an application by way of Notice of Motion dated 9 April 2021 supported by evidence by affidavit under section 4 of the Proceeds of Crime (Civil Confiscation) Act, 2008, as amended.

[44] The Applicant raised four preliminary objections to the Respondent's application, which the Supreme Court dismissed in an interlocutory order delivered on the 15 October 2021. The Supreme Court also ordered that the Applicant file the reply to the Notice of Motion dated 9 April 2021, supported by evidence by affidavit. The Applicant filed an application reference MA303/2021 under section 12 (2) (b) of the Courts Act for leave to

appeal from the ruling of the Supreme Court dismissing the preliminary objections, which application was dismissed by the Supreme Court.

[45] This application is made under section 12 (2) (c) of the Courts Act, which stipulates that should the Supreme Court refuse to grant leave to appeal under section 12 (2) (b) of the said Act, the Court of Appeal may grant special leave to appeal.

[46] The facts leading to this application for special leave to appeal from the interlocutory ruling of the Supreme Court are clearly set out in the Ruling of Andre JA. Fernando, President of the Court of Appeal, concurred with the said Ruling. The majority Ruling *inter alia* made an order dismissing the application for special leave to appeal from the decision of the learned Judge of the Supreme Court. I hold the view that the application for special leave to appeal from the decision of the learned Judge should be granted with costs in favour of the Applicant.

[47] I give reasons for this holding.

[48] This Order on Motion is concerned with the following preliminary objections raised by the Applicant before the Supreme Court —

" The application is defective as there is no affidavit in support of the motion before the court of law;

There is no evidence to support the application and it should be dismissed forthwith."

[49] Concerning the preliminary objections reproduced at paragraph [48] hereof, Counsel for the Applicant relied on the defect in the *jurat*. He contended that the *jurat* must follow immediately on from the text and not be put on a separate page. In this respect, he contended that the affidavit was bad in law and urged the learned Judge to refuse to admit the defective affidavit as evidence.

[50] Having considered the preliminary objections raised by the Applicant by Counsel, the learned Judge held the view that the objection was a technicality that had not caused any

prejudice to the Applicant. He also held the view that the technicality based on the defect in the *jurat* did not create any doubt concerning the authenticity of the affidavit.

[51] The Applicant raised the same arguments concerning the irregularities in the form of the *jurat* in this application for special leave. The Respondent contended *inter alia* that the Ruling of the learned Judge did not dispose so substantially of the matter in issue as to leave only ancillary matters for the final determination of the learned Judge

[52] In the case of *EME Management Services Ltd v Islands Development Co Ltd (2008-2009) SCAR 183*, the Court of Appeal determined that before granting special leave to appeal, it has to be satisfied that the interlocutory judgment disposed so substantially of all the matters in issue as to leave only ancillary matters for determination. The Court of Appeal also determined that it must be satisfied that there were grounds to treat the case as exceptional. To treat a case as exceptional, the Court of Appeal held that an applicant had to show that the interlocutory order was manifestly wrong and irreparable loss would be caused to it if the case proper were to proceed without the interlocutory order being corrected.

[53] I consider this application for special leave in light of the legal principles enunciated in **EME Management Services Ltd**, *supra*.

[54] In the case of *Morin v Pool (2012) SLR 109*, the Court of Appeal referred with approval to the White Book (Supreme Court Practice 1991 Order 41 rule 8) with respect to an objection raised at the appeal concerning irregularities in the form of the affidavit. In *Lablache de Charmoy v Lablache de Charmoy SCA MA 08/2019*, I accepted with approval *Order 41 (R.S.C. 1965)* which deals with the form of affidavits. **Lablache de Charmoy**, *supra* concerned an application to the discretion of the Court of Appeal to stay the execution of an order dated 30 January 2019, in case reference Civil Side175/2017. Counsel for the respondent relied *inter alia* on the defect in the *jurat*. With respect to the form of an affidavit, *O. 41, r. 1 (7)* stipulates — “[e]very affidavit must be signed by the

deponent, and the jurat must be completed and signed by the person before whom it is sworn."

- [55] In **Lablache de Charmoy**, *supra*, I stated at paragraph [27] — "*[i]rregularities in the form of the jurat cannot be waived by the parties. In Pilkington v. Himsworth, I Y. & C. Ex. 612), the court held that : "[j]urat and affidavits are considered as open to objection, when contrary to practice at any stage of the cause. That is an universal principle in all Courts; depending not upon any objection which the parties in a particular cause may waive, but upon the general rule that the document itself shall not be brought forward at all, if in any respect objectionable with reference to the rule of the Court."* In **Lablache de Charmoy**, *supra*, I accepted the submission of Counsel for the respondent that the affidavit was bad in law and refused to admit the defective affidavit as evidence.
- [56] *Savoy Development Limited v Salum SCA MA16/2021*, arising in *SCA10/2021*, also concerned *inter alia* irregularities in the form of the affidavit. In **Savoy Development Limited**, *supra*, Counsel for the respondent relied on the defect in the *jurat*. Twomey JA delivering the judgment of the Court of Appeal, stated, at paragraphs [13] and [14] — "*[13] The Court of Appeal in Lablache de Charmoy (supra) held that irregular affidavits cannot be waived by the parties. Affidavits are sworn evidence and evidential rules for their admission cannot be waived by the Court either. [14] The defect in the affidavit is fatal. In the circumstances, as the Application is improperly supported, it is dismissed with costs"*. [Emphasis is mine]
- [57] In light of the legal principles enunciated by the Court of Appeal, recited at paragraphs [54], [55] and [56] hereof, I find that the defect in the affidavit is fatal. As Twomey JA stated in **Savoy Development Limited**, *supra* — "*[a]ffidavits are sworn evidence and evidential rules for their admission cannot be waived by the Court either"*. I add that Counsel for the Respondent should be mindful that the evidence by affidavit stands in lieu of the testimony of Mr Prinsloo on behalf of the Respondent. It follows, therefore, that the orders made by the learned Judge that the preliminary objections referred to at

paragraph [48] hereof should be dismissed; and that the Applicant should file the reply to the Notice of Motion dated 9 April 2021, supported by evidence by affidavit, cannot stand.

[58] Based on the legal principles enunciated in **EME Management Services Ltd**, *supra*, I exercise my discretion under section 12 (2) (c) of the Courts Act to grant special leave to the Applicant to appeal from the decision of the learned Judge of the Supreme Court.

[59] With costs in favour of the Applicant.

F. Robinson JA

Signed, dated and delivered at Ile du Port on 28 February 2023