

## COURT OF APPEAL OF SEYCHELLES

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### **Reportable**

[2023] SCCA 5 (13 April 2023)

SCA MA 03/2023

(Arising in SCA 22/2021)

In the matter between

**Stefan Renato Petrescu**  
(rep. by Mr Serge Rouillon)

Applicant

and

**Stefan Adrian Iliescu**  
(rep. by Mr Frank Elizabeth)

Respondent

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**Neutral Citation:** *Petrescu v Iliescu* (SCA MA 03/2023) [2023] SCCA 5 (Arising in SCA 22/2021 (13 April 2023))

**Before:** Robinson, Tibatemwa-Ekirikubinza, Andre, JJA

**Heard:** 11 April 2023

**Summary:** Rule 31 (1) of the Seychelles Court of Appeal Rules, 2005, as amended — Discretionary power of the Court of Appeal to receive further evidence — the form of foreign affidavit — defective application — the defect is fatal — application is dismissed with costs

**Delivered:** 13 April 2023

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### **ORDER**

(1) The application is dismissed with costs

(2) The appeal stands listed for hearing on the 14 April 2023.

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### **RULING ON NOTICE OF MOTION**

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#### **ROBINSON JA**

1. The Applicant is Stefan Renato Petrescu hereinafter referred to as "*Renato*" and the Respondent is Stefan Adrian Iliescu, hereinafter referred to as "*Adrian*".

2. This ruling deals with an application that further evidence be allowed to be produced in connection with the hearing of the appeal in case reference SCA 22/2021. The appeal listed to be heard on the 14 April 2023 is against the judgment of a learned Judge of the Supreme Court entering judgment in favour of Adrian together with costs. Renato, by Counsel, has filed an amended notice of appeal on the 1 March 2023, after having been granted leave by the Court of Appeal to file an amended notice of appeal.
3. Adrian resisted the application asking the Court of Appeal to exercise its discretion to receive further evidence. Adrian, by Counsel, filed pleas in *limine litis* on the basis of which he urged the Court of Appeal to dismiss the application *inter alia* on the ground that the affidavit was defective.
4. At the hearing of the application, both Counsel informed the Court of Appeal that they would not be making any *viva voce* submissions and would rely on their written submissions.
5. This application is made under rule 31 (1) of the Seychelles Court of Appeal Rules, 2005, as amended, which stipulates —

*"(1) Appeals to the Court shall be by way of re-hearing and the Court shall have all the powers of the Supreme Court together with full discretionary power to receive further evidence by oral examination in Court, by affidavit or by deposition taken before an examiner or commissioner."*

6. Rule 31 (1) of the Seychelles Court of Appeal Rules, 2005, as amended, dealing with the discretionary power of the Court of Appeal to receive further evidence, bears a close resemblance to O. 59. r. 10 subr. (2) of the Supreme Court Practice 1970, Volume 1, which reads as follows—

*"59/10.— (2) The Court of Appeal shall have power to receive further evidence on questions of facts, either by oral examination in court, by affidavit, or from a judgment after trial or hearing of any cause or matter on the merits, no such further evidence (other than evidence as to matters which have occurred after the date of the trial or hearing) shall be admitted except on special grounds."*

7. Lord Denning L.J. in *Ladd v Marshall* [1954] 1 WLR 1489, laid down three conditions to be satisfied before further evidence can be received in the following terms —

*"When a litigant has obtained a judgment in a Court of Justice [...] he is by law entitled not to be deprived of that judgment without very solid grounds" (Brown v Dean [1910] A.C. 373, p. 374, per Lord Loreburn L.C. who adds that the maxim "interest reipublicae ut finis sit litium" is applicable). If it is sought to deprive him of his judgment by further evidence, three conditions must be satisfied before it can be received: "first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive, thirdly, the evidence must be such as is presumably to be believed, or, in other words, it must be apparently credible though it need not be incontrovertible."*

8. The Court of Appeal in *Parcou v Laporte* SCA63/2019 [2022] SCCA 13 [29 April 2022] referred to *General Insurance Company of Seychelles v Bonte* SCA 6/1994 (12 August 1994) and *Charles V Charles Civil Appeal 1/2003* (3 December 2004) in which the Court of Appeal reiterated the conditions to be fulfilled before further evidence could be received in the exercise of its discretionary power (at paragraph 39 of **Parcou**) —

*"The evidence must not have been obtainable at trial despite reasonable diligence;*

*The evidence must have an important influence on the result of the case.*

*The evidence must be prima facie credible.*

*Whether or not the new evidence will be prejudicial to the other party."*

9. Having set out the principles by which further evidence can be received by the Court of Appeal in the exercise of its discretionary power, we now consider the application.
10. Counsel for Renato, in his written submissions, is asking the Court of Appeal, in the exercise of its discretionary power, to receive two items of evidence, namely "a. a formal ruling from a Romania Prosecutors Tribunal dated 20<sup>th</sup> April 2021 in case 122/P/2019

[...]; and b. a final ruling of the Romania Bucharest Appeal Court in case SC GBC CRIAD SRL v Petrescu Stephan Renato dated 16<sup>th</sup> May 2022 file. number 3953/2/2019 [...]." (at paragraph 2 of the written submissions). We mention that the two items of evidence have been annexed to Renato's application. Counsel for Renato contended, in essence, that the application meets the test laid down in **General Insurance Company of Seychelles** [supra] and **Charles v Charles** [supra].

11. In raising the plea in *limine litis* that the affidavit is defective and should be struck out, Counsel for Adrian contended essentially in his written submissions that the "*application is bad in law and liable to be dismissed as it seeks to rely entirely on a foreign judgment delivered in Romania and the judgment has not been recognised in the Seychelles court in order to render it admissible under Seychelles law*". Having considered with care Renato's application, the pleas in *limine litis* and the written submissions of both Counsel, we opine that there is only one point for consideration, and that is the form of the affidavit filed in support of the matter.
12. In this regard, we consider whether or not the way the affidavit was sworn was regular. Renato's application is supported by a document in a foreign language. An affidavit in the English language entitled, "*AFFIDAVIT IN SUPPORT OF APPLICATION AND MOTION*" supports his application. We observe that the affidavit written in English immediately follows the document written in a foreign language. Various documents have been annexed to the document in a foreign language and the "*AFFIDAVIT IN SUPPORT OF APPLICATION AND MOTION*". We also mention that there is a certificate (*apostille*) titled "*Apostille (Convention de la Haye du 5 Octobre 1961*". The certificate, when correctly filled in, will certify the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp that the document bears. See *Onezime v The Attorney General and Another (SCA CL03/2021) [2022] SCCA 20 (29 April 2022*. We observe that the certificate, other than the title in French, is in a foreign language.
13. The issue for consideration, as mentioned above, is whether or not the way the affidavit was sworn was regular. We have to turn to English law on the matter in the absence of

any local provision governing this aspect of our law of evidence. We read from **Halsbury's Laws of England Fourth Edition**, paragraph 321, page 223 on the filing of affidavits —

*"(8) FILING AND OFFICE COPIES OF AFFIDAVITS*

*321. Filing affidavits. [...]. In the case of an affidavit in a foreign language, there must be filed with it a translation and an affidavit from the translator verifying the translation and annexing both the original affidavit and the translation. [...], see Re Sarazin's patent (1947) 64 R. P. 51."*

14. We also read from the Supreme Court Practice 1976, para 41/12/5, which stipulates —

*"Filing Affidavit in Foreign Language. — "When it is desired to file an affidavit in a foreign language the usual course is to obtain a translation of such affidavit by a qualified translator, and to annex the foreign affidavit and the translation as exhibits to an affidavit by the translator verifying the translation. The three documents are filed together, filing fees being paid for two affidavits." See Re Sarazin's patent (1947) 64 R. P. 51."*

[Emphasis supplied]

15. This procedure has not been adopted in the present case.
16. For the reasons stated above, we cannot receive the evidence of Renato in the form of an affidavit for the purpose of being used in this matter.
17. In *Savoy Development Limited v Salum SCA MA16/2021*, arising in SCA10/2021, Twomey JA stated at paragraphs [13] and [14] — "[13] *The Court of Appeal in Lablache de Charmoy (supra) held that the parties cannot waive irregular affidavits. Affidavits are sworn evidence and evidential rules for their admission cannot be waived by the Court either.* " In **Savoy Development Limited**, Counsel for the respondent relied on defect in the *jurat*. Twomey JA considered the defect in the affidavit to be fatal. She dismissed the application with costs.

18. In the present case, the defect is fatal. In the circumstances, as Renato's application is improperly supported, the case is dismissed with costs.
19. The appeal stands listed to be heard on the 14 April 2023.

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F. Robinson JA

I concur:-

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Dr. L. Tibatemwa-Ekirikubinza JA

I concur:-

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S. Andre JA

Signed, dated and delivered at Ile du Port on 13 April 2023.