

**Krishnamart & Company v Opportunity International
(2007) SLR 73**

Charles LUCAS for the applicant/defendant
Francis CHANG-SAM for the respondent/plaintiff

Ruling delivered on 20 July 2007 by:

GASWAGA J: A notice of motion dated 29/01/2007 was filed by the defendant, now applicant, for the orders that:

- a) The cause of action for failure to comply with the Court's orders for the respondent to pay costs of the petition for a new trial filed by the applicant at the rate of R4,310 to be dismissed.
- b) The R500,000 paid by the applicant to respondent's counsel in part-satisfaction of the first judgment which was set aside is refunded.

When the same came up for hearing Mr Chang-Sam, who was appearing for the plaintiff, now respondent, raised an objection that the said application does not comply with the requirements of sections 121 and 122 of the Civil Procedure Code and therefore no proper motion is before the Court.

Although such a motion for incidental demands must be accompanied by an affidavit, the present application has what he called a 'document' attached to it titled 'Affidavit' and signed at the bottom by Ms Lucy Pool as an attorney-at-law instead of a notary public or somebody qualified and authorised to attest.

The relevant sections of the law provide thus:

121. Either party of a suit may, in the course of such suit, apply to the Court by way of motion to make an incidental demand."

122. The motion shall be accompanied by an affidavit of the facts in support thereof and shall be served upon the adverse party.

The relevant part of the document 'Affidavit' is reproduced below:

(Signature of P. K. Pillay)
DEPONENT

Sworn Before Me
This 29th day of January, 2007.
At Victoria, Mahe, Seychelles.

(Signature and stamp of Lucie Pool Attorney-At-Law)

Mr Charles Lucas submitted that the stamping of the affidavit by Ms Lucy Pool with her attorney-at-law stamp instead of the notarial stamp was a human error which he conceded and at the same time regretted. He further stated that the said error was not fatal per se as Ms Pool was in a position to rectify it after filing an affidavit or offering an explanation on oath to the Court. The Court was also invited to take note of the fact that Ms Pool is a notary public well-known to all agencies, authorities, and ministries of the Republic of Seychelles and the judiciary and she always signs documents in that capacity some of which are filed and accepted in Court.

In relation to affidavits, Mr Lucas cited the authority of *Paul Chow v The Commissioner of Elections* (unreported) CC 3/ 2007 wherein the Constitutional Court allowed the petitioner's affidavit despite certain flaws in it. He then concluded that it was the signature of Ms Pool and not the stamp that is proof of authenticity of her status as a notary and since the trial Judge can identify her signature then it ought to be accepted as a notary's signature irrespective of the erroneous stamping.

The law regarding commissioning of affidavits is enshrined in section 171 of the Civil Procedure Code which reads as follows:

171. Affidavits may be sworn in Seychelles-

- (a) Before a Judge, a Magistrate, a Justice of the Peace, a Notary or the Registrar; and
- (b) In any cause or matter, in addition to those mentioned in paragraph (a) before any person specially appointed for the purpose by the Court.

Section 122 (supra) provides for an 'affidavit of fact' in support of the motion. This affidavit of fact is actually evidence given on oath whose purpose is to obviate the necessity for the Court to hear oral evidence (on oath). Therefore, there must be a clear indication on the face of the affidavit to the effect that the facts adduced have in fact been sworn to by the deponent and before a person authorised by law to attest or commission such documents, otherwise it loses its legal cogency. It should be stressed that a legal document must speak for itself without requiring any follow up or explanation from its Commissioner (notary), author or deponent. Even in a small jurisdiction like ours where everybody knows everyone, it is immaterial whether the Judge or the reader encountering such document knows the status of its Commissioner or the circumstances under which it was prepared.

Suffice it to say that although in Seychelles the functions of a notary public and attorney-at-law can be fused and embedded in one and the same person, there is a clear and distinct demarcation when it comes to executing the two independent roles. Indeed there is no doubt that Ms Pool is both an attorney-at-law and a notary public and has signed various court documents in the different capacities, each capacity with

a distinct role to play.

Regarding the affidavit or document in question, she signed it in her capacity as attorney-at-law and proceeded to stamp it as such. It would be unfair for the Court to take on the onerous duty of speculating or venturing to look into the intention of Ms Pool when she signed the affidavit in that capacity other than that of notary public. That document has not passed the above test since its purported commissioner is precluded by section 171 (supra) and as such cannot qualify as an affidavit of fact envisaged in section 122 (supra). The applicant and his counsel ought to have acted with more diligence and responsibility by at least perusing the pleadings for possible defects before filing the same in Court.

In my view no amount of explanation can remedy the situation apart from rectifying it by way of amendment or filing a new affidavit.

Unlike in the present case, in *Paul Chow v The Commissioner of Elections and United Opposition v Attorney-General* (unreported) CC 8/1995, the Constitutional Court was prepared to put up with the defects in the affidavits on the reasoning that

... petitions seeking redress of infringements of fundamental rights and contraventions of provisions of the constitution should not generally be defeated by procedural deficiencies, unless such deficiencies are fundamentally fatal to the maintenance of such petitions.

Further, the former case was of a very urgent and sensitive nature calling for an immediate solution. It involved a challenge of the constitutionality of an impending general election which affects the whole country.

In the case of *Mrs Mersia Chetty v Krishna Levy Chetty* (unreported) CS 417/2006 I stated that -

....merely not being supported by an affidavit is not enough reason to warrant a dismissal of a motion especially where the grounds to be argued require no evidence and are, for instance, purely matters of law. A motion drawn in the prescribed form and in general terms sufficiently setting out the grounds on which it is made would suffice where no evidence is required. (see *Odongokara v Kamanda* (1968) EA 210).

This is an application for incidental demands which, by their very nature and as seen above would require adducing of evidence. There being no accompanying affidavit this application must be found incompetent and dismissed as prayed by Mr. Chang-Sam but without costs. Unless for academic purposes this Court sees no reason in dealing with the other matters raised in the defective application.

Record: Civil Side No 111 of 2003