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IN THE SUPREME COURT OF SEYCHELLES

Civil Side: MA 317/16

arising in MC25/2014

[2018] SCSC 347

A.S.

Petitioner

versus

M.E.

Respondent

ATTORNEY GENERAL

Ministère Public

Heard: 24 August 2018, 11 January 2018, 1 February 2018, 28 February 2018

Counsel: Mr. Somasundaram Rajasundaram for plaintiff
Mr. Frank Ally and Ms. Manuella Parmentier for defendant
Ms. Emily Gonthier for Ministère Public

Delivered: 5 April 2018

Judgment

M. TWOMEY, CJ

- [1] In February 2014, the Petitioner, who had been interdicted on 30 January 2005 applied to the Supreme Court to have his interdiction lifted. The guardian appointed on his interdiction was his sister, the Respondent.
- [2] Before the application for the lifting of the interdiction could be heard, a second application which became subsumed within this application was made in which the Petitioner applied either for his interdiction to be lifted or his wife to be made his guardian in place of the Respondent. It is this matter that is now the subject of much litigation.
- [3] At the trial, the Petitioner testified that he married his wife, J.S. on 19 May 2015 and that they were living at M.. His wife had six adult children from a previous relationship and four of them lived with them. He got on well with them. He understood that the Respondent had been appointed as his guardian in order to assist him. At the time they were getting on well and he was drinking a lot and he wanted someone from his family to assist him.
- [4] He stated that his sister was no longer helpful to him, that he had changed his drinking habit and his wife was very supportive of him. He admitted that he had been living with the Respondent previously to their marriage. He stated that he could manage on his own, although he suffered from tremors which however did not stop him gardening. He thought that his tremors were caused by the interaction with his family members.
- [5] He spoke haltingly in court and became very emotional when asked awkward questions. At one point he had great difficulty speaking. He also displayed involuntary tremors of both arms while testifying. He was however able to do simple mathematics and was fully aware of his surroundings. He admitted fighting in the workplace when people called him names. He also stated that he was no longer working but when he was, his family kept all his money. Now his wife collects all his pension and he can buy whatever he wants. Before when he asked for money his family would not give it to him. He also gave money to his wife and for his contributions at the Housing Finance Company Ltd.(HFC).

- [6] He admitted having stolen from a neighbour before the interdiction order. He seemed unaware of the money in his account in the bank but stated that his family blocked his accounts and he had to resort to begging. He was aware that the money his siblings had saved for him was to go towards a house for him but stated that they should have left him, the way he was. He wanted a three bedroom house while they wanted to build him a two-bedroom house with no veranda.
- [7] He was of the view that his sister did not love him but only the money and the land. She did not greet him when she met him. Hr agreed that it was his brother P. who had made contributions towards the purchase of his land. He also admitted that his family had applied and obtained planning permission for his house.
- [8] J.S., the Petitioner's wife also testified. She stated that she had been living with the Petitioner for eleven years before they got married. At first he only had mental issues but now he also had other health conditions but she was comfortable living with him. She worked both office hours and outside hours and during those times the Petitioner was at home with her kids. She wished to be his guardian. She had at one point in their relationship moved into the Respondent's house with him and had stayed there for four years. They had had disputes as spouses but there had been no physical violence.
- [9] She stated that she had not known that her husband had land and money because they did not speak of such things. She admitted that her husband needed guidance. She collected his pension and gave him SR1, 500; the rest she kept for his outgoings. She stated that they were encouraged by HFC to make payments on a deposit for a house and land. They had so far contributed SR23, 000. She admitted that she could not give her husband all his pension in one go and that he was a vulnerable person and that someone had to manage his affairs.
- [10] Mrs. M.B., a clinical psychologist also testified. She had had sessions with the Respondent five times from 2016 to 2018. He had slightly improved in terms of daily living activities. He was presently handling his medication independently with minimal interference from alcohol. The Respondent had also been diagnosed with Parkinson Disease. She was equivocal about the Respondent managing his own affairs, first stating

that it would not be fair to ask him to do that and then stating that he could operate an account on his own. She also stated that although she had stated in her report that the Respondent had temporary suspension of short term memory she was referring to dissociative episodes he experienced from post-traumatic stress. She admitted that he had “eminent emotional issues”. She admitted that she had not interviewed his family members, only his wife. She also stated that it was her view that the Petitioner was better and when pushed about his obvious degenerative condition stated that he would be happier in the future.

[11] The Respondent testified. She was a banker. She was the Petitioner’s guardian since 2006. Her brother’s mental health was stable until 2013 when he was diagnosed with Parkinson’s and then his health deteriorated. The Petitioner had lived in her house with his partner until things started going wrong. He had poured water onto her wooden floor deliberately. She had attempted to bring him to the doctor but later learnt that his partner had taken him instead.

[12] She had told him that since he had land next to her she would start the process to have him have his own house. The family had contributed to an account together with the Petitioner to fund the construction of his house.

[13] He got into trouble at work so he was advised to stay home and help out the family with odd jobs for which he was paid. That money was invested together with contributions from the family. When his partner got to know of this she wanted to take over the project herself. Then he started proceedings in the Family Tribunal stating that she was not helping him. His partner influenced him to bring this matter to court. She was not aware her brother married his partner until recently and without her permission or her knowledge.

[14] She was aware that her brother wanted to have the money saved in his account to give his wife for her business. She only wanted to look after her brother’s best interest and to ensure his happiness. She was upset that her brother had turned against her and treated her the way he did.

- [15] In cross examination she stated that in the past her brother had kept regular contact with her and she gave him his bank statements. She communicated more with his wife. They discussed his medication when she had last spoken to her.
- [16] She was no longer able to visit her brother. During the time she was his guardian, she managed his finances, and she generally kept an eye on him. She had at one time rented a place for him when his health was bad. She agreed that he looked clean but was unaware of what went on inside his home. She thought the priority was for him to have his own home and not to be spending money renting a place. She wanted to remain on as guardian to safeguard his interests. The family had received adverse reports about his wife. At one point in the past she had left him and had been unfaithful towards him. She stated that the family would always be there for him.
- [17] Mrs. A.M., testified on behalf of the Respondent. She was also a banker by profession and the Petitioner was her little brother. He'd had a difficult birth and infancy and had suffered from epilepsy. He worked when he was older but was easily influenced by others. He could not plan for the future. His siblings consulted him and agreed to provide for him while his money was invested in a savings account to build a home for him.
- [18] He had difficulties at the different places he had worked by others influencing him and getting him to do things he was not permitted to do and then giving him alcohol. At one time the Petitioner withdrew money willy-nilly and even lost his bank pass book. It was subsequently agreed that a joint account with both signatories having to sign to permit withdrawals be opened instead.
- [19] He withdrew money sensibly then, to go on holidays to Germany and then twice to Scotland to his sisters but on the fourth occasion he had difficulties getting into the UK as he had overstayed previously. Then he started getting upset about his siblings' refusal to him withdrawing money without a reason. He started insulting his sister, taking things from his brother's shop to give to members of the public. That was when it was agreed to obtain a guardianship order in relation to him.

[20] He had initially consented to a two bedroom house being built for him but after meeting his wife changed his mind and said he wanted a three bedroom house. He had moved into the Respondent's house but towards the end started damaging it deliberately. The relationship with his siblings started deteriorating at that stage. None of them were aware that the Petitioner was getting married. He behaved irrationally, had insulted his mother, slapped and kicked the witness after being asked for a receipt for a survey he had conducted to identify the beacons on his land. She was anxious about the Petitioner's wife being substituted for his present guardian as she knew that when contradicted about money the Petitioner would get annoyed and act out.

[21] They had never done anything as a family where it concerned the Petitioner without consulting and getting his approval. All her siblings including the ones overseas had discussed the Petitioner's application and wanted the Respondent to remain as his guardian. She knew her brother well as she was the eldest child and had been with him since he was born. Her brother did not comprehend the consequences of his actions. Even after he was with his wife he had stolen things from [a company], his employers. He did not agree that her brother could do things independently and that he was getting better. She was not of the view that her brother could build a house without their assistance. She was anxious that if his brother got on the wrong side of the law the family would have to pick up the pieces. She had received reports of her brother's ill treatment by his wife from neighbours and that she absents herself from the home telling him she is working nights.

[22] During the course of the trial it became obvious the Petitioner had married his wife, J.S. without his legal guardian's permission. The marriage certificate (Exhibit P1) certifies that the parties were married with no consent required. That therefore became an issue and the parties were asked to make specific legal submissions in that respect.

[23] In this regard, both learned Counsel for the Respondent and the Ministère Public respectively, have submitted that since the Respondent's permission for the marriage was not sought, the marriage was therefore null pursuant to both the provisions of Article 502 of the Civil Code and section 12(1) of the Matrimonial Causes Act. By contrast, in his closing submissions learned Counsel for the Petitioner has submitted that the Respondent

ratified the Petitioner's marriage by not challenging it and that Article 502 in any case had no application in regards to the act of marriage.

[24] It is helpful at this juncture to bring to light the relevant provisions of the Civil Code of Seychelles in relation the capacity of interdicted persons:

“Article 499 - If the Court rejects the request for interdiction, the Court shall nevertheless, be empowered, if the circumstances require it, to order that the Respondent shall no longer be allowed to compromise, borrow, receive any capital, or give receipts therefor, alienate or mortgage his property, without the assistance of a person, who shall be appointed in the same judgement.

“Article 502-The interdiction or the appointment of a person to look after the interest of a person in need of such assistance under Article 499 shall have effect as from the day of judgment. All legal acts executed subsequently by the interdicted person or the person in need of protection, as provided by Article 499, shall be null by operation of law.

Article 509 – The interdicted person is assimilated to a minor. Both in regard to his person and to his property; the laws relating to the guardianship of minors shall apply to the guardianship of interdicted persons.

[25] The above provisions make it clear that an interdiction is a harsh remedy. It has been described as a kind of civil death, with the interdict's active role taken over by a guardian. Interdiction is permitted in Seychelles in cases of persons who are “habitually feebly minded, insane or a lunatic...even if he has lucid intervals” (viz Article 589). Articles 502 and 509 indicate the consequences of the interdiction on the interdict and his guardian. As the consequences of an interdiction are so severe the provisions of Article 499 of the Civil Code provides an alternative for an interdiction by the court.

[26] The consequences of interdiction are spelt out in Article 509- the rights of the interdict are assimilated to that of a minor's. Demolombre defined interdiction as:

*“la defense faite à une personne d’exercer elle-même ses droits civils”*¹

[27] He identified three interests that interdiction protects: that of the interdict, that of the family, and that of the state.² Planiol goes as far as stating that interdiction is a regime of judicial protection as interdicts “may have dealings with dishonest persons who would take advantage of them and rob them.”³ Hence, Article 502 declares that all the “legal acts” executed by an interdict are null by operation of law.

[28] Learned Counsel for the Petitioner has sought to limit “legal acts” to those specified in Article 499. That is not an interpretation this court can accept given the clear wording of Article 502. French law makes a distinction between *actes juridiques* (legal acts) and *faits juridiques* (legal facts). A legal act is a manifestation of will destined to produce legal effects, for example a contract. A legal fact is material event that does not involve an expression of will but which nevertheless has legal effects, for example births and deaths.

[29] A contract of marriage is a legal act as it involves the will of both parties to the marriage. **An interdict cannot marry simply because he is incapable of contracting and/or giving consent. Section 41 of the Civil Status Act provides that there is no marriage where there is no consent.**

[30] Where the decision to marry involves an interdicted person, Article 509 of the Seychelles Civil Code directs the Court to treat the interdicted person as a minor.⁴

¹ 8 C. Demolombe, Cours de Code Napoleon § 410 (1880)

² Ibid, § 421

³ 1 Marcel Planiol et Georges Ripert, Traité pratique de droit civil § 659 (2^{ed} 1952)

⁴ Additionally, a Court determining rights of a disabled person should be mindful of Seychelles’s obligations under the UN *Convention on the Rights of Persons with Disabilities*, which the Seychelles ratified on 2 October 2009. In particular, a Court should be mindful of Article 23 entitled “Respect for home and the family”, which provides that:

1. States Parties shall take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships, on an equal basis with others, so as to ensure that:

(a) The right of all persons with disabilities who are of marriageable age to marry and to found a family on the basis of free and full consent of the intending spouses is recognized;

UN General Assembly, *Convention on the Rights of Persons with Disabilities : resolution / adopted by the General Assembly, 24 January 2007, A/RES/61/106*, available at: <http://www.refworld.org/docid/45f973632.html> [accessed 3 April 2018].

While Seychellois law grants an interdicted person - who is determined to have the capacity to consent to marriage - the right to marry, a question remains regarding the scope of the Judge's power to nullify a marriage, where the interdicted person lacked the capacity to consent at the time of marriage.

- [31] In this regard, sections 46 and 47 of the Civil Status Act, which deal respectively with the consent requirements for legitimate (§ 46) and illegitimate (§ 47) minors, essentially provide that the acknowledged father's consent or in the alternative, the mother's consent, suffices to meet the consent requirement for the marriage of the minor.
- [32] At first glance, sections 46 and 47 may create a certain confusion as to whether the consent required should be given by a parent or the guardian. When read together with Article 509, however, any confusion is dispelled as it indicates that an interdicted person is to be assimilated to a minor with a guardian, where the guardian may or may not also be the father or mother. Indeed, section 47, dealing with illegitimate minor, further provides that where the father has been refused the guardianship of the child, the consent of the guardian shall also be required.
- [33] However, where the parents or guardian whose consent is necessary to any marriage withhold their consent to any marriage, section 49 entitled "Appeal from refusal of parent or guardian to give consent" provides that it shall be lawful for the minor/interdicted person to "*appeal*" such refusal through an application by petition to a judge.
- [34] Upon such application being made, section 49 adds that "the judge may, after examining any person on oath touching any facts he may deem relevant to such application, declare that such marriage is proper and may be celebrated, and thereupon such marriage may be celebrated and shall be as valid as if the consent of such parent or guardian has been given thereto."
- [35] Additionally, where consent of a guardian is required, section 69 of the Civil Status Act provides that proof of such consent will be established in the following ways:

whose “(1) The signature or mark on the act of marriage of any parent or guardian consent is required by law shall be proof of such consent.

(2) Such person may signify his consent to the marriage-

that (a) by a writing signed by him in the presence of two witnesses who shall attest the writing was signed in their presence and sign such writing; or

(b) by a writing marked by him in the presence of any of the following namely: a Magistrate, a Justice of the Peace, a Minister of a Christian Religion, a Barrister-at-Law, an Attorney, a Notary, a Medical Practitioner, a Civil Status Officer, who shall attest that the writing was marked in his presence and sign such writing.

Such writing which shall fully mention the names, surnames, professions and residences of the parties to the marriage, shall be produced to the officer celebrating the marriage and shall be kept by him and the officer shall, in the margin of the act of marriage, mention such writing.

(3) When the consent of a judge has been given to a marriage this fact shall be mentioned in the margin of the act of marriage together with the date on which such consent was given.”

[36] Finally, section 50 provides that: “No marriage shall be rendered null and void for the reason of lack of consent of any parent or guardian if in fact the consent of a judge to such marriage was given.” Conversely, where a marriage has not been obtained with the consent of a judge, it follows that a judge may nullify a marriage if the guardian’s consent was missing (§ 50).

[37] Nevertheless, in the present circumstances, a question remains as to the scope of my power to nullify the marriage of the interdicted person who lacked the consent to marry at the time of his marriage, particularly where there was no application to nullify the marriage. *A priori*, upon application, if an interdicted person is determined to have lacked the consent to marry and that such marriage was not obtained with the consent

of a guardian or of a judge, the judge hearing the matter must nullify the marriage. In the present case, no such application has been brought. The matter was brought to my attention in the course of the Respondent's testimony and that of her witness, her sister. This begs the fundamental question of (a) what is the legal test for capacity to marry and (b) the conditions for nullifying a marriage.

[38] While the Seychellois courts do not appear to have addressed this matter, the French Constitutional Court indirectly addressed the issue after being seized by the French Supreme Court.⁵ The French Constitutional Court dealt with the issue of whether the statutory requirement that *une personne en curatelle* obtain an authorisation was in conformity with the right to matrimonial liberty protected by the Constitution.⁶ Following the Constitutional Court's ruling that such an authorisation was constitutional, the French Supreme Court upheld the Court of Appeal's decision to refuse an interdicted person the right to marry stating that:

« [L]a cour d'appel, après avoir analysé tant les certificats établis par le médecin psychiatre qui a examiné M. X... que les autres éléments d'appréciation versés aux débats, a estimé, en considération de l'évolution psychopathologique des troubles présentés par l'intéressé et de sa perte de maîtrise des réalités financières, que celui-ci n'était pas en mesure de donner un consentement éclairé au mariage ; que cette appréciation souveraine, qui échappe aux griefs du moyen, justifie légalement sa décision. »⁷

[39] In short, in evaluating the interdicted person's capacity to consent, the French Supreme Court apprehended marriage through an angle that emphasized its status as consisting of personal and patrimonial obligations. Indeed, the French Supreme Court elevated the "*perte de maitrise des réalités financière*" as a decisive factor in assessing the

⁵ Cons. const., Décision n° 2012-260 QPC du 29 juin 2012. Available at: <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2012/2012-260-qpc/decision-n-2012-260-qpc-du-29-juin-2012.114848.html> .

⁶ While the right to marriage is not expressly mentioned in the French Constitution, the Constitutional Court indicated that: la « liberté du mariage, composante de la liberté personnelle, résulte des articles 2 et 4 de la Déclaration des droits de l'homme et du citoyen de 1789 ».

⁷ Cour de cassation, civile, Chambre civile 1, 5 décembre 2012, 11-25.158, Publié au bulletin. Available at: <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000026742041&fastReqId=489105625&fastPos=3> .

interdicted person's capacity to consent to marriage.⁸ Though such a view has been criticized by the *doctrine*,⁹ it is not inconsistent with decisions taken in the UK that have emphasized that the test for the right to marry is not a complex or sophisticated one, but that one seeking to marry should understand the reasonable consequences of marriage, including the financial or patrimonial ones.¹⁰

[40] In general, a judge evaluating whether an interdicted person can marry must determine (1) whether the interdicted person has capacity to consent, which the Judge will evaluate by considering the medical evidence and evidence of any interested person in order to assess whether the interdicted person understands the obligations resulting from the marriage and (2) whether the guardian has consented (or given his/her authorisation) to such marriage.

[41] Where the consent/authorization of the guardian is denied, the interdicted person may “appeal” such a refusal. In such a case, supposing the interdicted person has the capacity to consent, the judge will have to determine whether to authorize the interdicted person to marry.

⁸ Céline RUET, « *Protection de la personne en curatelle, liberté matrimoniale ou droit au mariage : l'approche interne confrontée à l'approche européenne* », *La Revue des droits de l'homme* [En ligne], 5 | 2014, mis en ligne le 27 mai 2014, at para. 1.

⁹ See *id.* RUET criticizes the decision of the Constitutional Court and states that: « [L]e Conseil constitutionnel aurait pu mettre l'accent non seulement sur les obligations nées du mariage mais également sur la volonté de mener une vie conjugale, qui implique la volonté d'une communauté de vie d'une certaine nature, liant durée, assistance, respect et fidélité, et qui est essentielle à la formation du mariage. **Or le caractère personnel de l'acte n'est appréhendé que par référence aux obligations personnelles et non sous l'angle de la volonté des époux eu égard à la finalité de l'union . . .** Cependant l'aptitude à consentir au mariage suppose bien en réalité de se référer à une certaine conception de la nature du consentement matrimonial, qui peut, ou non, intégrer la considération du but de l'institution. Le Code civil n'appréhendait le mariage que par ses effets, le consentement matrimonial est susceptible d'être entendu en doctrine de manière relativement différente. **Examinant l'impossibilité de donner un consentement véritable, le traité d'Aubry et Rau énonce que « l'état de démence présente une infinité de degrés, et un homme d'ailleurs incapable de gérer ses affaires peut, malgré la faiblesse de ses facultés intellectuelles, être en état de comprendre la nature et le but du mariage ».** Dans cette perspective doctrinale, l'aptitude à consentir s'apprécie en relation avec la finalité de l'institution, alors que l'intention matrimoniale et l'aptitude à consentir au mariage sont abordées par la doctrine contemporaine de manière distincte. **Quand l'aptitude au consentement est en jeu, et qu'il ne s'agit pas d'exclure certaines motivations étrangères au mariage, le Conseil constitutionnel appréhende le mariage seulement sous l'angle de ses effets, conformément à l'approche civiliste actuelle : il s'agit de consentir à un ensemble d'obligations.** » See *id.* paras. 11-12 (emphasis added).

¹⁰ See [2017] EWCOP 32 (holding that the person should be able to understand, retain, use and weigh information as to the reasonably foreseeable financial consequences of a marriage). Available at: <http://www.bailii.org/ew/cases/EWCOP/2017/32.html> .

[42] It is clear from the marriage certificate (Exhibit P1) that consent of either the guardian or a judge was not obtained. Under the heading (Names, surnames, NIN of parents or guardians whose consent is required...) is the entry made by M. Labrosse, Officer of the Civil Status: “No consent required”

[43] Although no application for nullifying the marriage was made and since the matter is before me I cannot ignore an act done against the law and public policy

[44] There are two texts in our statutory law that refer expressly to the nullification of a marriage: section 50 of the Civil Status Act (discussed above) and section 12 of the Matrimonial Causes Act. Section 12 (1) provides *inter alia* that a Court may, upon application, grant an order of nullity if:

“(b) a party to the marriage had not, at the time of the marriage, obtained the required consent in terms of the Civil Status Act and any other written law;

...

(f) a party to the marriage was, at the time of the marriage, a mental patient in terms of the Mental Treatment Act or suffering from a mental disorder or if unsound mind; and

...

(g) a party to the marriage did not give a valid consent to the marriage by reason of mistake, fraud, duress, unsoundness of mind or any other legal incapacity.”

[45] Section 12(2), however, provides that the Court shall not grant an order of nullity:

“(b) in the case referred to in subsection (1)(b), unless proceedings for the order of nullity were instituted by a party to the marriage or a person whose consent to the marriage was required within 12 months of the marriage;

(c) in the case referred to in subsection (1)(f), (k) or (l)-

(i) unless proceedings for the order were instituted within 12 months of the date of the marriage;

(ii) unless the court is satisfied that the petitioner was at the time of the marriage ignorant of the facts alleged;

(iii) unless the court is satisfied that the petitioner had not consented to intercourse with the respondent since the discovery by the petitioner of the alleged facts; and

(iv) if the respondent satisfies the court that it would be unjust to grant the order of nullity;

(d) in the case referred to in subsection (1)(g), (i) or (j)-

(i) unless proceedings for the order were instituted within 12 months of the date of the marriage;

(ii) unless the court is satisfied that the petitioner was at the time of the marriage ignorant of the facts alleged; and

(iii) if the respondent satisfies the court that it would be unjust to grant the order of nullity;”

[46] More importantly, section 103 of the Civil Status Act provides that: “Any order of a judge or magistrate or judgment of the court for the amendment, rectification or annulment of any act shall not be binding upon any interested party who shall not have either moved or applied for such order or judgment or shall not have been made a party to it” (emphasis added).

[47] While the initial provisions of section 103 expressly preclude a Judge from issuing an order on its own accord, the last clause appears to implicitly allow a Judge to issue such an order, so long as the concerned party (ies) have been made party to the proceedings.

- [48] This is to be contrasted with French law, which distinguishes between two types of nullifications (*nullité relative* and *nullité absolue*) depending on the nature of the irregularity.
- [49] With respect to *nullité relative*, it can generally only be invoked by parties concerned (*i.e.* the spouses and the guardian),¹¹ and it applies to instances, *inter alia*, where the consent to marriage was obtained through violence or moral coercion or when the guardian's consent was missing. Where the guardian's consent is missing, the Civil Code provides that where the guardian has failed to act within a period of one year following the celebration marriage, the guardian will be found to have tacitly consented to the marriage.
- [50] On the other hand, with respect to the *nullité absolue*, the French Civil Code provides that all interested persons may seek the nullification of the marriage. While French law does not expressly provide that a Judge may raise such a nullity affecting *l'ordre public* of her own accord, the jurisprudence appears to have allowed it.¹² The French Civil Procedure Code, however, provides that the facts on which such a decision is based must have been part of the debate (Article 7) and the facts must have been examined in conformity with the principle of a right to a fair hearing (*principe du contradictoire*) (Article16).¹³

¹¹ *But see* Cour de Cassation, Chambre commerciale, du 3 mai 1995, 93-12.256, Publié au bulletin. Available at: <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000007033469&fastReqId=1541450926&fastPos=1> (indicating that the French Supreme Court has raised a relative nullity *sua sponte*).

¹² Cour de Cassation, Chambre civile 1, du 22 mai 1985, 84-10.572, Publié au bulletin. Available at : <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000007014961&fastReqId=318146329&fastPos=1> ; Cour de Cassation, Chambre civile 1, du 14 juin 2005, 03-10.192, Publié au bulletin. Availableat:<https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000007051371&fastReqId=2027007071&fastPos=1> .

¹³ Article 7 of the French Civil Procedure Code provides that : « *Le juge ne peut fonder sa décision sur des faits qui ne sont pas dans le débat. Parmi les éléments du débat, le juge peut prendre en considération même les faits que les parties n'auraient pas spécialement invoqués au soutien de leurs prétention* » ; Article 16 provides that : « *Le juge doit, en toutes circonstances, faire observer et observer lui-même le principe de la contradiction. Il ne peut retenir, dans sa décision, les moyens, les explications et les documents invoqués ou produits par les parties que si celles-ci ont été à même d'en débattre contradictoirement. Il ne peut fonder sa décision sur les moyens de droit qu'il a relevés d'office sans avoir au préalable invité les parties à présenter leurs observations.* »

- [51] Article 184 of the French Civil Code provides that absolute nullification applies *inter alia* to: incest, bigamy and where the marriage is obtained without the consent of one of the spouses.
- [52] Ultimately as regards the present case, I rely on the last part of the provisions of section 103 of the Civil Status Act to allow my order to issue. With respect to the present case, my appreciation of the Petitioner's testimony in court leaves me with no doubt that although he has affection for his wife and probably vice versa, he has no comprehension of the consequences of marriage least the financial ones. He comes across as eager to please and to be liked but he is unable to cope with disappointment and refusals of particular demands. This is made out in respect of his frustration and dislike of his siblings when they refuse to let him have money for unaccounted expenses or when thwarted in some of his unreasonable demands.
- [53] In the circumstances I will order that the marriage celebrated between J, JM, AS and JC on 19 May 2015 be annulled on the grounds of the non- consent by the J, JM, AS.
- [54] The substantive application in this case was in respect of either the lifting of the interdiction order against the Petitioner or in the alternative the substitution of JC for his guardian.
- [55] The evidence of the doctor with respect to the Petitioner, as I have stated before is equivocal. I am not able to comprehend why she did not consult the family members if the Petitioner as they have a longer history and engagement with him. I find it highly unusual that she has given evidence and taken at face value the accounts of the Petitioner without at least having ascertained one of the facts he raised with his family members. Thus renders her testimony highly suspect.
- [56] Article 505 provides that the Supreme Court may appoint a guardian to a person who is interdicted and Article 506 provides that the appointment of a guardian may be revoked by the Supreme Court.
- [57] Article 445 of the Seychelles Civil Code further provides that:

“Any interested party or the Attorney General may start proceedings for the removal of an incompetent or dishonest guardian. A guardian whose conduct endangers the life or health of the minor may be removed upon an application of any interested party or the Attorney General.” Moreover, Article 444 further provides that the following persons shall be liable to removal: Those whose misconduct is notorious and those whose guardianship has proved incompetent or dishonest.”

[58] Article 446 adds that:

“The Court, in dealing with an application for the removal of a guardian, shall give an opportunity to the guardian to be heard if he objects to his removal.”

[59] Where the Court decides to remove a guardian, it shall give its reasons. And Article 448 indicates that:

“In proceedings for the removal of a guardian, the Court shall have power to consider at the same time the appointment of another guardian.”

[60] A guardian therefore can be removed for incompetence, dishonesty, or notorious misconduct. While the criteria for removing a guardian for dishonesty is self-explanatory, removing a guardian for incompetence should be evaluated in light of the duties of a guardian, which are set forth in “SECTION VIII - The Administration of Guardians” and “SECTION IX - Accounting Procedure for Guardians”, which correspond to sections 450 through 475 of the Seychelles Civil Code.

[61] As for guardians whose misconduct is notorious, the criteria has not been defined in statute or the local jurisprudence.

[62] Suffice it to say however that from the evidence adduced I am not of the view that the criteria for removing the Respondent as guardian has been established. She is certainly neither incompetent, dishonest or has engaged in notorious conduct which I assume means that she has engaged in disreputable, harmful or dishonourable behaviour.

[63] Nor am I convinced that the proposed substitute guardian has any qualities to show that she would manage the affairs of the Petitioner as well as the Respondent has. Having heard the evidence in this case I have been struck by the regard, affection and concern both the Respondent and her sister have for the Petitioner despite his somewhat irrational behaviour. I see no reason why the present arrangements should not continue.

Signed, dated and delivered at Ile du Port on

M. TWOMEY
Chief Justice