

SUPREME COURT OF SEYCHELLES

Reportable
[2020] SCSC 618
MA 39/2019
(Arising in DV 97/2018)

In the matter between

MARIE NOELLE ANNICK ALBERT
(rep. by Bernard Georges and Basil Hoareau)

Petitioner

and

PIERRE FRANCE JOSEPH ALBERT
(rep. by Anthony Derjacques and Tamara Christen)

Respondent

Neutral Citation: *Albert v Albert* (MA 39/2019 (Arising in DV 97/2018)) [2020] SCSC 618
(1 September 2020)

Before: Twomey CJ

Summary: Marriage in Mauritius – regime of *séparation de biens* – application for division of matrimonial property in Seychelles – jurisdiction - conflict of laws

Heard: 11 July 2019- 10 June 2020

Delivered: 1 September 2020

ORDER

The application for division of matrimonial property is dismissed.

JUDGMENT

TWOMEY CJ

Introduction

[13]. The present application is brought pursuant to the divorce petition between the parties and as such I have adopted the language used by the parties in the pleadings. The parties, the Petitioner, a Mauritian national and the Respondent, a Seychellois national, were married on 1 September 1975 at Curepipe, Mauritius under the regime

of *séparation de biens* and were divorced in Seychelles on 2nd October 2018 with the order of divorce being made final and absolute on 5 December 2018.

[14]. This application is brought under section 20(1) of the Matrimonial Causes Act (MCA) in which the Petitioner seeks ancillary relief to the divorce in the form of an order for the division of matrimonial property. In her application the Petitioner seeks a half share in the estate of her former husband. She did not apply for other maintenance or other financial relief.

The Petitioner's Affidavit of Means

[15]. In her affidavit supporting the said application, the Petitioner avers that she will turn 72 years of age in the year of filing the application and that she had been married to the Respondent for forty-three years.

[16]. She further states that they had married relatively young and both had little in the form of money or possessions at the time. The Respondent was employed as manager of United Concrete Products Limited (UCPS), a company substantially owned by a consortium of Mauritians and in which her father was a substantial shareholder and director. UCPS was an offshoot of a larger Mauritian company in the same business, United Basalt Products Limited (UBPL) of which her father was managing director. Both companies were involved in preparing stone and stone products for the construction industry. The Petitioner avers that the Respondent obtained his start in life because her father appointed him manager of UCPS and trained him in the management of the company.

[17]. She herself had been a journalist employed with the Mauritius Broadcasting Corporation prior to the marriage. Her married life started in a rented house at Anse La Mouche paid for by UCPS and the Respondent's starting salary was SR2,500. He was also provided with a company car.

[18]. The Respondent's parents were substantial landowners and as a wedding present gave them a small plot of land at Anse Soleil which is currently registered as Parcel T1060 in the name of the Respondent. They subsequently opened a souvenir shop at Pirates Arms in Victoria, securing the capital for the same by mortgaging the property at Anse Soleil. This was followed by a second shop, Le Flamboyant, at Victoria House.

The household bills were paid from these ventures and she carried on the business for at least six years.

- [19]. She also looked after their three children and helped to home school them as their secondary classes were by correspondence.
- [20]. With regard to UCPS, the Respondent was assisted in the early 1980's in buying out the Mauritian shareholders by her father and the other Mauritian shareholders who gave him easy terms of payment. He used this start well and made the company very profitable. This enabled him to acquire property in diverse fields and build a business empire that he still owns and runs today and which is worth a substantial amount of money.
- [21]. This included the acquisition of Parcel T74 purchased in the name of a company Cap Lazare (Proprietary) Limited and Parcel T727 purchased in the sole name of the Respondent. Parcel T74 had a wooden house which they used as a weekend getaway. The Respondent also purchased two parcels of land at Ma Josephine where the family home was built and which the Petitioner occupies. Cap Lazare became a tourist establishment with a restaurant and other support buildings. The expenses for this venture came from UCPS directly or indirectly. The Petitioner avers that she managed the catering operation for ten years doing the shopping and overseeing the operation and did not draw a salary. The first manager was only employed after ten years. At that time the Respondent was responsible for all the household expenses and those of educating the children as the Petitioner had no independent income.
- [22]. The Respondent also set up a destination management company (DMC), Creole Holidays, and later merged it with another DMC, Travel Services (Seychelles) Limited (TSS) which he had acquired.
- [23]. He also acquired Interisland Boats Limited, operating the ferry services between Mahe and Praslin named Cat Cocos which became very profitable as it grew into the largest operator in the field.
- [24]. The Respondent further diversified into the hotel business acquiring a majority stake in Le Domaine de l'Orangeraie on La Digue and La Reserve on Praslin. The

Petitioner is the owner of the boutique at l'Orangeraie. The Respondent also acquired a number of properties in his own name both locally and abroad.

[25]. The Petitioner avers, finally, that she has the use and occupation of the former matrimonial home at Ma Josephine situate on Parcel V506, a maid, gardener and security for the home is paid for paid by UCPS, a monthly allowance of SR 28,000 paid by either the Respondent or UCPS and a monthly allowance of Euro 3,000 paid by Creole Holidays.

The Respondent's Affidavit of Means

[26]. In his affidavit in reply, the Respondent emphasised that he and the Petitioner married under Mauritian law and specifically the regime of *séparation de biens*.

[27]. He avers that he purchased 100 shares in UCPS in October 1978 through his personal finances, a further 1,102 shares in November 1982 again through his personal finances another 196,206 shares from one Naiad Investment Ltd financed by a bank loan from Barclays Bank together with another 46,069 shares financed personally. The purchase price for these shares were the market value of the shares. At the time of these purchases, the Petitioner's father was neither a majority shareholder in UCPS or Naiad Investment Pty Ltd. The Petitioner did not contribute to these shares.

[28]. On 11 November 1992, 18 December 1992 and 26 January 1998 and December 2010 he received 490,000 shares, 1,225,650 shares, 1,961,040 shares, 3,762,880 and 180,000 (both in December 2010) respectively through bonus share issues approved by the Board of Directors of UCPS.

[29]. With regard to Cap Lazare, the two parcels of land, T74 and T727 were purchased by bank loans obtained personally and to which the Petitioner did not contribute.

[30]. The shares in TSS were purchased by him personally; Creole Travel is the business name for the same and for which the Petitioner made no contributions either to their acquisition or development. Similarly, with Cat Cocos and the hotels on La Digue and Praslin. Equally, other companies including Rapid Transport Ltd, JFA Holdings Ltd, Residence Mulapa Ltd, Southern Transport LTD, Vallée de Mai Hotel Ltd, United Boat Charters (Pty) Ltd, Action Marine Ltd, South East Crushing Limited, Cap Lazare (Pty) Ltd, Dynamics (Pty) Ltd and Travelex (Seychelles) Ltd were ventures in which

he had either nominal shareholding or substantial shareholding but none of these companies had received contributions financial or otherwise from the Petitioner.

- [31]. With regard to Land Parcels and properties comprised in titles T2207, T2676, T2372, T1032, T2970, T1060, T213, T12571, C4868, V18604, PR1717, PR1719, C9197, C9198 the ten acres at Anse Citron, Praslin, the house in Cape Town, South Africa, the house and apartment in France, the house at La Blague, Praslin, the house at Cote d'Or Praslin, the two apartments at Laguna Beach, Providence, he either purchased them from his own personal finances, with bank loans that he personally repaid or leased them from the government. The Respondent reiterated that the Petitioner never contributed to their purchase or upkeep.
- [32]. With regard to land title V506 on which the matrimonial home is built, although presently occupied by the Petitioner, she did not contribute to the purchase price of the property or for the construction of the home. He continues to pay five domestic staff and all utility bills. He also provides the Petitioner with a vehicle. He has kept the house repaired and renovated from time to time. It is large and luxurious with its own swimming pool.
- [33]. The Respondent also avers that he purchased a house at Grand Baie, Mauritius which he registered in the name of the Petitioner which she subsequently sold but did not share the proceeds with him. He has also not sought any part of her inheritance from her parents. He also pays for her travel overseas in first class together with her hotel expenses and medical treatment overseas when required.

The Petitioner's Evidence in Court

- [34]. The Petitioner referred to the averments of her affidavit that she adopted and in addition testified that the Respondent owned the properties as listed and that she sought a settlement of half of the properties into her name.
- [35]. She specifically referred to the fact that her father created UBPL and of which he was the general manager at the time they married. The shareholders of UBPL owned UCPS.
- [36]. She was Mauritian by birth and her family were in Mauritius when they married and attended the civil ceremony together with the Respondent's parents, brothers and

sisters. She had previously visited Seychelles and met her husband there as at the time he was working at UCPS. After a year, they decided to get married. She stated that at the civil ceremony, they were asked under what regime they wanted to marry and they had been both ignorant of the different regimes. They had not resolved to get married under either of the regimes but her father advised *séparation de biens* at the ceremony that they went along with. They had just followed his advice. They had never discussed the matrimonial regime under which they were going to marry.

- [37]. At the time neither of them had any assets. They moved to Seychelles and she has been here ever since. Her husband continued to work for UCPS in various capacities until today.
- [38]. The early years were difficult. She had no car, her husband would drop her at UCPS at Anse de Genets, and she would continue on to town by bus to work. The takings from her shop paid for the rent for the house in which they lived and for the household bills. She had three children, although born in Mauritius they were reared in Seychelles. She maintained ties with Mauritius because her parents were there. She was one of the persons behind the setting up of the French school in Seychelles and her children were partly educated there and at home by her with correspondence classes from France. She had run a shop in Victoria for about five or six years but her role was looking after the children and managing the home.
- [39]. She entertained his business associates and hosted dinners. Over the years while she minded the home and looked after the family, he rose within the company and acquired businesses and properties as listed in her affidavit. In particular, Cap Lazare had always been coveted by her husband and he eventually acquired it. They spent weekends there but eventually it was developed to receive tourists, an endeavour in which she played a substantive role.
- [40]. She admitted that she had not contributed to the purchase of the properties or the businesses. She had however helped with Cat Cocos by making sandwiches for the business class passengers.
- [41]. With regard to the house in Mauritius, it was sold for 20 million Mauritian rupees (equivalent to 8.5 million Seychelles Rupees) and the Respondent did not make any

claims on the proceeds. She admitted that he had not claimed any of her inheritance as she had not claimed any of his.

[42]. She denied that the Respondent paid for her holidays abroad or that he paid for first class travel for her. She stated that it was also untrue that he had had paid for her medical bills although she accepted that he had partly paid for one of her medical bills.

[43]. She disagreed that the Respondent had maintained the family home in which she lived, she stated that the swimming pool was black and the roof of the house was leaking.

The Respondent's Evidence in Court

Evidence of the Respondent

[44]. The Respondent referred to the averments of his affidavit, which he adopted and in addition testified that he was born in Seychelles on 28 January 1948 and after finishing school in Seychelles, studied Business Management and Business Studies in London and Surrey. His first job on his return in Seychelles was with UCPS. The Petitioner's father, Mr. Giraud was the manager of UBML in Mauritius who had set up UCPS in Seychelles. He confirmed the Petitioner's version of events how they had met on her visit with her father to Seychelles and that they married in Mauritius about eighteen months later.

[45]. The wedding was organised by the Respondent's family. He was a poor man at the time, only earning SR 2000 a month. Fares to Mauritius were expensive. The Girauds had about four hundred guests at the wedding while he only had eight.

[46]. They married in Curepipe with everything organised by the Girauds and he was driven to the Civil Status office by them. Before they signed the deed the civil status officer explained that there were two types of marriage regimes: *communauté de biens* or *séparation de biens* and then explained what it meant. The Respondent further stated:

“My ladyship we came there without having ever discussed this. It is only when the Civil Status Officer explained, Mr. Giraud turned to my father and his daughter and he said ‘we would want the newlyweds to be married under Ordinance 50.’ And he turned to my father and said ‘Joseph do you have any

objection?’ My father said no. And to me, no, and to her, no, and we signed. I was the first to sign and she signed afterwards” (page 57 of transcript of proceedings dated 23 July 2019 at 2 pm).

- [47]. He testified further that they moved to Seychelles and initially lived with his parents and then three or four months later moved into a house he had found for SR2000. The company did not provide him with a vehicle only fuel. The car had belonged to his ex-girlfriend. The shop that was run by the Petitioner at Pirates Arms was set up with money from the Respondent’s father and his brother. The Petitioner who checked on the proceeds managed it but a girl from Baie Lazare was the salesperson. Eventually he got a bigger shop with a loan for Standard Chartered Bank. The Respondent did the purchasing in Mauritius.
- [48]. The children were born in Mauritius, as the Petitioner did not have faith in the hospital Seychelles’ hospitals. He agreed that the Petitioner contributed to the household bills initially.
- [49]. Through his hard work he paid off UCPS’ bank loans. He was refused shares in the company however and went to Queensland for six weeks to see if he could emigrate there but at the time all the sugar farmers there were going bankrupt. On his return home he was happily welcomed back and obtained commission from UCPS. Then he was approached by the government who intimated that they would acquire the company. The Mauritians told him he would have to buy the company to stop the government acquiring it. He purchased the company with the help of Mario Ricci who issued him with SR 2 million in promissory notes which he paid the Mauritians for their shares.
- [50]. He testified that he had purchased the properties as detailed in his affidavit mostly with bank loans. With regard to Parcel T74 and T727 these were purchased with a personal bank loan from Barclays Bank. The Petitioner did not run the estate there but only kept an eye on the place to make sure the money was banked and the stores checked as there was lot of pilferage happening.
- [51]. He purchased TSS and merged it with Cat Cocos which he developed with loans from the Mauritius Commercial bank. With regard to the other companies set out in his affidavit not a penny had been contributed by the Petitioner. He still owed the bank

SR 163,517 million for them and with other businesses in the pipeline he was in debt to the tune of SR 200 million.

[52]. He disagreed that they had separated three or five years prior to the divorce being filed; he was sure that they had separated in 2009. He testified that the Petitioner received about SR68,000 monthly from him. He had also given her a villa in Mauritius which she was renting to a French man for MR 100,000 a month but then had sold it and did not share the proceeds of the sale with him. She was staying in the matrimonial home, which had a very large swimming pool, and he paid all the household bills. He paid for two security men, one driver, one domestic servant, one gardener and his wife. He also provided the Respondent with a car and all the expenses. He had repaired and repainted the house only last year.

[53]. He testified that he had paid for her heart operations when required and would continue to pay her medical bills. He also agreed to give her two business class tickets per year to Europe and another four to the Indian Ocean rim countries.

[54]. Although the Petitioner had averred that the money paid to her came from different companies he pointed out that he personally paid it from the dividends he earns from those companies.

[55]. He stated that with regard to the Petitioner as the mother of his children:

“I give my solemn promise in this court and I am prepared to write it down as long as I live Madame Albert will be provided for – until I disappear...” (p.37 of the transcript of proceedings of 22 July 2019 at 9.30 am).

[56]. In cross examination, he reiterated that it was his intention to maintain the Petitioner until he died but not to devolve any property onto her. He testified that she did not have the ability to run a company. He was however prepared to buy her a smaller house or apartment as the matrimonial home was too big for her to live there alone. He would prefer to devolve all the properties onto their three sons.

[57]. With respect to UCPS of which he is currently the chairman, he explained that the company would have to close unless it obtained a new quarry as the present quarry only had about one and half years' rock supply left. In the last four years the shareholders had drawn no dividends.

- [58]. He was unsure how much salary he drew each month from the different companies. The hotels were losing money and they had outstanding loans to pay off. He stated that he leads a very frugal life. He travelled business class and sometimes economy class. He had several personal accounts in Seychelles and overseas. He did not know how much money was in all the accounts. He was not prepared to give his wife property or more money apart from her maintenance payments as he was worried about her ability to manage finances responsibly.
- [59]. He agreed that he owned 90% shareholding or 99% shareholding in most of his companies with the rest of the shares in his sons' names but that he needed to pay off substantial loans with respect to all of them.
- [60]. He admitted that he had properties abroad including a house in France where he goes for an occasional rest. In sum, he had had nothing when he married and slowly built his portfolio of properties and assets from his hard work to which his wife had not contributed. He had looked after his wife, providing her with all that she needed including housekeeping money, nannies for the children and servants for the home.
- [61]. He admitted that he had sold four parcels of land for USD4 million in September 2018 but stated that this was his land and the money had been banked in one of his company's accounts.
- [62]. He had understood that under the regime of *séparation de biens* if either of them acquired property it would remain in the name of whosoever had acquired it.

Evidence of the legal expert Narghis Bundhun

- [63]. An expert witness, Ms. Narghis Bundhun, a Mauritian lawyer specialising in family law, gave expert evidence on the relevant Mauritian law.
- [64]. She testified that in Mauritius, before parties marry, they are asked to decide under which property regime they wish to marry. Up to 1949, parties could opt for 'separation of property' (*séparation de biens*) by a notarial declaration with the default position being the regime of 'community of property'. This was because women could not own property independently. In 1949, legislation was enacted which permitted a woman to have her own assets and marry under the regime of separation of property.

[65]. In 1980, this was replaced by introducing Articles 1475 to 1481 of the Mauritian Civil Code, which specifically provided for a regime of legal separation of property. Each spouse retains the administration, management and disposal of their personal property as if they weren't married. Each spouse also remains liable for all debts arising from their personal acts before or during marriage. The exception to this is under Article 221, which gives each spouse the power to enter into contracts, without the consent of the other, with the aim of the maintenance of the household or education of the children. The obligation contracted by a spouse alone in this respect will bind the two spouses jointly and severally. She confirmed that the parties could change the matrimonial regime under which they were married:

“You can change it every five years if you wish. There is no limit to that”.

[66]. She added that if parties marry in Mauritius and then move abroad, the properties abroad would also be subject to the matrimonial regime they had opted for when they had married (*Mootoo v Mootoo* (2009) SCJ 237, *Jokhoo v Jokhoo* (1998) SCJ 84). In the case of *Jokhoo v Jokhoo* 1998 SCJ 84 (Exhibit 26), the Court referred to the case of *Widow Canabady v Amurdalingum* [1946] MR 56, in which the Court noted that:

“the principle laid down by the French Courts that the regime applicable to spouses married without a marriage settlement should be deemed to be the one which the spouses had intended to adopt, can find its application only when a conflict of laws arises”.

[67]. The Court in that case concluded that:

“From the evidence adduced and the principles referred to above, I am unable to say that the parties had intended that the law of England should govern their proprietary rights in Mauritius.”

[68]. The expert explained that in the present case, a marginal entry on the marriage certificate indicated that the parties opted for the regime of separation of property. This regime more or less signifies that ‘what is mine is mine and what is yours is yours’. The only exception to this rule is if property is purchased in their joint names in which instance the rules of co-ownership would apply. This regime allows for claims to be made against the spouse for financial contributions to the spouse’s

property but does not permit a presumption of indirect contribution, for example a spouse's devotion to the children and the home. Ms. Bundhun explained that:

“...under Mauritian law, we separate divorce and its consequences and division of assets. These are two separate issues. In a divorce what you are suggesting is devotion to children and the family would be taken on board in a claim for maintenance. Maintenance under the Divorce and Judicial Separation Act of 1981 but not in a claim for assets purchased after marriage or inherited or by whichever way acquired” (p. 36 of transcript of proceedings of 11 July 2019, 2 pm).

- [69]. She explained that if the parties were married under the legal separation of property, there would be no reason to proceed with the liquidation and distribution of assets. Conversely, if the parties were married under the regime of community of property, the judge would appoint a notary assisted by a valuer to inventorise the assets and then proceed to the division, taking all circumstances into account.
- [70]. She explained that the Divorce and Judicial Separation Act sets out the procedure to be followed in a divorce, for example, it provides that an application for a divorce is by petition, it sets out the time-limits to be complied with and the consequences of a divorce. For instance, it makes provision for provisional orders for payment of maintenance and alimony. However, it does not govern nor has a bearing on matrimonial regimes and the division of assets.
- [71]. With regard to section 16 of the Act which provides for the transfer of property to a party as the court thinks fit, this provision refers to maintenance orders if they had been made a live issue at the divorce and which would ultimately be the consequence of the divorce. Section 16 and article 254 of the Mauritian Civil Code were in respect of the financial consequences of the divorce where one party had by his fault caused the marriage to rupture. They did not concern the dissolution or liquidation of the matrimonial regime.
- [72]. An order under section 16 for maintenance could take the form of a monthly payment or could be converted into a capital payment and in that sense might include property and could be granted to parties under any regime under which they had married but this did not relate to division of property which depended on the regime under which the parties had married.

The value of the properties sought to be divided

[73]. Valuers were appointed by the court to value the properties listed by the parties in their affidavits of means. No value for these properties have been produced to the court at the time of the decision being delivered.

[74]. The Respondent filed an affidavit on 22 July 2019 suggesting two persons as valuers but also averring that there could be no division of matrimonial property as they had married under the regime of *séparation de biens* and that if the Petitioner were to make a claim on the property she would have had to prove direct financial contributions to the property which she had failed to do. The affidavit also contained other averments concerning when he had vacated the home and differences in value of properties over time. The Court is not enlightened by these averments which it disregards as both parties had closed their case prior to the affidavit being sworn.

[75]. The order of the Court was to the effect that Michel Leong and Hubert Alton value the properties listed in the Appendix attached to the order and that John Richardson and Bernard Domingue value the shares in the companies listed in the Appendix attached to the order. The valuers wrote asking for confirmation that their fees would be met and that they would have access to the properties. The fee proposed was not acceptable to the Respondent who proposed to find alternative valuers. Several adjournments followed to enable Counsel to obtain valuers and values. None have been forthcoming and as will become evident below none are required.

Closing submissions

[76]. On 10 June 2020, the following exchange took place between Counsel for the parties and the Court some eleven months after the parties' cases were closed:

<i>“Mr. Derjacques</i>	<i>...we have our submissions ready.</i>
<i>Court:</i>	<i>Okay. I will have your submissions. Can I have the submissions in the next two weeks. I am going to set a date for judgement today...<u>If a week before judgment these submissions and those reports are not in I am going to disregard them...</u></i>
<i>Mr. Georges:</i>	<i>We are happy with that my lady.” (Emphasis added)</i>

[77]. The Respondents' Counsel duly filed submission on 23 June 2020. The Petitioner only filed their submissions at 2.55pm on Friday 28 August 2020; these were placed

on file on the morning of 31 August 2020, the morning before the delivery of the decision. The delay by Counsel for the Petitioner in filing their submissions has not been satisfactorily explained despite a considerable amount of time and reminders from the Registrar of the Supreme Court. It should be noted that the Court need not wait for submissions for the delivery of its decision and there is no legal procedural requirement in our jurisdiction which would necessitate the Court even considering submissions filed this late. Nevertheless, given the difficult area of law in this case, the submissions have been taken into account.

The Petitioner’s closing submissions

- [78]. The Petitioner submits that given that the parties were married under Mauritian law and the divorce pronounced in Seychelles in accordance with Seychellois law, the determination of ancillary relief (under the MCA) raises an issue of conflict of laws. After analysing the different principles of private international law, the Petitioner submits that the applicable private international law should be English law, in which case the ancillary relief should be determined in accordance with the MCA.
- [79]. The Petitioner relies for this submission on the cases of *Dauban v De Faily & Ors* [1936-1955] SLR 93, *Sullivan v Sullivan* (1962) SLR 318 and *Robert v Robert* (1971) SLR 274 which held that rules of private international law obtaining in France should be followed in cases where issues of conflict of laws concerning the applicable matrimonial regime to marriages contracted by Seychellois nationals abroad. Under these French principles, the Court would consider the *indices du domicile matrimonial* to determine which law governs the matrimonial property of the parties. The Petitioner concludes that the evidence in the instant case is indicative that the Parties made Seychelles their *domicile matrimonial* and therefore that they intended that their matrimonial property be governed by Seychellois law.
- [80]. Therefore, if Seychellois law is applicable to the matrimonial regime, the Petitioner submits that the MCA enables the Court to grant financial relief after divorce, legislation borrowed from English law. In this respect, the court ought to be guided by “English rules of private international law in respect of the issue of conflict of laws relating to financial relief as a consequence of divorce.” The Petitioner applies in this regard *Austin v Bailey* (1962) MR 113 quoted with approval in *Privatbanken v Aktieselekab v Bantele* (1978) SLR 226. Therefore, since the Supreme Court has

jurisdiction to make the financial relief in the present case, it will have to apply the domestic law of Seychelles - that is the MCA.

- [81]. In the alternative, Counsel for the Petitioner submits that if the Court were to find that the matrimonial regime is governed by Mauritian law it would still have the power to grant the financial relief prayed for under section 16 of the Divorce and Judicial Separation Act, 1981 of Mauritius.
- [82]. The Petitioner discusses case law related to the exercise of the Court's discretion under section 20(1) of the MCA to show that this Court could take into consideration all the factors of the case, including non-monetary contributions by a spouse and obligations of support.
- [83]. Counsel relied on the English case of *Miller v Miller; McFarlane v McFarlane* [2006] UKHC 24 (a conjoined appeal) which were 'big money, high value' cases where the House of Lords identified three elements of a fair outcome in financial relief and property adjustment cases, namely:
- a. Financial needs
 - b. Compensation to address significant economic disparity between the parties arising from the way they conducted their marriage
 - c. The Equal sharing principle
- [84]. In the case, Baroness Hale opined that although the sources of the assets may be taken into account, its importance diminishes over time. This judgment also addressed the issue of the clean break principle, which encourages the Court to terminate the ongoing financial ties between the parties by ordering a once off capital and property transfer and no periodical payments.
- [85]. The Petitioner therefore argues that fairness dictates that she be granted a half share interest in all the properties owned by the Respondent or that the assets of the Respondent should be transferred to her so that the two of them will own assets of equal value.

[86]. Due to the lateness of the filing of these submissions, the Respondent has not had any opportunity to consider these novel principles or make submissions as to their applicability to Seychelles.

The Respondent's closing submissions

[87]. The Respondent submits a summary of the evidence adduced which the court notes. Of particular relevance is the submission that the undisputed facts are to the effect that the Petitioner was a Mauritian citizen domiciled in Mauritius, that the marriage was celebrated according to Mauritian law and that as required by the Mauritian law, specifically section 81 (3) of the Civil Status Ordinance of 1890. The parties had a choice between the system of *communauté de biens* and *séparation de biens* and opted for the latter with the choice noted on their marriage certificate. What is disputed and is at issue is whether, having married under the regime of *séparation de biens*, the Petitioner can claim a share in the Respondent's assets.

[88]. The Respondent relies on the expert witnesses' evidence that under Mauritian law the issue of maintenance of a spouse following divorce is an issue that is decided separately from the distribution/division of assets; the distribution of assets is decided solely and exclusively according to the matrimonial regime chosen by the parties at the time of marriage or as subsequently changed and a property transfer order as envisaged by section 16 of the Mauritian Divorce and Separation Act of 1982 is in relation to the obligation of a guilty spouse (*époux fautif*) in a divorce to pay maintenance to the innocent spouse (*époux non-fautif*). The Act is aimed at authorising the court to ensure the maintenance of the spouse or children of the marriage.

[89]. However, where an order for maintenance is sought, this has to be included in the divorce petition and in this respect, the court would have to take into account the criterion set out in section 17 of the Divorce and Judicial Separation Act of 1982.

[90]. In 1975, when the parties married there were three forms of matrimonial regime: a pre-nuptial contract, the regimes of *communauté de biens*, and *séparation de biens* as provided by articles 1399 to 1539 of the Mauritian Civil Code then in force and the Status of Married Women Ordinance 50 of 1949. The liquidation of the matrimonial

regime was provided for by Articles 1387 et al of the Mauritian Civil Code in respect of marriages contracted under the regime of *communauté de biens*.

- [91]. The parties' marriage in the instant case was ostensibly under the regime of *séparation de biens* and they never proceeded to change the regime although they were permitted to do so. There cannot however be an implicit or indirect change to the regime they chose (*Gujadhur and ors v Gujadhur* (1951) MR 171).
- [92]. The fact that the parties live elsewhere for a period of time following their marriage and prior to their divorce does not alter the regime under which they had chosen to marry. The principle of autonomy of the will of the parties has been applied by the courts; hence the court has to seek out the intention of the parties as expressed or evidenced at the time they contracted the marriage (*Jokhoo v Jokhoo* (1998) SCJ 84, *Mootoo v Mootoo* (2009) SCJ 237 following *Widow Canabady v Amurdalingum* (1946) MR 56).
- [93]. In the present case it is submitted that the intention of the parties is borne out inter alia by the express entry on the marriage certificate of the regime of *séparation de biens* chosen by them, the Petitioner's lingering attachment with Mauritius demonstrated by inter alia retaining her citizenship, investing money in property in Mauritius, giving birth to her children and educating them in Mauritius, living in Mauritius when the marriage soured, having medical treatment in Mauritius when required.
- [94]. It is the Respondent's submission therefore that having married under the regime of *séparation de biens*, the Petitioner cannot now seek a division of matrimonial property.

Discussion of the applicable law

- [95]. In the application, the Petitioner failed to mention under which law the application was being brought. In their submissions, Counsel for the Petitioner has cited section 20(1) of the MCA read with Rule 4(1) of the Matrimonial Causes Rules (MCR). The application is centered around the "division of the matrimonial property" and not other forms of ancillary relief such as maintenance. That was the sole prayer for relief. Section 20(1)(g) of the MCA which provides in relevant part:

“(1) Subject to section 24, on the granting of a conditional order of divorce or nullity or an order of separation, or at any time thereafter, the court may, after making such inquiries as the court thinks fit and having regard to all the circumstances of the case, including the ability and financial means of the parties to the marriage-

...

(g) make such order, as the court thinks fit, in respect of any property of a party to a marriage or any interest or right of a party in any property for the benefit of the other party or a relevant child.” [Emphasis added]

[96]. In this respect section 21 of the MCA also has application:

“Subject to the rules of the court, proceedings for maintenance pending suit under section 19 or financial relief under section 20 may begin at any time after the presentation of the petition for an order of divorce, nullity or separation.”

[97]. Further, rule 4 of the MCR provides in relevant form:

(1) Every application in a matrimonial cause for ancillary relief where a claim for such relief has not been made in the original petition, shall be by notice in accordance with Form 2 issued out of the Registry, that is to say every application for: -

...

(f) an order in respect of any property of a party to a marriage or any interest or right of a party in any property for the benefit of the other party or a relevant child;

....”

[98]. Thus, in Seychelles, a party to a divorce may apply to the Supreme Court for the division of Matrimonial Property either in the petition for divorce or subsequent to the divorce in a claim for ancillary relief, as in this case.

[99]. In the process of determining the division of the Matrimonial Property, part of the court’s discretion in granting an order under section 20(1) is after making such inquiries “as the court thinks fit and having regard to all the circumstances of the case, including the ability and financial means of the parties to the marriage.”

[100]. In this respect in *Esparon v Esparon* [1998-1999] SCAR 191 the court held that this includes:

“all the circumstances of the case, [and] may have regard, without being exhaustive, to such matters as the standard of living enjoyed by each of the

parties before the breakdown of the marriage, the age of the parties and duration of the marriage, any physical or mental disability of any party, the contributions made by each to the welfare of the family, including looking after the home or caring for the family or the value to either party of any benefit (like a pension) which a party will lose as a result of the divorce....”

[101]. In *Chetty v Emile* [2008-2009] SCAR 65 the Seychelles Court of Appeal stated that:

“[C]ontributions towards matrimonial property cannot be measured in pure monetary terms, in hard cash. As stated earlier, the love and sweat and the long vigil to bring up a family by the spouses all have a role to play in the accumulation of matrimonial property. The cooking, the sweeping, the cleaning, the sewing, the laundering, tending to the children and the many other nameless chores in a home are not things for which a value can be put on but certainly contribute towards the building up of matrimonial property.”

[102]. The purpose of these subsections is to ensure that upon the dissolution of a marriage, a party to the marriage is not put to an unfair disadvantage in relation to the other by reason of the breakdown of the marriage and as far as is possible, to enable the party applying to maintain a fair and reasonable standard of living commensurate with or to the standard the parties have maintained before the dissolution. See *Renaud v Renaud* SCA No. 48 of 1998 and *AA v JA* [2006] SCSC 62.

[103]. Although section 20 of the MCA provides for ancillary relief upon divorce, neither the Civil Status Act, nor the MCA provides for laws regulating property regimes for marriages.

[104]. Most of the provisions in the Code Civil in relation to marriage, divorce and matrimonial property were repealed by the Status of Married Women Ordinance 1948 and the Matrimonial Causes Ordinance of 1949, which was replaced by the Matrimonial Causes Ordinance in 1973 and 1992. Prior to this, the French matrimonial regime that had largely grown out of customary law and the principle of community of property was applicable in Seychelles. This was replaced by the English based separation of property principles. A matrimonial property regime as such is unknown in English common law; there are no proprietary consequences flowing from the marriage and each spouse owns his/her property separately. The court is however given wide statutory powers to make property adjustments as it

thinks fit on the divorce of the parties (Section 25, Matrimonial Causes Act 1973 (England)).

[105]. With the repeal of the provisions relating to community of property in the Civil Code and the enactment of the Matrimonial Causes Act of 1992 in Seychelles, the matrimonial property regime in Seychelles has shifted from the French approach to that of the English common law principle of individual ownership. Section 20 thus gives the court seized with a divorce or judicial separation, the power to order a settlement as appears appropriate to remedy an unfairness upon divorce. There have been no court cases specifically involving prenuptial agreements since the enactment of the English based provisions relating to division of matrimonial property. However, the dictum of Adams JA in *Maurel v Maurel* [1998-1999] SCAR 57 (cited with approval in *Leonil v Leonil* (1998) SLR 100 and *AA v JA* [2006] SCSC 62) took for granted that pre- and post-nuptial agreements would be enforceable:

“It follows that any assets acquired during the marriage do not necessarily mean that such assets are held by each spouse in co-ownership of half share each. Spouses can enter into prenuptial and post-nuptial contracts relating to property. But when this is not the case, assets owned in the name of each spouse must be regarded prima facie as such spouse's property unless it can be established, that was not the intention of the party or parties.”

[106]. Mauritian law is also relevant for the purposes of the Court's inquiry given the fact that the parties married in Mauritius under a specific property regime and it is the Respondent's submission that that is the law that applies. With regard to foreign law, there is *jurisprudence constant* that the foreign law which is said to be applicable must be pleaded and proved as fact. If foreign law is not pleaded and proved, it is presumed to be the same as Seychellois law (*Dauban v de Faily* (1943) SLR 93; *Beitsma v Dingjan* (No 1) (1974) SLR 292; *Teemooljee v Pardiwalla* (1975) SLR 39; *Biancardi v Tabberer Travel* (1975) SLR 91; *Sounardin v D'Offay* (1976) SLR 236; *Privatbanken Aktieselskab v Bantele* (1978) SLR 226; *Intour v Emerald Cove* (2000) SLR 21; *La Serenissima v Boldrini* (2000-2001) SCAR 225).

[107]. In the present case, the foreign law has been pleaded and proved. An expert witness, Ms. Narghis Bundhun, a Mauritian lawyer specialised in family law, gave expert

evidence on the relevant Mauritian law. No contrary expert evidence was adduced by the Petitioner.

[108]. In Mauritius, at the time that the Parties married, they opted to marry under the regime of *séparation de biens*. The Respondent's expert witness explained to the Court that this election is an agreement as to which law would govern how the parties' property would be dealt with in the event of a dissolution of the marriage. In the book on 'Du Regime Legal de Séparation de biens', Article 1476 of the Mauritian Civil Code provides that each spouse would retain the administration, management and disposal of his or her personal property as if he or she were not married, and each spouse remained liable for all debts that arose of his or her personal acts before or during the marriage (with the exception of decisions to incur liabilities with regard to the maintenance of the children which is not relevant in this case). Under Article 1479, regarding the contracting of marriage, the Mauritian Code says that the parties can stipulate the matrimonial regime of their choice subject to public policy and morality.

[109]. The Mauritian legal expert added that if parties marry in Mauritius and then move abroad, the properties abroad would also be subject to the matrimonial regime they had opted for when they had married (*Mootoo v Mootoo* (2009) SCJ 237, *Jokhoo v Jokhoo* (1998) SCJ 84).

[110]. Divorce in Mauritius is governed by the Divorce and Judicial Separation Act, which sets out the procedure to be followed in a divorce. It makes provision for provisional orders for payment of maintenance and alimony. However, it does not govern nor has a bearing on matrimonial regimes and the division of assets, which is provided for in the Civil Code. Section 16 (1) of the Divorce and Judicial Separation Act of Mauritius relates to property transfer orders. The provisions apply exclusively to applications for maintenance where the "guilty" spouse is made to provide for the "non-guilty" spouse. In such applications, the orders could be in the form of periodical payments, capital payments or even transfers of property. Section 16 bears no relevance in respect of the dissolution or liquidation of the matrimonial regime.

[111]. In the instant case, there is a Mauritian marriage contract and a Seychellois divorce. It was the clear election at the time of the marriage that the matrimonial property regime would be governed by the Mauritian law regime of *séparation des biens*. This

election, albeit mandated by statute, is a choice of laws agreement, similar to that found in many contracts. It expresses the intention of the parties as to which law of which jurisdiction will govern the determination of matters arising from that agreement.

[112]. There has been some confusion as to whether this application is correctly brought under section 20(1)(g) (a matter of procedure) and whether the Petitioner would be entitled to any relief under any applicable matrimonial property regime (a matter of substance).

[113]. The issues to be determined under this case therefore come down to three key questions:

- 1 Whether the Court has jurisdiction to entertain the application under section 20(1) of the MCA?
- 2 Whether Seychellois law or Mauritian law should apply to the matrimonial property regime of the Parties?
- 3 Whether the Petitioner entitled to relief under the MCA in the circumstances of having chosen the Mauritian property regime of *séparation de biens*?

1. Whether the Court has jurisdiction to entertain the application under section 20(1) of the MCA?

[114]. Procedurally, the present application arises out of the divorce proceedings filed by the Petitioner (DV No. 97/2018) in Seychelles. A conditional order for divorce was granted, which was made absolute on 5 December 2018. The Petitioner now seeks an order for division of matrimonial property arising out of that divorce proceedings.

[115]. The jurisdiction of this Court under the MCA to hear this matter was not disputed – and nor is there reason for it to be. Seychellois law governs the question of whether a Seychellois court will accept or decline jurisdiction (*Emerald Cove v Intour SRL* (2000-2001) SCAR 83; *Wartsila NSD Finland v United Concrete Products* (2004-2005) SCAR 223).

[116]. The MCA specifically provides that the Supreme Court has jurisdiction in relation to matrimonial causes (divorces and their effects) on an application of a party to a marriage who, at the date when the proceedings are begun, is domiciled or habitually resident in Seychelles (MCA s 3; *Coppolino v Coppolino* SSC 112/2001, 24 May 2002). Therefore, the filing of this case in the Seychellois courts is not incorrect. The answer to the first question must be in the affirmative.

2. Whether Seychellois law or Mauritian law should apply to the matrimonial property regime of the Parties?

[117]. Whilst I am satisfied that the Seychellois procedure in section 20 is applicable to how this case has been brought, and thus that this Court is properly suited, what then in the instant case is the choice of law to be applied to the matrimonial property? The law where the cause of action, the divorce, arose (Seychellois law) or the law of the forum that the parties had chosen to govern the marriage when they contracted their marriage (Mauritius). All discussions of conflicts of laws can become unnecessarily messy and confusing. In Seychelles, it is even more confusing because early Seychellois jurisprudence concluded that in conflict of law cases, French rules of private international law are to be followed in Seychelles: *Rose v Mondon* (1964) SLR 134; *Morgan v Morgan* (1972) SLR 79; *Pillay v Pillay* (1973) SLR 307; *Pillay v Pillay* (1978) SLR 217.

[118]. A more modern approach has been adopted in the case of *Intelvision Network Ltd & Ors v Multichoice Africa Ltd* (SCA 31/2014) [2015] SCCA 31 (28 August 2015), the Court of Appeal noted (emphasis added):

“[15] Rose decided that the judgment of the Court of Appeal of Seychelles in Austin v Bailey (1962) MR 115 had conclusively laid down the rules of private international law to be followed in Seychelles. In Austin, the Court of Appeal of Seychelles in Mauritius stated:

“Since the rules of private international law in any country must necessarily have their foundations in the internal laws of that country, those which are applicable must be based substantially on the provisions of our laws regarding civil rights and obligations. These laws are basically and almost entirely French so that, subject to any exceptions which may arise through litigation we must be guided by the French Rules of private international law.”

In 1975, we enacted our own Civil Code and although it is substantially based on the Code Civil of France, logically it is our Code and the Seychellois jurisprudence emanating from it that must now guide us on the question of private international law. In this sense the Appellants are correct to say that it is Seychellois law that should apply when deciding on the proper law of the contract in this case.

[119]. While there is a scarcity of Seychellois jurisprudence on the topic of choice of laws, the jurisprudence relating to matrimonial property indicates that the intention of the parties at the time of the marriage is indicative of the applicable regime (*Dauban v de Faily* (1943) SLR 93, *Sullivan v Sullivan* (1962) SLR 318). The case of *Dauban* concerned a question of choice of law – the Court asked: ‘should this Court decide the matter as a French Court or as an English Court would?’ The Court considered the intention of the parties at the time they were married and concluded that, on the specific facts, the intention of the parties was to marry according to English law.

[120]. To ascertain the parties’ intention when they married, any relevant fact and circumstance may be taken into account. In the absence of anything to the contrary, the national law of the parties at the time of the marriage is presumed to be the law which the parties intended to govern their property rights (*Sullivan v Sullivan* (1962) SLR 318). While the jurisprudence cited here is dated, there is no reason to suggest that a different approach should apply in the present case.

[121]. The Respondent, a Seychellois domiciled in Seychelles travelled to Mauritius for the wedding – which was hosted and largely attended by the Petitioner’s family who were based in Mauritius. In Mauritius, parties are asked what property regime they wish to marry under. The evidence of both parties was that the couple did not discuss what property regime they would marry under prior to their marriage. The first time it came up was when they were at the registry for the civil ceremony. The Respondent gave the following evidence which is worth repeating:

“My ladyship we came there without having ever discussed this. It is only when the Civil Status Officer explained, Mr. Giraud turned to my father and his daughter and he said ‘we would want the newlyweds to be married under Ordinance 50.’ And he turned to my father and said ‘Joseph do you have any objection?’ My father said no. And to me, no, and to her, no, and we signed. I was the first to sign and she signed afterwards...”

[122]. When asked whether they both were clear as to what this meant, the Respondent said:

“But they made it very clear, they explained it to us. Separation des biens ... means what’s hers before remains hers and what was mine remains mine. And that was very clear.” (page 57 of 63, transcript of proceedings dated 22 July 2019 at 2 pm)

[123]. And regarding assets acquired during the marriage, he said:

“Well if she brought it on her name it would be hers. If I bought it on my name it would be mine” (page 58 of 63, also see page 42 of 63 transcript of proceedings dated 22 July 2019 at 2 pm).

[124]. For the Petitioner’s part, the evidence is much the same as regards how the decision was made, although she denies having a clear understanding of the regime and trusting her father’s advice. She explained:

*“...in front of the Civil Officer he asked us after writing everything and after he asked us on which contract you want to get married and Joe and myself we just looked at each other we did not know really; I do not know if we were stupid at this time but we really did not know what it was meaning you know. So I turned to my father and I said what is that? And he said to me it is up to you and I said but I do not know, and my father saw to say *séparation des biens*. And it has come from my father really...” (p 17 of 40 transcript of proceedings dated 11 July 2019 at 9.30 pm).*

[125]. The Petitioner nevertheless gave evidence that there was no deliberate intention on the parties’ part to marry under this regime. However, while the Petitioner may have chosen to take her father’s advice on the matter, it is clear that she was aware that a decision was made, and that it was to marry under *séparation des biens*. The Petitioner’s Counsel submits that by electing their ‘*domicile matrimonial*’ in Seychelles, it was the intention of the parties to make their ‘*regime matrimonial*’ to be governed by Seychellois law. Counsel then pointed out the ‘*indices du domicile matrimonial*.’ The Petitioner’s assumption is that the application of the MCA will entitle the Petitioner to a half share in the matrimonial property.

[126]. However, the Court cannot overlook the other *indices du domicile matrimonial* pointed to by the Respondent, including maintaining close ties to Mauritius throughout the marriage. Perhaps the most important *indice* is the documentary

evidence, that is the marriage certificate, which is an official and authentic document attesting to the regime chosen (*Albert v Rose* (2006) SLR 140; *Hoareau v Hoareau* (1984) SLR 108).

[127]. Altogether, the circumstances surrounding the marriage and subsequent events indicate an intention on the part of both parties to marry under Mauritian law, and specifically under the regime of *séparation de biens*. Had the Parties intended to change the regime during the many years of marriage, they were permitted to do so under Mauritian law. The parties married with the election that all property accrued during the marriage would remain separately owned. The parties intended that Mauritian law govern the marriage, and therefore the matrimonial property regime arising from the marriage. Mrs. Bundhun specified that the division of matrimonial property is solely and exclusively determined by the choice of regime. Thus, all properties individually purchased by the parties remains theirs individually. There is therefore no matrimonial property per se. This Court is not empowered by the application of Mauritian law to adjust the ownership of the properties when applying this chosen property regime.

3. Is the Petitioner entitled to relief under the MCA in the circumstances of having chosen the Mauritian property regime of *séparation du biens*?

[128]. Having determined that the matrimonial property regime of the Parties' marriage is to be determined according to Mauritian law, which results in a strict separation of properties, the final question for determination is whether the application of the MCA nevertheless entitles the Petitioner to an order of relief upon the granting of a divorce under section 20 of the MCA.

[129]. Whilst it may appear patently unjust that this Court cannot exercise a discretion to adjust matrimonial property in a case where one party to a marriage has amassed such a fortune, it is not within the Court's power or discretion, to change another country's law where it finds that the parties had chosen for that law to apply.

[130]. Section 20 of the MCA does provide the Court with the ability to make an order to ensure that one party to a marriage is not put to an unfair disadvantage because of the dissolution of the marriage and the application of the chosen matrimonial property regime. Section 20 of the MCA enjoins the court to have regard to all the

circumstances of the case in making its order and the remedies available to the court under section 20(1) are wide. This may include maintenance and other forms of ancillary relief. This avenue is still open to the Petitioner. It is noted that an application for maintenance was not made by the Petitioner in the instant case but the Respondent by judicial admission undertook to maintain the Petitioner as he is presently doing until the end of his days.

Decision

[131]. The remedy sought by the Petitioner cannot be granted by the court. The application for division of matrimonial property is therefore dismissed.

Signed, dated and delivered at Ile du Port on 1 September 2020

Twomey CJ