

**SUPREME COURT OF SEYCHELLES**

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**Reportable**

[2021] SCSC ..... 356

MC 87/2020

**IN THE MATTER OF: THE COMPANIES ACT 1972**

**AND IN THE MATTER OF GREGOIRE'S COMPANY (PTY) LTD**

**BETWEEN**

**BRIGITTE PAYET**

*(rep. by Guy Ferley)*

**Petitioner**

and

**GREGOIRE'S COMPANY (PTY) LTD**

*(rep. by Edith Wong)*

**Respondent**

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**Neutral Citation:** Payet v Gregoire's Company (Pty) Ltd (MC 87/2020) [2021] SCSC ..... 356  
(..... June 2021).

**Before:** Pillay

**Summary:** Plea in limine litis – affidavit sworn by counsel representing the Plaintiff

**Heard:** By way of submissions

**Delivered:** ..... June 2021

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**ORDER**

The plea in limine is dismissed with costs to the Petitioner.

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**RULING**

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## PILLAY J

- [1] The Petitioner filed an application pursuant to section 136 of the Companies Act 1972 seeking a declaration that resolutions passed at the extra-ordinary general meeting of the Respondent on 25<sup>th</sup> September 2020 are invalid because the meeting was not properly convened and because the notice dated 22<sup>nd</sup> September 2020 was not signed by Gregoire Payet and/or...
- [2] In her reply to the Petition, counsel for the Respondent raised a plea in limine in that the affidavit is defective as it is sworn by the Petitioner's former lawyer.
- [3] Both sides filed submissions.
- [4] The Respondent's counsel submitted that she relies on the Court of Appeal case of **Morin v Pool [2002] SCCA 37** for the plea.
- [5] She submitted that Twomey JA, said case, went further and relied on extracts from the White Book, referring among others, to practice direction 9.2 in Volume 1 at page 914 of the White Book wherein it is stated that;
- "an affidavit must be sworn before a person independent of the parties."*
- [6] Miss Wong further relied on the Supreme Court case of **Church v Boniface [2011] SLR 260** wherein it was stated that:
- "the practice of an attorney acting for a party accepting to swear an affidavit is clearly contrary to the law of this land and ought to stop."*
- [7] On the basis of the above cases she submitted that failure to adhere to the above rules laid down in practice and jurisprudence makes the affidavit defective and in turn so is any application which has used it in support thereof.
- [8] The Respondent's counsel refers the court to the documents attached to the Reply, specifically R2 and R3, to show that Mr. Derjacques was the Petitioner's counsel as he was copied in emails.

[9] The Petitioner's submissions are that Mr. Derjacques attested the affidavit for the Petitioner in his capacity as a Notary and not as her attorney in the present matter.

[10] Counsel relies on the Legal Practitioners Act 1994

*"A legal practitioner shall not –*

*(a) act for any person unless he or she has received instructions from that person or his or her duly authorised agent."*

[11] It was his submission that at the time of filing the present petition the Petitioner had sought the services of Mr. Guy Ferley as counsel. It was his submission that Mr. Derjacques was only instructed to represent her in a separate case, namely ***MC 44 of 2020 Brigitte Lucy Payet v Gregoire Christian Payet in the year of 2020*** and at no point in time was he instructed to represent her, as her attorney, in the present case.

[12] In answer to the Respondent's reliance on the case of **Ponoo v Attorney-General (2011) SLR 423** and **Morin v Pool (2012) SCCA 17** the Petitioner submits that Mr. Derjacques is not a witness of any facts contained in the affidavit signed by the Petitioner. He submitted that the principles established in the said cases does not state that an affidavit cannot be attested by a client's former lawyer but simply that an attorney cannot attest the signature of his client in his own case.

[13] He prayed for the plea in limine to be dismissed with costs.

[14] The issue for this Court is very narrow. Is the affidavit attached to the Petition defective for having been sworn by her former counsel?

[15] In the case of **Church v Boniface [2011] SLR 260** the finding that the

*"the practice of an attorney acting for a party accepting to swear an affidavit is clearly contrary to the law of this land and ought to stop."*

was based on

*Section 17 of the Courts Act which states that-*

*in civil matters whenever the laws and rules of procedure are silent, the procedure, rules and practice of the High Court of Justice in England shall be followed as far as practicable.*

*Order 41 rule 8 of the Rules of the Supreme Court of England states -*

*Without prejudice to the Commissioners for Oaths Act, 1889, no affidavit shall be sufficient if sworn before the solicitor of the party on whose behalf the affidavit is to be used or before any agent, partner or clerk of that solicitor.*

[16] In the case of **Ponoo v Attorney-General [2011] SLR 423** the Court of Appeal stated that

*“it is trite law, that affidavits are evidence and counsel cannot be a witness in the case of his client. It is also ethically unacceptable.”*

[17] In **Morin v Pool** objection was taken “since the affidavit [was] sworn before counsel who also sign[ed] the application for the writ”. The Court also noted that the affidavit in the appeal case was also irregular having been attested by the partner of counsel appearing in the appeal case.

[18] The Court noted that “In some common law countries like Canada this rule has been abandoned and a lawyer can act as oath taker of his own client’s affidavit. The White Book has of course been updated and we have tried to ascertain whether any significant change to this rule has occurred. The 2010 edition does indeed show an update of the rule in the practice directions but it only supports the traditional approach vide Practice Direction 9.2 in Volume 1 at page 914 – “an affidavit must be sworn before a person independent of the parties or their representatives”

[19] I note that the matter was filed on 16<sup>th</sup> October 2020 and the affidavit was sworn before Mr. Derjacques on 12<sup>th</sup> October in the same year.

[20] Indeed Mr. Derjacques was sworn into the office of Minister on 4<sup>th</sup> November 2020 having appeared before the National Assembly the last week of October 2020.

[21] Indeed the case of **Ponoo** stands as the correct position to be followed as to swearing of affidavits by counsels representing parties in the case.

[22] However one has to be attentive to the subtle difference between appearing for parties and representing parties and not put a too strict interpretation on the principle enunciated by **Ponoo** above specially in view of the small pool of lawyers available in our jurisdiction.

[23] Furthermore, in light of **Morin v Pool** above, it is clear that the Court of Appeal was willing to look to any amendments hence willing to adopt a liberal approach to the rule. To my mind the rule is that counsels who are representing parties in active litigation should not swear affidavits of their own clients in that particular case. That in my humble view was the intent and purpose of the principle established in **Ponoo**.

[24] This view is reinforced by section 183 of the UK Legal Services Act 2007 which provides in relevant part that;

*(1)For the purposes of any enactment or instrument (including an enactment passed or instrument made after the passing of this Act) “commissioner for oaths” includes an authorised person in relation to the administration of oaths (“a relevant authorised person”).*


...

*(3)A relevant authorised person may not carry on the administration of oaths in any proceedings in which that person represents any of the parties or is interested.*

[25] I further note that the email that the Respondent’s counsel refers to is as follows: [dec@seychelles.net](mailto:dec@seychelles.net). This Court has no way of knowing that this is the email address of Anthony Derjacques. Unlike that of the Petitioner no name appears before the email address.

[26] In the circumstances the plea in limine is dismissed with costs to the Petitioner.

Signed, dated and delivered at Ile du Port on ... 23<sup>th</sup> June 2021

  
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Pillay J