

**SUPREME COURT OF SEYCHELLES**

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**Reportable**  
[2021] SCSC 618  
CS 16/2019

In the matter between:

**BRIGITTE MATHILDA PILLAY**  
*(rep. by Frank Elizabeth)*

**Plaintiff**

and

**LOUISA CLAUDIA JEREMIE (NEE PILLAY)**  
*(rep. by Karine Dick)*

**Defendant**

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**Neutral Citation:** Pillay v Jeremie (CS16/2019) [2021] SCSC 618 (17 September 2021).  
**Before:** Carolus J  
**Summary:** Removal of Executor – Civil Code of Seychelles Act; Judgment by Consent – Section 131 of the Seychelles Code of Civil Procedure; Procedure in case of inability to comply with Judgment by Consent entered as judgment of Court - Setting aside Judgment by Consent.  
**Heard:** 1<sup>st</sup> April 2021  
**Delivered:** 17 September 2021

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**ORDER**

The Plaintiff and the Counterclaim are dismissed. The plaintiff shall pay costs to the defendant.

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**JUDGMENT**

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**E. CAROLUS, J**

**Background & Pleadings**

[1] The plaintiff and the defendant are sisters. They are the daughters of the late Claudette Rose Moncherry who died on 29<sup>th</sup> August 2017, leaving behind land parcel Title No. V9830 with a house thereon (“the property”), and her two daughters as her sole heirs.

- [2] The parties were appointed joint executrices of their late mother's estate by Court Order dated 14<sup>th</sup> November 2017 in XP153/2017. In that same Order, the Court entered a Judgment by Consent entered into by the parties on 19<sup>th</sup> October 2017, as a judgment of the Court. In terms of the Judgment by Consent the parties agreed that the defendant would purchase the plaintiff's share of the property at the market value, three months after valuation of the property. Each party was to commission a quantity surveyor to ascertain the market value of the property.
- [3] The case for the plaintiff is that the defendant has failed, refused and neglected to buy the plaintiff's share of the property as agreed and has instead moved into the house which she is currently occupying rent-free. She claims that the rental value of the property is estimated at SCR14,000.00 per month and avers that the defendant should be ordered to pay her a monthly rent in the sum of SCR7,000.00. She also avers that the defendant should be removed as executrix of their late mother's estate as she is in breach of her fiduciary duties and abusing her powers as executrix to the said estate.
- [4] The plaintiff therefore prays for an order for the defendant to pay her the sum of SCR7,000.00 per month from January 2018 when the defendant moved into the house to date and continuing; an order removing the defendant as executrix of the estate of the parties' late mother; and costs.
- [5] The defendant opposes the action and has filed a defence thereto as well as a counterclaim. She denies not complying with the Judgment by Consent. She avers that she has had the property valued and made an offer to the plaintiff to purchase her share, but that it is the plaintiff who has not responded to the said offer and is thwarting putting the said judgment by consent into effect. She admits occupying the house but avers that she is an heir and not liable to pay rent for property she is lawfully occupying. She further avers that she has not breached her fiduciary duties but it is the plaintiff who is not discharging her duty as executrix.
- [6] In her counterclaim the defendant/counterclaimant avers that the plaintiff has failed and refused to comply with the judgment by consent and reiterates that it is the plaintiff who has not responded to her offer. She further avers that she has tried on numerous occasions

to contact the plaintiff through her elected domicile. However she was informed that the plaintiff had not provided an answer to her proposal, had changed her mind and wished to sell her share of the property at a higher price. The defendant/counterclaimant avers that she is willing to take a loan from a financial institution to pay the plaintiff her share of the property but that she needs the plaintiff as joint executrix to sign the bank documents in order for her to be able to obtain the loan.

[7] The defendant/counterclaimant therefore prays for dismissal of the plaint, and for an order directing the plaintiff to abide by the terms of the judgment.

[8] In her defence to the counterclaim, the plaintiff denies the averments therein and puts the defendant/counterclaimant to the strictest proof thereof. She further denies any knowledge regarding the loan which the defendant alleges that she is willing to borrow from the bank. She avers that the offer made to her by the defendant/counterclaimant to purchase her share of the property is way below its market value and is not acceptable to her. She prays for dismissal of the counterclaim with costs.

[9] During the course of the proceedings the parties agreed to the appointment of a quantity surveyor to submit a third valuation of the property to the court, as the difference between the valuations commissioned by each party was quite substantial and they were unable to come to an agreement as to the sum to be paid to the plaintiff by the defendant for her half share of the property. Through their respective counsels the parties undertook to accept this third valuation as a basis for calculating the plaintiff's half share of the property. Mr Jacques G. Renaud was appointed to carry out the valuation by Order dated 6<sup>th</sup> November 2020. He submitted a report dated 25<sup>th</sup> November 2020 (which was produced as Exhibit D1 by the plaintiff in cross-examination) in terms of which the property was valued in the sum of Seychelles Rupees One Million Four Hundred and Fifty One Thousand only (SCR1,451,000.00). However although the defendant agreed to pay half the value of the property as per the valuation report, that is SCR725,500.00 the plaintiff refused to accept that sum. The matter therefore proceeded to hearing.

## The Evidence

### *Testimony of Brigitte Pillay*

- [10] The plaintiff, Brigitte Pillay, 29 years old, resides at Beau Vallon, La Batie and works at the IT Help desk at the Seychelles Fishing Authority. She testified on oath at the hearing.
- [11] She confirmed that she is the sister of the defendant and produced as **Exhibit P1** the Court Order dated 14<sup>th</sup> November 2017 appointing them as joint executrices to the succession of their late mother Claudette Rose Moncherry. She further confirmed that they entered into a Judgment by Consent in which they agreed that the defendant would purchase the plaintiffs share of the property left to them by their mother upon her death, three months after valuation of the same. The property consists of land parcel Title No. V9830 and a house thereon. The Judgment by Consent was entered as a judgment of the Court in the same Court Order that appointed them as executrices to their mother's succession. Title No. V9830 was transferred to and registered in their joint names by affidavit on transmission by death dated 12<sup>th</sup> June 2018 on 24<sup>th</sup> August 2018 (**Exhibit P3**).
- [12] The plaintiff testified that she commissioned a valuation of Title No. V9830 and the house thereon. She produced a valuation report made by Quantity Surveyor Nigel Stanley Valentin dated 17<sup>th</sup> January 2018 (**Exhibit P4**), according to which the market value of the property as at 21<sup>st</sup> December 2017 (date of the site visit) was Seychelles Rupees One Million Four Hundred and Thirty Eight Thousand Two Hundred and Six Only (SCR1,438,206.00). She stated that the defendant failed to pay her half the market value of the property after valuation thereof, as per their agreement in the Judgement by Consent according to which the defendant was given three months after the valuation to do so (paragraph 5 of the Judgment by Consent).
- [13] The plaintiff testified that she and her partner used to live with her late mother in the house on the property but she moved out in May 2017 three months before her mother died. The defendant had been spreading rumours about the plaintiff's partner with other family members leading to him and eventually her mother being harassed. Plaintiff's mother had told him that it would be better if he found a place of his own so that she

would not be involved in these matters. The plaintiff and defendant are not on good terms.

[14] After their mother's death on 29<sup>th</sup> August 2017, the house remained unoccupied until the defendant moved in on 1<sup>st</sup> June 2018. Since moving in, she has not paid any rent to the plaintiff despite the latter claiming SCR7000.00 per month from her for the same. The amount of SCR7000.00 per month is based on plaintiff's own evaluation of half the rental value of the property. The plaintiff herself is paying rent in the sum of SCR12,000.00 per month for an apartment she is currently occupying at La Batie.

[15] As to the alleged breach of the defendant's fiduciary duties and abuse of her powers as co-executrix of their mother's succession, on the basis of which the plaintiff prays for her removal as co-executrix, the plaintiff states firstly that the defendant has breached the terms of the Judgment by Consent by not paying the plaintiff her share of the property. Secondly she simply started occupying the house which she is still occupying to date. Thirdly while their mother was in hospital and also after she had passed away, the plaintiff had a daily routine of coming to their mother's house every morning to switch off the lights which were left on at night and open the windows, and every evening to switch on the lights and close the windows. The plaintiff had a set of keys and gave a set to the defendant on the 3<sup>rd</sup> September 2017 when they came to the house to scatter their mother's ashes. Around 15<sup>th</sup> September 2017, she travelled to Dubai and left the keys with her partner so that he could continue the daily routine at the house during her absence. The plaintiff returned to Seychelles around 20<sup>th</sup> September 2017, and two days before that, the defendant reported plaintiff's partner to the police saying that he had come to the house and brought a Kenyan woman there to cook food and do other things.

[16] The defendant also changed the locks to the house and the plaintiff was unable to access the house upon her return to the country. The defendant told her that her lawyer Mr. Julie had advised her to do so and that the plaintiff should collect the keys from the lawyer which the plaintiff did not, although she had personal belongings in the house which are still there. The plaintiff stated that since September 2017 she has been unable to have access to the property.

[17] In cross-examination, the plaintiff identified the Judgment by Consent entered into and signed by the parties, dated 19<sup>th</sup> October 2017 (admitted as **Exhibit D1**) which was subsequently entered as a judgment of the Court namely Exhibit P1. She agreed that as per paragraph 4 of the Judgment by Consent (reproduced at paragraph 3 of Exhibit P1) both parties were supposed to obtain their own valuations of the property from different quantity surveyors. She admitted that the defendant, having obtained a valuation from Ms Cecile Bastille, made an offer to her by letter in the sum of SCR500,000.00 for her half share of the property. She did not accept the offer as she found that the valuation of Ms. Bastille was not correct and was very different from the one she had obtained from Mr. Stanley Valentin. The defendant recently revised her offer to SCR700,000.00 but the plaintiff did not accept that sum although it amounts to about half of the value of the property as per Mr. Stanley Valentin's valuation because a long time has elapsed since the defendant was supposed to buy her share of the property and she had now changed her mind.

[18] The Plaintiff admitted that because the parties could not agree on the sum that the defendant was to pay the plaintiff for her share of the property, the parties had agreed, in the present proceedings, to the appointment by the Court of an independent Quantity Surveyor to produce a valuation report that both parties would abide by. It was put to her that Mr. Jacques Renaud who was appointed by the Court submitted a report dated 25<sup>th</sup> November 2020 (admitted as **Exhibit D2**) valuing the property at Seychelles Rupees One Million Four Hundred and Fifty One Thousand only (SCR1,451,000.00) whereupon the defendant increased her offer to SCR725,500.00 which is exactly half the amount of the valuation but which the plaintiff refused to accept. The plaintiff explained that the defendant was supposed to have paid the plaintiff for her share of the property three months after the valuation and that three years had now elapsed. Furthermore when she entered into the Judgment by Consent their mother had just died and she was confused with everything going on. Since then however she has had time to reflect and realised that she has always been there for her mother whereas the defendant has not.

[19] She admitted that the initial offer of SCR500,000.00 was made within the agreed three months period but that she refused to accept it and instead filed a petition for licitation of

the property, explaining that it was because the sum of SCR500,000.00 was not reasonable. With regards to the offer of SCR700,000.00 she reiterated that three years have elapsed since payment should have been made and that she has now changed her mind. She then admitted that the offer had been made after Mr Jacques Renaud's valuation report had been submitted. She further agreed that half of the value of the property as per his valuation amounts to SCR725,500.00.

[20] The plaintiff admitted that there was no agreement between the parties for the defendant to pay rent to her for the house. She claims that she came up with the figure of SCR7000.00 per month which she is claiming as rent from the defendant based on her own estimate on how much she could rent the house for. Counsel explained that the parties have the same rights on the property until such time as one of them pays the other for the other's half share and that until then the defendant does not owe her any rent for occupying the house with her husband and children. The plaintiff replied that she also inherited a share in the house but the defendant is living in it for free whereas she has to pay rent for an apartment and is not benefitting from the house. It was put to her that she moved out even prior to her mother's death; that she had been free to move back in and the defendant had not prevented her from doing so; that it was her choice to go and rent an apartment for SCR12,000.00; and that things happened the way they did because she had entered into the Judgment by Consent. The plaintiff replied that she could not return to the house as the locks had been changed and she no longer had access to the property. Furthermore even if she had left the house before her mother died she had always been there for her mother and supported her whereas the defendant never bothered to visit her or do anything for her.

[21] The plaintiff understood her role as co-executrix to be "*to take care of the house and everything. The situation. Documents*". She stated that as her sister is living in the house she is obviously taking care of the property including the house, bills and expenses. It was put to her that the defendant had not breached any of her fiduciary duties as steps were taken by the parties to have the property transferred in their names and the defendant had also settled their mother's debts to which she replied that she had not been aware of any such debts.

[22] The plaintiff stated that when she left for Dubai, at her request, an aunt with whom she had been staying informed the defendant that she would be travelling. However the plaintiff did not inform the defendant that her partner would be carrying routine checks on the house, as at that time the defendant had said that she wanted nothing to do with the property because the plaintiff was taking care of everything. The plaintiff did not agree that the defendant had been right to change the locks because a person who had no rights over the house was allowed access to it without her being informed. She stated that the person was not a stranger and the defendant knew it was her partner. Further she stated that she had been informed by the police that the keys for the new locks had been left at Mr. Julie's office but she had decided not to ascertain if that was so, and instead file the current court case to remove the defendant as executrix.

[23] The plaintiff admitted that she had filed a previous case for licitation against the defendant and produced **Exhibit D3** - a petition for sale by licitation of Title No. V9830 dated 9<sup>th</sup> April 2018 in CS77 of 2018 and filed on 30<sup>th</sup> October 2018.

[24] She acknowledged that she is aware that the defendant is willing to pay her for her half share in the property. She was asked whether she would be willing to accept instalments of SCR5000.00 until a loan is approved and the defendant can pay her a lump sum. She replied that she no longer wants to do so and now wants to purchase her sister's share in the property. Furthermore when the evaluation was first made in 2014, her counsel had asked the defendant whether the plaintiff needed to sign any papers so that the defendant could obtain money to pay her for her share of the property but that she had shown no interest in doing so until now.

[25] It was further put to her that all offers communicated to her attorney had not been accepted by her hence the reason why she has not received any payment to date. She reiterated that the first offer of SCR500,000.00 was not a reasonable sum. As to the latest offer of SCR725,000.00 she is no longer interested in selling her share but is ready to pay the defendant for her share as she has waited for too long and lost a lot of opportunities.

[26] In re-examination the plaintiff confirmed that the reason that she was no longer accepting the defendant's offer is because the defendant had three months to pay her for her share

and did not do so. She stated that she did make an offer of SCR700,000 to the defendant but that she is now prepared to increase the offer to SCR900,000.00.

- [27] She stated that the apartment she is currently renting at La Batie for SCR12,000.00 per month has two bedrooms and no garden whereas their late mother's house has two bedrooms and a garden.

*Testimony of Claudia Jeremie*

- [28] The defendant Claudia Louisa Jeremie born Pillay, lives at Beau Vallon and works as a control duty manager. She confirmed that she is a co-owner of Title No V9830 and produced a Certificate of Official Search dated 23<sup>rd</sup> October 2018 showing that Brigitte Mathilda Pillay and Claudia Louisa Jeremie (born Pillay) are proprietors of Title V9830, which was admitted as **Exhibit D4**.

- [29] She testified that she has been living on Title No. V9830 since she was four years old. When she got married she did not move out completely but she and her husband sometimes lived both at Anse Aux Pins at his family's place and sometimes at the property at Beau Vallon, and they were therefore in and out of that property at all relevant times. The parties' mother, the plaintiff, her partner and their son also lived there.

- [30] She stated that it was the plaintiff's idea to enter into the Judgment by Consent. She confirmed that it was a term of the Judgment by Consent that the parties would each commission their own Quantity Surveyor to provide a valuation of the property and that she would pay the plaintiff the value of plaintiff's half-share of the property. In compliance thereof she appointed Ms Cecile Bastille to carry out a valuation of the property. Ms Bastille's valuation report dated 14<sup>th</sup> March 2018 was admitted as **Exhibit D5**. According to the report, the estimated market value of the property is Seychelles Rupees Nine Hundred and Fifteen Thousand only (SCR915,000.00). Upon receipt of the report the defendant instructed her lawyer to make an offer to the plaintiff. She produced a letter dated 27<sup>th</sup> March 2018 addressed to Mr. Frank Elizabeth, Attorney-at-Law from the chambers of Georges & Co, Attorneys, in which it was stated that they were instructed by Miss Claudia Louisa Jeremie to make an offer of SCR500,000.00 for the

dwelling house located on parcel V9830 (**Exhibit D6**). The offer was made on 27<sup>th</sup> March 2018, within the three month period after the date of Ms. Cecile Bastille's valuation report dated 14<sup>th</sup> March 2018, as stipulated in the Judgment by Consent. The plaintiff did not accept the offer and did not reply to the letter of offer. The defendant tried to contact Mr. Elizabeth and was eventually informed by his secretary that the plaintiff had changed her mind.

[31] In 2018, the defendant was served with summons to appear in Court in a petition for licitation of Title No. V9830. In 2019 she was served with summons to appear in the present case.

[32] The defendant testified that she is willing to pay the plaintiff half of the value of the property as per the valuation of Mr. Jacques Renaud which amounts to around SCR700,000.00, starting from end of this month, She stated that she has not been able to pay the plaintiff for her half share of the property because the plaintiff did not cooperate with her: in order to obtain a loan to effect the payment she needs to have a promise of sale which she was unable to obtain from the plaintiff. She could not communicate to the plaintiff that she needs a promise of sale because she had been unable to get in contact with her and they are now not on good terms. The defendant stated that she has already started the process to obtain a loan from the bank but that she cannot proceed further without the promise of sale. Furthermore because of the Covid19 pandemic the bank is not giving any loans at the moment. However she expressed willingness to start making monthly payments of SCR5000.00 until she obtains a loan from the bank when she can pay the outstanding amount in a lump sum.

[33] The defendant does not agree with paying a monthly rent of SCR7,000.00 to the plaintiff. She stated that she never asked the plaintiff to move out of the house.

[34] As for her reason for changing the locks, she stated that as she still lived in the house sometimes sharing her time between Anse Aux Pins and Beau Vallon, and had some of her personal belongings there, it was not right for a third party to come into the house without her knowledge.

- [35] The defendant denies breaching any of her fiduciary duties as executrix of her mother's succession. She claims that she paid her mother's debts when the latter passed away, namely electricity bills and house insurance. Further she has been maintaining the property including the house together with her husband.
- [36] In cross-examination the defendant stated that before she got married on 3<sup>rd</sup> October 2013, she lived with her mother at Beau-Vallon. She maintained that after her marriage she and her husband lived part of the time at her father-in-law's place at Anse Aux Pins and part of the time at her mother's place at Beau Vallon, and she kept some of her personal belongings at Beau Vallon. She explained that this was because she was used to her home and her mother was ill. She denies that the plaintiff gave her a set of keys to the house and stated that she always had a set of keys since the time she was living at both Anse Aux Pins and Beau Vallon. She moved back permanently in her mother's house on 1<sup>st</sup> June 2018 and has since then been living there full time.
- [37] She stated that it was not correct to say that it was the plaintiff who took care of their mother and drove her wherever she needed to go including her hospital appointments, and that the defendant was not there for her at all.
- [38] She remembers changing the locks to the house after their mother's death whilst the plaintiff was out of the country in September 2017. At the time she had not yet moved permanently in the house but was still living at both Anse Aux Pins and Beau Vallon. The plaintiff on the other hand had already moved out a few months before their mother passed away because of certain issues, leaving none of her belongings in the house. She stated that she did not change the locks to deny access to the plaintiff but because the plaintiff's partner was coming into the house and she did not know what he was looking for. After claiming that the same keys still work, she then admitted that she had blocked the door by installing a bolt on the inside and that the plaintiff could therefore not have access to the house. In reply to plaintiff's counsel as to why she would not let the plaintiff have access to the house since the parties have the same rights over the property, she stated that she does not find any reason to do so especially without her knowledge, as she is the one occupying the house. She stated that furthermore the parties are not on good

terms, she is the only one taking care of the bills and expenses, and that the plaintiff is not living in the house and therefore has no business coming into the house.

[39] As to why the defendant should not compensate the plaintiff by paying her rent, given that the property is co-owned by both parties in shares of 50% each and the defendant had 100% possession and enjoyment thereof, the defendant replied that as an heir she has no obligation to pay rent although the plaintiff owns 50% of the property. She states that the only obligation she has is to pay a half share of the value of the property to the plaintiff and that in the meantime until she effects such payment, she does not have to pay any rent to the plaintiff.

[40] The defendant reiterated that she only needs a promise of sale so that she can obtain a loan from the bank to pay the plaintiff, but admitted that it was not a term of the Judgment by Consent that the plaintiff provide her with a promise of sale.

[41] The defendant could not give an explanation for the disparity between the valuations provided by Quantity Surveyors Mr. Jacques Renaud and Mr. Stanley Valentin and that of Ms. Cecile Bastille. However she denied any collusion with Ms. Bastille to put a low value on the property so as to justify her offer of SCR500,000.00 to the plaintiff.

[42] The defendant refused to accept the plaintiff's offer for payment of the sum of SCR900,000.00 for defendant's share of the property, her reason being that it is her family and childhood home and her mother's ashes are scattered there. She stated that she is not willing to sell her share for any amount but accepted that that the same argument could also be used by the plaintiff. She also would not consider paying the plaintiff the sum of SCR900,000.00 because the sum agreed upon is SCR725,500 which is what she is prepared to pay.

[43] The defendant admitted that the bank would not give her a loan without a promise of sale and that in any case no loans were being approved because of the pandemic and therefore there was no possibility of her obtaining a loan to pay the plaintiff for her share of the property. However despite that, she maintained her refusal to pay the plaintiff a monthly rent.

## Submissions

[44] Only counsel for the defendant filed written submissions setting out the applicable law and relevant authorities and applying those to the particular facts of this case. The Court has considered these submissions with care and has taken them into account as appropriate in the analysis below.

## Analysis

[45] In light of the pleadings, the following three issues arise for the determination of this Court, each of which will be considered in turn below:

- (a) Whether the defendant should be removed as co-executrix of her mother's succession;
- (b) Whether the plaintiff is entitled to payment of rent from the defendant;
- (c) Whether the Court can Order the plaintiff to abide by the terms of the Judgment by Consent.

*Should the defendant be removed as co-executrix of her mother's succession?*

[46] The plaintiff seeks the removal of the defendant as co-executrix on the ground that she has breached her fiduciary duties and abused her powers as executrix. The Court is empowered under Article 829 of the Civil code of Seychelles Act ("the Civil Code") "*at the instance of an interested party ... to make such orders relating to the appointment or dismissal of a fiduciary or to his management as it thinks fit*". In *Suttie & Anor v Rebecca David* (Civil Appeal SCA 25/2015) [2017] SCCA 37 (07 December 2017) Twomey JA stated at paragraph 21 of the judgment -

*... it is correct that an appointment and replacement of an executor is reviewable by the court. Until and unless the Respondent acts in breach of her duties and obligations as an executor there is no valid reason why her appointment has to be revoked.*

[47] In order to determine whether there was a breach of defendant's duties or abuse of her powers of executrix, it is necessary to first ascertain what those duties are. The provisions relating to the duties and powers of Court appointed executors are found in Book III,

Title II, Chapter V, Section VII of the Civil Code. They are reproduced in relevant part below.

*Article 1027*

*The duties of an executor shall be to make an inventory of the succession to pay the debts thereof, and to distribute the remainder in accordance with the rules of intestacy, or the terms of the will, as the case may be ...*

*[...]*

*The manner of payment of debts and other rights and duties of the executor, insofar as they are not regulated by this Code, whether directly or by analogy to the rights and duties of successors to movable property, shall be settled by the Court.*

*Article 1028*

*The executor, in his capacity as fiduciary of the succession, shall also be bound by all the rules laid down in this Code under Chapter VI of Title I of Book III relating to the functions and administration of fiduciaries, insofar as they may be applicable.*

*Article 1029*

*Executors shall represent the estate in all legal proceedings, and shall act in any legal action the purpose of which is to declare the will null. At the end of their function, they shall render account of their administration as provided for fiduciaries in the Chapter referred to in article 1028.*

*Emphasis added.*

- [48] As to the fiduciary duties of an executor, these are provided for in Book III, Title I, Chapter VI, Section III of the Civil Code entitled “*The Functions and Powers of the Fiduciary*” (referred to in Articles 1028 and 1029 above). Articles 825 and 830 which fall under that section, provide in relevant part:

*Article 825*

*The functions of the fiduciary shall be to hold, manage and administer the property, honestly, diligently and in a business-like manner as if he were the sole owner of the property. He shall be bound to follow such instructions, directions and guidelines as are given to him in the document of appointment by the unanimous agreement, duly authenticated, of all the co-owners or by the Court ...*

*Article 827*

*A fiduciary shall be under a duty to render full and regular account of his management until such time as his functions are terminated ...*

[49] In *Ramkalawan & Anor v Nibourette & Anor* (MA178/2017) [2018] SCSC 618, Twomey then CJ at paragraph 28 of her judgment, quoted with approval the following passage from the Court of Appeal case of *Rajasundam & Ors v Pillay* (SCA 09/2013) [2015] SCCA 12:

*The purpose of an executor appointment is to have the executor share out the succession among the heirs. Winding up a succession estate means evaluating the share of the heirs under the laws of succession and then to propose and make a physical allocation of property to the heirs where that is possible and to sell the land and share out the proceeds of sale to the heirs where partition is impossible (at paragraph 19).*

[50] Twomey then CJ, went on to “*adopt the statutory provisions and the authority of Rajasundaram as expounding in clear and simple terms what an executor has to do in relation to the succession and the heirs*”.

[51] The first thing that the parties had to do, in their capacities as co-executrices was to make an inventory of their mother’s succession comprising of all her assets and debts. There is no evidence that this was done. I note that this was the responsibility of both parties as co-executors.

[52] In any event it appears that the entire succession of the deceased comprised of Title No. V9830 and the house thereon. At paragraph 2 of the plaint it is averred that “... *at the time of her death, the deceased left behind immovable property namely, title No. V9830 and a house thereon and two heirs to the estate, namely the Petitioner and the Respondent*”. This is admitted by the defendant at paragraph 1 of her statement of defence. This property has already been distributed to the sole heirs of the deceased namely the parties, by way of an affidavit on transmission by death dated 12<sup>th</sup> June 2018 and registered on 24<sup>th</sup> August 2018 i.e. Exhibit P3. According to Exhibit D4 - the Certificate of Official Search - the parties are now the proprietors of undivided shares of the said property. It does not appear from the pleadings that there is anything else left

behind by the deceased which formed part of her succession. In any case the present application to remove the defendant as co-executrix is grounded on reasons related to the immovable property. To all intents and purposes therefore the duties of the co-executrices have been performed insofar as it relates to such property and there is nothing remaining for them to do. The property is the only thing which would have featured in the inventory. This has been distributed in equal shares to the parties. The property having been distributed, the fiduciary duties of the executors of managing and administering the property and rendering account of such management does not arise.

[53] As for the debts of the deceased, no claims are being made in respect thereof either in the claim or counterclaim. The defendant has only made unsubstantiated claims in examination in chief that she paid her mother's debts when she passed away consisting of electricity bills and house insurance, which in any case has not been pleaded. As to her claim that she has been maintaining the house and property, it is only right that she does so given that she is occupying the property.

[54] The only matter in issue therefore in light of the pleadings, is that the defendant has failed to pay the plaintiff for her half share of the property, and has moved into and is occupying the house situated on Title No. V9830 rent-free. In addition to this, in her testimony the plaintiff reproaches the defendant for changing the locks on the house thereby denying her access to it. According to the plaintiff all these are in breach of her fiduciary duties and an abuse of her powers as executrix on the basis of which the defendant seeks her removal as executor. However in seeking the removal of the defendant as co-executrix, the plaintiff fails to take into account that their duties as co-executrices have been performed and that the removal of the defendant will serve no useful purpose as there is nothing left to do in regards to the succession. In the circumstances this Court declines to make such Order.

*Is the plaintiff entitled to payment of rent from the defendant?*

[55] The plaintiff also prays for an Order for the defendant to pay her the sum of SCR7,000.00 per month from January 2018 when she moved into the house to date and continuing. First of all I note that the plaintiff herself stated in examination-in-chief

(proceedings of 1<sup>st</sup> April 2021, pg.7) that the defendant moved in the house on 1<sup>st</sup> June 2018. This is confirmed by the defendants own testimony (proceedings of 1<sup>st</sup> April 2021, pg.42). The claim should therefore be for rent as from 1<sup>st</sup> June 2018.

[56] The parties now being registered co-owners of the property, any remedy sought by the plaintiff in respect of such property should be directed against the defendant as a co-owner and not in her capacity as executrix of their mother's succession. Having said that, I am mindful that at the time the defendant moved into the house on 1<sup>st</sup> June 2018, the property had not yet been transferred to the parties and it may be argued that it still formed part of the deceased's succession, and that the claim for rent should be made against her in her capacity of executrix: the deceased died on 29<sup>th</sup> August 2017; the parties were appointed co-executrices on 14<sup>th</sup> November 2017; the defendant moved into the house on 1<sup>st</sup> June 2018; and the Affidavit on Transmission by Death (dated 12<sup>th</sup> June 2018) was only registered on the 24<sup>th</sup> August 2018. However this issue is resolved by section 72 of the Land Registration Act which deals with transmission of property on death and in particular subsection (3) thereof which essentially provides that the registration of a person as proprietor of immovable property by way of an affidavit of transmission by death takes effect from the date of the death of the person from which the new proprietor inherits the property. Upon registration of the affidavit on transmission by death therefore, the parties retrospectively became co-proprietors of the property as from 29<sup>th</sup> August 2017, the date of the death of their mother. Subsections (1) and (3) of that section 72 of the Land Registration Act is reproduced below:

*72. (1) When a proprietor dies the persons who under the will or the law relating to succession on intestacy, as the case may be, are entitled to any land, lease or charge registered in the name of the deceased proprietor shall, upon production and filing of an affidavit by them in the prescribed form, be registered as the proprietors of the land, lease or charge for the interests and in the shares shown in the affidavit.*

*[...]*

*(3) The registration of any person as aforesaid shall relate back to and take effect from the date of the death of the deceased proprietor...*

[57] This Court therefore has to determine whether the plaintiff is entitled to payment of rent from the defendant for occupation of the house of which they are co-owners and which in

terms of subsections (3) of section 72 of the Land Registration Act became co-owners upon the death of their mother on 29<sup>th</sup> August 2017.

[58] In the case of *Gemma de Commarmond v Gemma Monthy* (1980) SLR 139 the plaintiff and the defendant constructed a house at their joint expense on the land of another for the plaintiff's mother (who was also the defendant's foster mother) to occupy. Upon the death of the plaintiff's mother she sought to eject the defendant from the house. Sauzier J found *inter alia* that –

*(b) The plaintiff and the defendant shared the expense of erecting the house ...*

*(c) The defendant was in charge of the construction of the house.*

*(d) The defendant is the present occupier of the house and her occupation thereof is not unlawful as at no time was she a trespasser... At most she would be a lessee under the Control of Rent and Tenancy Agreements Act (Cap 166).*

*(e) Both the plaintiff and the defendant have a joint interest or right in the house.*

and went on to state that –

*What is certain is that the plaintiff cannot ask the defendant to vacate the house and sue her for damages ...*

*If the defendant is to remain in the house and thus enjoy the use of it exclusively, she would have to pay to the plaintiff her share of expenses ...*

[59] Although the facts of that case differ somewhat from those of the present one, in the *Decommarmond* case (supra) the plaintiff and defendant were co-owners of the property in dispute and the defendant had exclusive enjoyment of the property, similarly to the situation arising in present case. In the *Decommarmond* case (supra) the court stated that if the defendant was to continue enjoying exclusive use of the property she would have to pay the plaintiff her share of expenses in building the house. On the authority of that case, the plaintiff in the present case as the co-owner of a half share in the property is entitled to be compensated for her share by the defendant for her exclusive enjoyment of the property. This is in fact what the parties had agreed upon in their Judgment by Consent.

[60] The parties being unable to agree on the sum to be paid to the plaintiff and the plaintiff having now decided that she no longer wants to sell her share to the defendant, the

plaintiff is now claiming a monthly rent in the sum of SCR7,000.00 for her half share. However she bases this sum mainly on the fact that she is renting a two bedroom apartment at La Batie with no garden for the sum of Seychelles Rupees Twelve while the house being occupied by the defendant on Title No. V9830 also a two bedroom house but has a garden. She has not brought any evidence to show the amount of the rent that she claims she is paying or indeed to show the type of apartment she is renting, the area in which it is located or in fact anything which would enable the court to make a comparison of the two houses and thereby conclude that her claim of SCR7,000.00 per month is justified. Although *a locus in quo* of Title No. V9830 and the house thereon was conducted, in the absence of some material as indicated above, to make a comparison between the two properties which would form the basis for its determination, this Court cannot determine whether the sum claimed is justified. Furthermore, the Court does not have the necessary expertise to determine rental rates of houses and would require expert evidence on this issue to make a determination as to the amount of rent payable by the defendant. In the circumstances this Court is unable to grant the plaintiff's prayer for an order for the defendant to pay her a monthly rent of SCR7,000.00.

[61] Furthermore to grant such prayer would amount to disregarding the fact that a Judgment by Consent was entered into by the Parties which was entered as judgment of the Court. The judgment made no reference to payment of rent by the defendant to the plaintiff but only made provision for the payment by the defendant to the plaintiff for the latter's half share of the property. This gives rise to the question whether the parties can depart from the Judgment by Consent which was entered as a judgment of the Court. This question will be addressed together with the third issue for determination by this Court that is whether this Court has jurisdiction to order the enforcement of the Judgment by Consent in terms of the counterclaim.

*Can the Court Order the plaintiff to abide by the terms of the Judgment by Consent*

[62] In terms of the counterclaim the defendant prays for the Court to direct the plaintiff to abide by the terms of the Judgment by Consent (Exhibit D1) which was entered as a judgement of the Court by Order dated 14<sup>th</sup> November 2017 (Exhibit P1) in which the parties agreed *inter alia* that –

3. *The Petitioner [plaintiff] hereby agrees to sell her share of title number V9830 to the Respondent [defendant] at the market value.*
4. *The parties shall each commission a quantity surveyor to ascertain the market value of the said property. The respondent shall be given three months after the said valuation is presented to the parties to purchase the Petitioner's share of the property.*

[63] In compliance with the Judgment by Consent the plaintiff commissioned Mr. Nigel Valentin to carry out a valuation of the property. According to his report dated 17<sup>th</sup> January 2018 (Exhibit P4) drawn up following a site visit conducted on 21<sup>st</sup> December 2017, he assessed the current market value of the property to be Seychelles Rupees One Million Four Hundred and Thirty Eight Thousand Two Hundred and Six Only (SCR1,438,206.00). The defendant on her part commissioned Ms. Cecile Bastille to carry out a valuation of the property. In terms of her report dated 14<sup>th</sup> March 2018 (Exhibit D5) she valued the property at an estimated market value of Seychelles Rupees Nine Hundred and Fifteen Thousand only (SCR915,000.00). Insofar as it concerns valuation of the property both parties complied with the Judgment by Consent.

[64] There is no evidence of any communication by the plaintiff to the defendant regarding the valuation by Mr. Nigel Valentin. The defendant on the other hand has produced a letter dated 27<sup>th</sup> March 2018 (**Exhibit D6**) addressed to the plaintiff's counsel from the defendant's counsel. It states in relevant part that–

*We act for Miss Claudia Louisa Jeremie.*

*Reference is made to the judgment by consent dated 19<sup>th</sup> October 2017.*

*We are instructed by our client to make an offer of Five Hundred Thousand Rupees for the dwelling house located on parcel V9830.*

*Thanking you in anticipation of hearing from you soon.*

[65] I note that Ms. Cecile Bastille's valuation report is dated 14<sup>th</sup> March 2018 and that the letter is dated about two weeks later. This shows that the defendant sought to comply

with the Judgment by Consent which required her to purchase the plaintiff's share of the property three months after presentation of the valuation.

[66] Having received the letter it was incumbent upon the plaintiff through her counsel, to reply thereto either to accept the offer or if she was not satisfied with the offer to inform defendant's counsel of the same or even to make a counter offer. No evidence has been adduced by the plaintiff to show that there was any such reply. According to the defendant she tried to contact plaintiff's counsel and was eventually informed by his secretary that the plaintiff had changed her mind. This is borne out by the plaintiff's testimony in cross examination where she states that she refused the offer because she found it very low compared to the valuation provided by Mr. Valentin. It also clear that the plaintiff had decided not to comply with the Judgment by Consent well before three months after Ms. Cecile Bastille's valuation had elapsed by the fact that a petition for licitation was drawn up dated as early as 9<sup>th</sup> April 2018, although such petition was filed on 30<sup>th</sup> October 2018.

[67] In cross-examination the plaintiff also stated that she is not prepared to consider the defendant's current offer of SCR725,500.00 as it was made more than three months after the valuations as agreed in the Judgment by Consent, and that three years have now elapsed since then, but instead she wants to buy the defendant's share for SCR900,000. I note that this is not a remedy claimed in the plaint. Furthermore the plaintiff now claims that she entered into the Judgment by Consent at a time when she was in a state of confusion after her mother's death but has since then had time to reflect on the matter.

[68] This Court now has to determine whether, having entered into a Judgment by Consent which has been entered as a Judgment of the Court, the Plaintiff is entitled in her words, to "*change her mind*" and refuse to comply with it for the aforementioned reasons, and to claim rent from the defendant instead.

[69] Section 131 of the Seychelles Code of Civil Procedure ("SCCP") provides for Judgment by Consent as follows:

131. *The parties may at any stage of the suit before judgment, appear in court and file a judgment by consent signed by both parties, stating the terms and conditions agreed upon between them in settlement of the suit and the amount, if any, to be paid by either party to the other and the court, unless it see cause not to do so, shall give judgment in accordance with such settlement.*

[70] It is trite that the effect of a Judgment by Consent which has been entered as a judgment by a Court has the same force and effect as a judgment of the Court itself. Vide *Fabien Villemont v Charles Dubignon & Anor* (MA313/2018) [2020] SCSC 206 (27 March 2020). In the same vein in the Ramkalawan case (*supra*) the Court at para [49] of its judgment stated “*lest it not be clear, consent judgment entered as judgments of the court have the equivalent force of a judgment delivered by the court itself*”.

[71] The plaintiff therefore cannot refuse to abide by the Judgment by Consent and instead claim rent from the defendant or to buy the defendant’s share of the property as those were not terms of the Judgment by Consent. I further take note that although the Judgment by Consent gave the defendant “*three months after the said valuation is presented to the parties to purchase the Petitioner’s share of the property*”, she was unable to do so in the absence of any communication from the plaintiff refusing her offer and in the absence of any agreement between the parties as to which of the two valuations should be used for that purpose. The plaintiff herself neither having bothered to inform the defendant of the valuation she had commissioned nor to respond to the defendant’s offer cannot now be heard to complain that the defendant has failed, refused and neglected to buy her share of the property within the time frame agreed upon. Furthermore while the Judgment by Consent made provision for valuations to be made by both parties it did not provide for what would happen if there were substantial differences in the valuations and the parties were unable to come to an agreement as to which valuation would apply, as in the present case, which has resulted in a stalemate and the present proceedings before this Court. In the circumstances the blame cannot be put at the defendant’s feet for failing to comply with the consent judgment. For those reasons the plaintiff’s claim for rent fails.

- [72] The defendant in her counterclaim prays the Court to “[d]irect the plaintiff to abide by the terms of the Judgment by Consent entered into between the Parties”. The difficulty in acceding to such a prayer as stated above is that the consent judgment does not state a specific sum to be paid by the defendant to the plaintiff or make provision as to how to proceed in the event of disagreement between the parties. If that were the case upon the plaintiff’s failure to comply with the judgment the defendant could have proceeded with execution.
- [73] In her testimony the defendant has indicated her willingness to pay the sum of SCR725,500.00 which amounts to half the sum of the valuation by Quantity Surveyor Jacques Renaud. In essence the defendant is asking the Court to direct the plaintiff to accept that sum for her half share of the property or at least one or the other of the two valuations commissioned by the parties. I note that the valuation of Mr. Renaud and Mr. Valentin (commissioned by the plaintiff) are quite close with only a difference of SCR12,794.00, Mr. Renaud’s valuation being the higher one. The plaintiff on her part maintains that she no longer wishes to sell her share of the property but wishes instead to buy the defendant’s share at the sum of SCR900,000.00. Not only is this not pleaded but it is not a term of the Judgment by Consent which this Court has stated is binding on the plaintiff.
- [74] The question which arises at this stage is whether this Court has the jurisdiction to add to the Order of the 14<sup>th</sup> November 2014 and make a further Order for the defendant to pay and the plaintiff to accept the sum of SCR725,000.00 (or other sums based on the other two valuations) and upon payment thereof for the plaintiff to transfer her share of the property to the defendant. It would seem not. This is because a Court once it has rendered judgment is effectively *functus officio*.
- [75] In *Attorney General v Marzorcchi & Anor* (SCA 8/1996) [1998] SCCA 6 (9 April 1998) The Court quoted with approval paragraph 556 of Halsbury’s Laws of England, Vol. 26, 4<sup>th</sup> Edition, which sets out the rule of *functus officio* as follows:

556. ***Amendment after entry of judgment or order.*** *As a general rule, except by way of appeal, no court, judge or master has power to rehear, review, alter or*

*vary any judgment or order after it has been entered either in an application made in the original action or matter or in a fresh action brought to review the judgment or order. The object of the rule is to bring litigation to finality...*

[76] However this rule is subject to a number of exceptions. In that respect Paragraph 556 of Halsbury's Laws of England (supra) goes on to state that -

*... but it is subject to a number of exceptions. For example, a clerical error or an error arising from an accidental slip or omission may be corrected under rules of court or the court's inherent jurisdiction. The court has inherent jurisdiction to vary or clarify an order as to carry out the court's meaning or make the language plain or to amend it where a party has been wrongly named or described unless this would change the substance of the judgment. The court will treat as a nullity and set aside, of its own motion if necessary, a judgment entered against a person who was in fact dead or a non-existent company or, in certain circumstances, a judgment in default, or a consent judgment. Where there has been some procedural irregularity in the proceedings leading up to the judgment or order which is so serious that the judgment or order ought to be treated as a nullity, the court will set it aside.*

[77] A number of statutory exceptions are provided for in our laws where the doctrine of *functus officio* does not apply and a judgment of the Supreme Court may be revisited or set aside by the same Court namely section 69 of the Seychelles Code of Civil Procedure ("SCCP") - setting aside *ex-parte* judgment; section 147 SCCP - correction of mistakes in a judgement; section 150 SCCP – suspension or variation of judgment; sections 172 to 175 SCCP - setting aside a judgment by way of third party opposition; section 194 SCCP - setting aside judgment and new trial. However none of these statutory exceptions are applicable to the present case. Although the provisions relating to a new trial could have been applied, the present matter falls outside the time limit prescribed for bringing an application under those provisions.

[78] In addition to the statutory exceptions to the principle of *functus officio*, our jurisprudence has also developed certain exceptions to the rule. This is for example where a Judgment by Consent has been entered without following the procedure prescribed in section 131 SCCP. In the case of *Gill v Freminot & Anor* (4 of 2006) [2006] SCCA 7 (28 November 2006) the Court of Appeal set aside a Judgment by Consent for non-

compliance with the procedure prescribed for entering such judgments. In that case application had been made to a Judge who had entered a Judgment by Consent to set it aside and to order a new trial. The application was refused on the ground that the law in Seychelles is silent on the procedure for challenging a consent judgment. However on appeal to the Chief Justice he decided “*in the best interest of justice that the matter be fully exhausted before the Supreme Court*” and ordered a new trial and a stay of the Judgment by Consent. The decision of the Chief Justice was appealed against.

[79] On appeal, after stating that “[t]he existence of a procedure for entering a consent-judgment in Seychelles law is provided for in section 131 of the Code of Civil Procedure (Cap 50)” and observing that the existence of such judgments and the legal effect that flows therefrom has been recognised in judicial decisions with reference to *Pardiwalla v Pardiwalla* (1993) SLR 126. Domah JA went on to state that:

[9] *To that extent, if the law of Seychelles allows for a consent judgment to be entered, it is our view that it should also allow an avenue for challenge not necessarily by way of appeal which in the majority of cases may be foreclosed because of an absence of determination by the court either on the facts of the case or the law applicable in the case. In such circumstances, the only avenue left to the parties would be to go to the Supreme Court by way of motion for the purposes of setting it aside. If an applicant can demonstrate that there are good grounds for setting aside the order made, it may do so and order that the case where the consent judgment was given proceeds for hearing in the normal course of things.*

[80] In that particular case the Court of Appeal took the view that there was neither any consent nor any judgment as required by section 131 putting the very validity of the consent judgment in issue and dismissed the appeal.

[81] Robinson JA in the majority judgment of *Bantele-Lefevre v Lanza* (SCA 43/2017) [2020] SCCA (16 October 2020) adopted the pronouncement in *Gill v Freminot* (supra) regarding the procedure for entering a Judgment by Consent and expressed the opinion that “*it removes much of the misunderstanding about the procedure for entering a judgment by consent, which has prevailed in this jurisdiction*”. However she disagreed with the Court’s pronouncement in the case of *Jessley Cecile v M.T. Rose & Ors* (SCA

8/2009) [2009] SCCA (14 August 2009) in which the Court of Appeal relying on the case of *Gill v Freminot* (supra), stated that “*Where the facts fall short of full compliance with article 131 of the Code of Civil Procedure, the court agreement reached between the parties to a dispute [under section 131 of the Seychelles Code of Civil Procedure] results in a “contrat judiciaire”*”. Along the same lines, the Court of Appeal had stated in *Gill v Freminot* (supra) at paragraph 14 –

[14] *The court may find that an agreement filed by the parties present certain impediments to enter judgment as per the terms agreed upon between the parties. For example, the terms may exceed the competence or the jurisdiction of the court. The agreement may relate to matters on which issues may not have been joined. In such cases, the Court may decline to give a judgment, leaving the agreement to have the force of a judicial contract between the parties. Or it may give judgment limited to what is within its powers to order, leaving the rest to have the force of a judicial contract between the parties.*

[82] After explaining the reasons for her disagreement with the two aforementioned cases regarding the *contrat judiciaire*, Robinson JA concluded that the procedure obtained in French jurisprudence resulting in a *contrat judiciaire* is not analogous to the procedure contained in section 131 of the Seychelles Code of Civil Procedure. Therefore the application of section 131 SCCP could not result in a *contrat judiciaire*. She went to state at paragraph 19 of her judgment that:

19. *... Under section 131 of the Seychelles Code of Civil Procedure, the role of the court is to enter a judgment by consent in accordance with the settlement of the parties. Thus, the settlement of the parties entered as a judgment by consent, under section 131 of the Seychelles Code of Civil Procedure becomes an enforceable judgment of the court*”. Emphasis added

[83] The footnote to that last sentence refers us to the *Pardiwalla* case (supra) in which it was held that – “*the judgment by consent was in effect a contract binding on the parties which had become an enforceable judgment of the Court*”. Robinson JA continues at paragraph 20 of the judgment as follows:

20. *It follows, therefore, that, as a judgment of the court, it is subjected to the provisions of the law which applies to appeals from a judgment at first instance,*

*although with an essential exception. Where the Court has not adjudicated on the evidence, its judgment cannot be challenged on appeal on the ground that the court has reached a wrong conclusion on the evidence before it. This conclusion should not be construed as suggesting that there is no right of appeal as of right. Nonetheless, where there are grounds to set aside a judgment by consent entered, I ought to conclude that the avenue open to a party would be to go to the Supreme Court by way of plaint (fresh action) to set aside the judgment by consent.*

- [84] The appeal was allowed for the reason that the procedure adopted by the Judge in entering the Judgment by Consent was unknown to the law of Seychelles and in essence did not comply with section 131. The ruling appealed against was quashed and the matter remitted to the Supreme Court “*to be either heard afresh or for the Court to enter judgment by consent*”.
- [85] In the present case the Court entered a Judgment by Consent and did not adjudicate on any evidence. An appeal would therefore not be an appropriate avenue for the parties to pursue. Although procedurally section 131 SCCP has been substantially complied with, the Judgment by Consent cannot be executed or enforced. This is because the parties cannot agree on which of the two valuations should be used and consequently how much the defendant should pay the plaintiff for her share of the property, and the Judgment by Consent did not make provision in the case where such a situation should arise. The Judgment by Consent therefore falls short of providing for terms and conditions which effectively settle the suit which is the purpose of such a judgment entered in terms of section 131 SCCP.
- [86] Relying on the pronouncement of Robinson JA at paragraph 20 of her judgment in *Bantele-Lefevre* (supra) (reproduced at paragraph 84 above) it appears that the correct procedure which should have been followed by the plaintiff in this case, would have been to file a plaint before the Supreme Court to set aside the Judgment by Consent, provided of course there are grounds to justify such setting aside. The parties would then have been put in the same position as they were prior to the Judgment by Consent having been entered as a judgment of the Court, and the matter heard afresh or another Judgment by Consent filed, as the case may be. Consequently the counterclaim also fails.

**Decision**

[87] For the reasons given above I dismiss both the plaint and the counterclaim and order the plaintiff to pay costs to the defendant.

Signed, dated and delivered at Ile du Port on 17<sup>th</sup> September 2021.

E. Carolus J