

## SUPREME COURT OF SEYCHELLES

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### **Reportable**

[2022] SCSC 465

MA105/2022

(Arising out of DC155/2020)

In the matter between:

**KARL JOUBERT**

*(Present / represented by Ms. Manuella M. Parmantier)*

**Applicant**

AND

**MARIE-CELINE JOUBERT BORN AZEMIA**

*(Present / represented by Mr. Frank Elizabeth)*

**Respondent**

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**Neutral Citation:** *Joubert v. Joubert* (MA105/2022) [2022] SCSC 465

(03 June 2022)

**Before:** B. Adeline, Judge

**Summary:** Notice of Motion to amend affidavit

**Heard:** 12 May 2022

**Delivered:** 02 June 2022

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### **FINAL ORDER**

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Notice of Motion supported by an affidavit for leave to amend affidavit - The statutory requirements of Section 77 of the Seychelles Code of Civil Procedure apply to statement of defence – A statement of defence is pleading – These requirements do not apply to affidavits which are sworn evidence – Affidavits have to comply with the rules of evidence to be made admissible – Documents to be used in combination with an affidavit must be exhibited and filed with it – An affidavit cannot be allowed to be amended at the behest of a witness – Amendment of an affidavit can only take the form of filing a fresh or additional affidavit – The motion is hereby dismissed.

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### **RULING ON MOTION**

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**B. Adeline, J**

[1] This is a ruling on a notice of motion supported by an affidavit brought by one Karl Joubert of Cote D'Or, Praslin, Seychelles "the Applicant" (the Respondent in the main case) pursuant to Section 121 read with Section 122 of the Seychelles Code of Civil Procedure, "the SCCP", filed in Court on the 12<sup>th</sup> May 2022 as MA105/2022 (arising out of DC158/2020), praying this Court for leave to amend the supporting affidavit to the petition proper, in the manner formulated and shown in red ink.

[2] "The Respondent", (the Petitioner in the main case) opposed the motion but opted not to file an affidavit in reply, sanctioned by the Court in accordance with Section 125 of the SCCP.

[3] The motion, with added emphasis by Learned Counsel for the Applicant / Respondent as underlined below, partly reads;

"For an Order that leave be granted to amend the affidavit in reply and add the list of documents as per the amended reply attached herewith".

## **THE BACKGROUND**

[4] The background to this motion, is that, the Respondent / Petitioner had filed in Court by way of notice of motion supported by an affidavit, a claim for ancillary relief under Rule 4 (1) (f) and (i) of the Matrimonial Causes Rules after her conditional decree of divorce had been made absolute. In the course of the hearing of the motion, learned Counsel for the Respondent / Petitioner objected to the production of certain documents as documentary evidence, contending, that under the provisions of the SCCP they are inadmissible, and cannot therefore be admitted in evidence. Learned Counsel stated, that Section 77 of the SCCP requires, that the "list of the defendant's documents" be listed to give advance notice to the Respondent / Petitioner for them to be rendered admissible.

## **THE APPLICANT'S / RESPONDENT'S AFFIDAVIT**

[5] In the supporting affidavit to the motion, the Applicant / Respondent makes, *inter alia*, the following averments;

*“2. That I have been advised by my Counsel that in Order for me to produce certain documents which I will be relying on before the Court, I must list those in my affidavit in reply which was not done previously.*

*3. I am now desirous of having those documents that I will rely on in the hearing listed in my affidavit in reply.*

*4. the content and nature of my affidavit remains completely unchanged and therefore will in no way prejudice the Petitioner.*

*5. that the case before the Court is still ongoing and I have not yet closed my case.*

*6. that it is in the best interest of justice that the Court allows me to make this amendments”.*

[7] In essence, by his motion, the Applicant / Respondent, contends, that the proposed amendment is necessary, given the evolution of new facts, and the fact that her client had omitted to list the documents he wishes to tender in evidence in his affidavit in reply to the Respondent’s / Petitioner’s petition.

#### **COUNSEL’S SUBMISSION OPPOSING THE MOTION**

[8] Learned Counsel for the Respondent / Petitioner opposition to the motion, stems from his contention, that an affidavit is evidence and cannot, therefore, be amended. Learned Counsel submitted, that the Applicant’s / Respondent’s affidavit in reply in respect of the main case, is evidence placed before the Court upon which the Court will make its determination of the issues in contention between the parties, and therefore, one cannot in law amend the evidence.

[9] Learned Counsel stated, that in law one can amend a plaint or a defence because they are pleadings, but certainly not an affidavit. He explained, that the proper way his learned friend could have dealt with the matter to achieve what she has sought to achieve, was to require her client to substitute his affidavit, or file a fresh additional affidavit in reply to the petition.

- [10] Learned Counsel for the Respondent / Petitioner also raised concerns about the impact of the motion on the speedy resolution of the case, contended, that the motion will cause further delay in concluding the case because the hearing has to be put to a halt for the Court to consider the motion. Learned Counsel stated, that instead, Counsel for the Applicant / Respondent could have simply sent him a list of documents her clients intends to rely on because the documents are from a bank, not from the Applicant witness himself, or his learned friend could have filed a motion to require the Applicant / Respondent to provide the list of the documents he wishes to tender in evidence as exhibits to the Respondent / Petitioner.
- [11] Learned Counsel explained, that he is particularly uneasy with the idea of an adjournment to consider the motion, when at this stage of the proceeding, the Applicant / Respondent was about to complete his examination in chief, and he was about to start cross examining him over his evidence.

#### **COUNSEL'S SUBMISSION IN SUPPORT OF THE MOTION**

- [12] In answer to learned Counsel's submission opposing the motion, learned Counsel for the Applicant / Respondent, submitted, that the motion is not seeking to amend his client's affidavit in reply to the petition in the main case in any shape or form, because he is not making any amendments to the content of the affidavit, but rather, to simply add the list of documents which are to be tendered in evidence as exhibits.
- [13] As to the proposition that an adjournment to consider the motion will further delay proceedings and the conclusion of the case, learned Counsel submitted, that the delay encountered so far, is attributed to the fact, that the parties in this case were attempting to reach a compromise in the form of a settlement which has failed. Learned Counsel indicated, that her client is ready and willing to bear the cost of the adjournment should cost becomes an issue.

#### **QUESTIONS AT ISSUE**

[14] For the purpose of this ruling, there are two questions at issue that should be made the subjects of discussion for a determination of the issues the Court is confronted with in this case, notably;

(1) Should the objection by learned Counsel for the Respondent / Petitioner to the production of documentary evidence as exhibits by the Applicant / Respondent on the ground that the requirement of Section 77 of the SCCP has not been complied with, in that, the Applicant / Respondent has not annexed to his affidavit the list of documents he intends to tender in evidence at the hearing of the petition be sustained?, and

(2) whether or not, the Applicant's / Respondent's motion for leave to amend his affidavit to annex therewith the list of documents he intends to tender as exhibits at the continuation of the hearing of the petition should succeed?

#### **THE DISCUSSION**

[15] In my quest to find the correct answer to the first question, there is a need to make references to Section 77 of the SCCP, which statutory provision, learned Counsel for the Respondent / Petitioner has relied on and referred the Court to Section 77 is couched in the following terms;

*“If the defendant intends to produce any documentary evidence, he shall annex a list thereof to his statement of defence and shall state where the same may be seen a reasonable time before the hearing. The underlined emphasis is mine.*

[16] At the outset, it must always be borne in mind, that Courts have decided, in a Plethora of cases, that where a rule of Court specifies the mode, manner and procedures for something to be done (such as an act for example) such thing should be carried out in the manner prescribed by the appropriate rules. In Nyaro v Zading (YL 124 of 2015) [2016 NG CA 10] (28<sup>th</sup> July 2016) Onalaja, JCA, made this statement;

*“The law, no doubt, is that rules of Court should be obeyed”.*

In *Lablache De Charmoye v. Lablache De Charmoye* SCA 9 of 2019 SCCA 34 (17th September 2019) the Court said that;

*“Rules cannot be overlooked for the sake of expedience or simplicity because rules are to be followed”.*

With this in mind, should it be the case in the instant case?

[17] We learned in our studies of elementary procedural law, that a statement of defence is pleading, and that it provides a concise road map of the defendant’s position *vis a vis* a statement of claim. We also learned, that it is the first step in procedural law afforded to the defendant to respond to the allegations contain in the statement of claim. The defendant to respond to the allegations contain in the statement of claim.

[18] In addition, the defendant will state the material facts that from the basis of the defence that will be raised. A statement of defence, therefore, is not an affidavit, its pleading and rules that apply to it are different than the rules that apply to affidavit. The Britannica defines pleadings as follows;

*“Pleadings are formal written documents by which the parties set forth their contention. Pleadings serve to give notice of the nature of the claim or defence, state the facts that each party, believes exist, narrow the number of issues that ultimately must be decided, provide means to determine whether the party has a valid claim or defence”.*

[19] The requirements of pleadings are therefore different than of affidavits. In the case of *Trope v. South Africa Reserve Bank and Another* and Two other cases [1993] ZASCA 54: 1993 (3) SA 264 was referred to, where GrossKopt, JA had articulated the requirements to be as follows;

*“It is trite law that a party has to plead with sufficient clarity and particularly, the material facts upon which he relied for the conclusion of the law he wishes the Court to draw from those facts. It is not sufficient, therefore, to plead a conclusion of the law without pleading the material facts giving rise to it”.* In

Etienne Gill vs. James Gill SCA 4 of 2004, the Court made similar point when it emphasised that a plaint must contain statements of the circumstances constituting the cause of action, and the relevant material facts.

[20] In ABSA Bank limited vs. Jaco Pelzer Mocke CS1324/2016 (in the High Court of South Africa) the Court has this to say;

*“2. The object of pleadings is to enable each side to come to trial prepared to meet the case of the other, and not to be taken by surprise. Pleadings must therefore be lucid and logical and in an intelligible form and the cause of action or defence must clearly appear from the factual allegations made. The particulars of claim should be so phrased that the defendant may reasonably and fairly be required to plead thereto”.*

[21] It is also statutory law, as illustrated in the SCCP, that a statement of defence is pleading. At Section 75 of the SCCP, we are told what a statement of defence should contain. Section 75 of the SCCP reads;

*“The statement of defence must contain a clear and distinct statement of material facts on which the defendant relies to meet the claim. A mere general denial of the plaintiff claim is not sufficient. Material facts alleged in the plaint must be distinctly denied or then will be taken to be admitted”.*

[22] It follows to say, unreservedly, that in view that a statement of claim is pleading and is subject to a different rule regime than that of affidavit, the requirements under the provisions of Section 77 of the SCCP do not apply to affidavit. In fact, contrary to what Counsel for the Respondent / Petitioner has sought to argue, there is no rule known to this Court, that requires a deponent of an affidavit to annex to its affidavit a list of documents he wishes to produce as documentary evidence at the hearing, and to state where the same may be seen within a reasonable time before the hearing. Therefore, learned Counsel’s objection to the production of the documents on that basis is groundless, and accordingly, is overruled.

[23] As regards to affidavit, it is well settled, that it is evidence to be relied upon by the Court in determining the issues in contention between the parties. It is a sworn

written statement made under oath or affirmation as to the truth, before a person authorised to administer oath under Section 171 of the SCCP, which in most cases, is a Notary Public. As to the requirements of affidavits, Section 170 of the SCCP provides for the following;

*“Affidavits shall be confined to such facts as the witness is able on his own knowledge to prove, except on interlocutory applications, on which statements as to his belief, with the grounds thereof, may be admitted”.*

[24] The proposition that affidavits are sworn evidence, and that they have to be in compliance with the law of evidence to be made admissible, is well illustrated by Pillay J in Michel vs. Michel (MA399/2019) [2020] SCSC 303 (9<sup>th</sup> June 2020) in relying on Elmastry & Anor v. Hua Sun (MA195/2010) (arising in CC13/2014) [2019] SCSC96 Z (8<sup>th</sup> November 2019). In that case, the Court had relied on Daniella Lablache De Charmoye vs. Patrick Lablache De Charmoye (Civil Appeal SCA MA08/2019, SCSC 35 (17 September 2019) in which, *inter alia*, Twomey CJ (as she then was) had said that,

*“Affidavit are sworn evidence and evidential Rules for admission cannot be waived”.*

[25] As a matter of procedural law, it is well settled, that it is not sufficient for an affidavit to simply contain averments in support of an application before a Court in this jurisdiction. The facts averred, have to be supported by documentary evidence which have to be exhibited to the affidavit. This case law requirements is in fact, in line with Practice Direction 32 (Supplements CPR Part 32) 4.3 (1) of the White Book. This case law requirement was emphasised by Carolus J, in MC112/2020, MA30/2021 and MA31/2021 (arising in MC11/2020 and MC20/2021 in a matter between Savoy Development Limited and Davia Todorova and Yuriy Nesterenko.

[26] This legal position, has been established in the precedent case of Lablache De Charmoye vs. Lablache De Charmoye SCA MA08/2019 [17<sup>th</sup> September 2019] when Robinson J. stated the following;



*“In Re Hinchcliffe, a person of unsound mind, deceased [1895] 1 CH, 1117, the Court of Appeal held that any document to be used in combination with an affidavit must be exhibited to and filed with it. In the same light, any document to be used in combination with an affidavit in support of an application [to stay execution] must be exhibited to and filed with it. Counsel for the Applicant should be mindful that affidavit stands in lieu of the testimony of the Applicant”.*

[27] In *Laurette & Ors vs. Savy & Ors*, SCA MA13/2019 [22 October 2019], the Applicant had applied to the Court for an extension of time to file a notice of Appeal against the Judgment of the Supreme Court. In her ruling, noting the deficiencies in the affidavit, Robison J, stated that;

*“the Judgment had not been exhibited to the affidavit”.*

[28] Clearly, therefore, on account of the case law authorities discussed in the preceding paragraphs, documentary evidence which the Applicant / Respondent intends to tender in evidence as exhibits, ought to have been exhibited to the affidavit. Having not done so, the documentary evidence cannot be admitted to be made part of the evidence for the Applicant’s / Respondent’s case. Is the failure of the Applicant / Respondent to exhibit the documents to his affidavit fatal to his case, in that, he cannot, therefore, produce these documents at the hearing of the petition proper? As per the rules elaborated in the various case law cited above, the answer is “yes”.

[29] There is before this Court, now under consideration, a motion filed in Court by the Applicant / Respondent, to amend his affidavit in reply to the Respondent’s / Petitioner’s motion in respect of the ancillary relief proceedings initiated. In answer to that motion, learned Counsel for the Respondent / Petitioner, has submitted, that an affidavit cannot in law be amended, contending, that instead, the Applicant should have filed a substitute or an additional affidavit.

[30] Considering the rival contentions, and perusing the materials available on record, the sole point that now arises for consideration, is whether the Applicant / Respondent should be permitted to amend his affidavit? It must be borne in mind, that there is no

statutory provision in the SCCP where under an affidavit of a witness can be amended. However, it is well settled by case law authorities, that the proposition that an affidavit cannot be amended is trite law. Therefore, it is safe to suggest, that whilst pleadings can be amended, an affidavit which is sworn evidence, cannot. Once you've sworn an affidavit, it is done with one exception, typos.

[31] Clearly, therefore, in the absence of any statutory provisions in the SCCP prescribing for rules governing exhibits as regards to affidavits, and the manner which documents have to be exhibited to affidavits, by not complying with the rules elaborated by case law, the Applicant / Respondent has failed to put before this Court all the evidence required for the Court to determine the petition justly and fairly.

[32] Furthermore, the failure on the part of the Applicant / Respondent to exhibit the documents, means, that he cannot tender those documents as exhibits amid the objection by Counsel for the Respondent / Petitioner.

[33] To determine the second question, that is to say, whether or not the Applicant's / Respondent's motion for leave to amend his affidavit should succeed, this Court has had regards to several case law authorities. In a High Court ruling (a Tanzanian's case) between Annandumi Alex Kipaa vs. Zahara Adamu Munisi, the Court acknowledged, that "there is a divided opinion as to whether a defective affidavit can be amended. The Court referred to one of the literatures on the subject, that is, Mulla on the Code of Civil Procedure V011, 15<sup>th</sup> edition whose position was quoted to be that;

*"a defective affidavit cannot be amended, but a fresh affidavit setting out the facts correctly can be filed".*

[34] In the case of Phantom Modern Transport [1985] Limited vs. D.T. Dobie ((Tanzania) Limited, the Court adopted a similar position. Makaramba J, in the case of Annandumi Alex Alias Kipaa (Supra) accepted that position when he made the following statement;

*“As I intimated to earlier I have determined that there are defects in the Applicant’s affidavit but which are curable by way of “amendment” by the Applicant filing a fresh affidavit with correct averments”.*

[35] In other jurisdiction, notably, in many states in India, for example, the legal position is quite clear, an affidavit cannot be amended. In NandaKumar Shankar Mhatre vs. Dayan and Mahader Matre and Ors [1989] (1) Bom CR112, the Bombay High Court had this to say;

*“I am unable to see how a party can be allowed to amend the affidavit which has already been made by him. The affidavit once made cannot be allowed to be changed by amending the same. Consequently, the prayer of learned Counsel for the Petitioner for permission to amend the affidavit cannot be granted”.*

[36] In Dwarka Natha vs. Income Tax Officer Air 1966 SC81 (a case where the affidavit was defective for lack of verification) the Supreme Court held that;

*“If an affidavit is defective in any manner, instead of rejecting it, a reasonable opportunity is to be given to the party concern to file a better affidavit complying with the requirements of the law”.*

[37] In B.P Pant vs. Cadre Authority U.P Co-operative Dairy Federation and Milk Union and Others, the High Court of Allahbad said the following;

*“It is known to us all, that affidavit is a piece of evidence and cannot be allowed to be amended at the behest of the Petitioner. However, this has been a long practice of the view that a statement given under oath by a witness cannot be allowed to be amended at the behest of a witness, similarly, writ petition founded on affidavit cannot be allowed to be amended”.*

[38] A close scrutiny of the case law authorities discussed in the preceding paragraphs in respect of amendment of affidavits, leads me to the conclusion, that where the Courts have concluded that an affidavit can be amended, they meant, that the amendment has

to be by way of filing fresh or additional affidavit not amending the affidavit which has already been verified and filed in Court.

## **CONCLUSION**

[39] In the final analysis, for the reasons discussed in the preceding paragraphs of this ruling, the Applicant's / Respondent's motion for leave of this Court to amend his affidavit filed in Court in reply to the Respondent's / Petitioner's petition is denied, and accordingly, the motion is hereby dismissed.

Signed, dated and delivered at Ile du Port on 02<sup>nd</sup> June 2022.

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B. Adeline

Judge of the Supreme Court