

SUPREME COURT OF SEYCHELLES

Reportable

[2022] SCSC 739

CS21/2022

In the matter between:

MICHAL TOMASZ NOWACKI

*(electing his legal domicile in the chambers of Frank Elizabeth,
Attorney at Law of Suite 212
Premier Building, Victoria, Mahe, Seychelles)*

Plaintiff

vs

KATAVZYNA ANNA DABROWSKA

(Address unknown to be served by publication)

Defendant

Neutral Citation: *Nowacki v. Dabrowska* CS21/2022 [2022] SCSC 739

(21 July 2022)

Before: B. Adeline, Judge

Summary: Jurisdiction of the Supreme Court to make declaratory Judgment to declare marriage unlawful, null and void ab initio.

Heard: 12 May 2022 – (Submission)

Delivered: 29 July 2022

FINAL ORDER

Jurisdiction of the Supreme Court – Unlimited jurisdiction – Inherent Jurisdiction – Equitable Jurisdiction – Article 125 of the Constitution – Section 5 and 6 of the Courts Act – Declaratory Judgment equitable or statutory remedy.

This Court has the necessary jurisdiction in exercise of its inherent jurisdiction that emanates from its unlimited jurisdiction, to determine whether or not to grant the declaratory Judgment being sought for.

RULING

B. Adeline, J

[1] This is a plaint filed in Court by one Michal, Tomasz, Nowacki (“the plaintiff”), who elects his legal domicile in the Law Chambers of Mr. Frank Elizabeth, Attorney-at-Law against one Katavzyna, Anna Dabrowska (“the defendant”), whose address is unknown.

[2] In the plaint, as part of the pleadings, *interalia*, the following averments are made;

1. The Plaintiff and the Defendant were lawfully married on the 07th May 2020, at Anse Kerlan, Praslin, Seychelles.
2. Both the Plaintiff and the Defendant are of Polish nationality and at the time of their marriage they were residents of Anse Kerlan, Praslin.
3. At the time of the said marriage, the Plaintiff was a businessman and a married man, the Defendant a manager and a spinster.
4. There are no children born out of the said marriage.
5. After the said marriage, the parties lived and cohabited temporarily at Anse Kerlan, Praslin, and
6. The plaintiff avers that the marriage should be declared unlawful, null and void ab initio for the following reasons:
 - (a) at the time of the marriage, the plaintiff was already married to another person, and the marriage had not yet been dissolved.

[3] The Plaintiff prays this Court for the following relief;

- (i) A declaratory Judgment declaring the marriage unlawful and void ab initio.

BACKGROUND

[4] This Court has taken judicial notice of previous proceedings involving the same parties by which the Plaintiff, (“previously the Petitioner”) had petitioned this Court for an Order of nullity of marriage under the provisions of Section 238 (1) (c) of the Civil Code of Seychelles Act, 2020 (“the code”) which was subsequently withdrawn.

[5] Learned Counsel for the Plaintiff (the Petitioner then), withdrew the petition for the reason that the plaintiff could not satisfied the statutory requirement laid down by virtue of Section 229 (1) of the Code, that requires a party to a marriage, at the date when proceedings are commenced, to be domiciled in Seychelles, the effect of which, would have enabled this Court to seised jurisdiction to determine the petition and make a determination thereupon. (Underlined emphasis is mine).

[6] As part of my thoughts over the relief being sought by the plaintiff, as well as over whether this Court is a Court of competent jurisdiction to grant the relief being sought, I have first and foremost, reminded myself of an extract in the case of Nyaro v Zading (YL 124 of 2015) [2016] NGCA No (28th July 2016) which I came across recently and which are pertinent to my approach in this case. In that case, the Court stated the following;

“It is for this reason that the issue of competence, that is jurisdiction, can even be raised suo motu by the Court to ensure that matters before it are competent in order that the Court does not end up acting in vain and nullity if it turns out in the end that it indeed lacks the requisite competence to have heard and determine the cause, matter or action on appeal before it”.

[7] This pronouncement, is consistent with the views expressed by Dingake, JA in Vijay Construction Pty Ltd v Eastern European Engineering Limited SCA MA21/2022, who in his concurring Judgment, referred to a passage in the case of Owners of the Motor

Vessel “Lilian S” vs Caltex Oil (Kenya) Ltd [1989] KLR before the Court of Appeal in Kenya, when the Court had this to say;

“The question of jurisdiction ought to be raised at the earliest opportunity and the Court seised of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one or more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.

[8] It is in order to clear any possible doubts over whether this Court has jurisdiction to entertain the plaint for a declaratory Judgment, that in the light of the extracts from the case law authorities specified in the preceding paragraphs, that suo motu, the Court raised the issue of jurisdiction, and called upon learned Counsel for the Plaintiff to address it on the issue of whether this Court is a Court of competent jurisdiction to hear the plaint, and indeed, grant the relief being sought. For that, learned Counsel opted to provide the Court with a written submission.

[9] In his submission, learned Counsel began, by providing the Court with a definition of jurisdiction taken from the Halsbury’s laws of England that reads;

“jurisdiction is the authority which of course has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision to stop the limits of this authorities are imposed by statute, charter or commission under which the Court is constituted. If no restriction or limit is imposed the jurisdiction is said to be unlimited”.

[10] Learned Counsel also found it necessary, to quote a passage from a ruling of the Court of Appeal in Vijay Construction Pty Limited vs. Eastern European Engineering Limited, MA 24/2020 arising in SCA 28/2020, that reads;

“The primary source of jurisdiction of a Court is found in the Constitution or Statute constituting that Court and investing it with authority to decide matters. That authority may be unlimited or limited. Numerous texts and authorities have suggested that any Courts of unlimited original jurisdiction possess inherent jurisdiction.” Underlined emphasis is mine.

[11] This considered view, is one that emanates from different case law authorities, including the case of R vs. Forbes, ex parte Bevan 1972 HCA 34, quoted by learned Counsel. In that case, the Court had stated the following:

“Courts of unlimited jurisdiction have inherent jurisdiction”.

[12] Relying on these case law authorities, learned Counsel submitted, that this Court is a Court of unlimited jurisdiction, which as such, it has an inherent jurisdiction to grant the relief being sought in this instant case. Learned Counsel argued, that such inherent jurisdiction has evolved from the English common law, and that the High Court inherent jurisdiction has developed over the years. The case of Privatbaken vs. Aktieselskab Privatbanken [1978] SLR 226 was quoted, in which case, Sauzier J traced back the history of the creation of the Supreme Court in 1903, and confirmed, that in 1903, the Supreme Court of Seychelles became a Court of unlimited jurisdiction and given all the powers, privileges authority and jurisdiction of the High Court of justice in England.

[13] This, as per learned Counsel's submission, with the enactment of the Court's Act, statutory provisions have been introduced, notably, by virtue of Section 4, Section 5, Section 6, Section 7, Section 8, Section 9 and Section 10 of the Court's Act vesting into the Supreme Court different jurisdiction. Learned Counsel made specific mention of Section 4 of the Court's Act, which expressly provides, *inter alia*, that the Supreme Court "shall have and may exercise the powers, authorities and jurisdiction possessed and exercised by the High Court of justice in England, and Section 5 of the Court's Act, which *inter alia*, provides, that the Supreme Court shall have, and is hereby invested with, all the powers, privileges, authority and jurisdiction which is vested in, or capable of being exercised by the High Court of Justice in England".

[14] In essence, therefore, the crux of learned Counsel's submission on the issue of jurisdiction, is that, as a matter of procedural law, the Supreme Court does possess the necessary jurisdiction to grant the declaratory Order being sought for by the Plaintiff.

[15] It is appropriate, at this juncture, for a consensus as to what the term jurisdiction means in the sphere of procedural law. In an article in the Canterbury Law Review 10, (2005) II Canterbury Law Review 220, the author, one Joseph Rosara, gives a simple definition of jurisdiction by defining jurisdiction as follows;

"the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision".

[16] Rosara went on as to state, that jurisdiction is a substantive power to hear and determine a matter, and that it may be conferred by the statute under which the Court is constituted. He calls this "statutory jurisdiction". According to him, such jurisdiction may be inherent in a particular Court, which is called inherent

jurisdiction. Rosara also argues, that one must distinguish between jurisdiction and power as he stated the following;

“All Courts possesses inherent powers which are incidental or ancillary to their substantive jurisdiction. These ancillary powers are procedural rather than substantive in nature. They enable the Court to give effect to its jurisdiction by enabling the Court to regulate its procedure and protect its proceedings”.

[17] The question that becomes relevant in the instant discussion, is, therefore, where does the Court’s jurisdiction derives? In *Vijay Construction (Pty) Ltd vs. Eastern European Engineering Ltd* MA No 24/2020 (arising in SCA 28/2020) [2022] SCCA 5 (21 March 2022) Robinson J A had this to say;

“34. The primary source of the jurisdiction of the Court is found in the Constitution or Statute constituting that Court and investing it with authority to decide matters. That authority maybe be unlimited or limited. Numerous texts and authorities have suggested, that only Courts of unlimited original jurisdiction possess inherent jurisdiction”.

[18] As Judges, we often use the term “inherent jurisdiction”, when we feel that its use is necessary as a useful adjunct of one Court’s jurisdiction. Inherent jurisdiction is a creature of the English common law. Sir Jack Jacob has come up with a definition of inherent jurisdiction, which over the years, has been adopted in many common law jurisdiction, notably New Zealand, Canada and United Kingdom. He defines inherent jurisdiction as follows;

“residual source of powers, which the Court may draw upon as necessary, whenever it is just or equitable to do so, in particular, to ensure the observance of due process of the law to prevent vexation or oppression, to do justice between parties and to secure a fair trial between them”.

[19] The vexed questions that are for consideration at this juncture, are;

(i) is inherent jurisdiction different from common law jurisdiction, and if so, what are the differences?, And

(ii) is it necessary to retain inherent jurisdiction or common law jurisdiction, or indeed both, in order to ensure the proper and effective functioning of the Courts?

In *ex parte Millsite Investments Co (Pty) Ltd* 1965 (2) SA 582 (T) at 585 – G-H, the Court had this to say about the inherent jurisdiction of the Supreme Court;

“apart from the powers specifically conferred by statutory enactment and subject to any deprivations of power by the same source, a Supreme Court can entertain a claim or give an Order which, at common law, it would be entitled to entertain or give. It is to that reservoir of power that reference is made where in various judgments, Courts have spoken of the inherent power of the Supreme Court. The inherent power is not merely one derived from the need to make the Court’s Order effective, and to control its own procedure, but to hold the scales of justice where no specific law provides directly for a given situation. Underlined emphasis is mine.

[20] Pollak on jurisdiction (1993) makes the following comment, amongst others;

“In short, therefore, the position is that unlike, say the Magistrate’s Court or the industrial Court, the power of the Supreme Court is not spelled out in a legislative framework and limited by its creating statute, it inherently has all such power as entitles it to entertain, to hear all causes arising within the area over which it exercises jurisdiction”.

[21] Pollak then proceeded to give examples of the exercise by the Supreme Court of its inherent jurisdiction;

(i) to regulate their own proceedings.

(ii) to control their own officers.

(iii) to prevent abuse of their process.

(iv) to maintain their dignity.

(v) to ensure that substantial justice is not denied by a strict adherence to procedural rules.

As a point of caution, Pollak did emphasise, that inherent jurisdiction cannot be used to create substantive law.

[22] The effect of the exercise by the Supreme Court of its inherent jurisdiction, has been pronounced upon by Twomey, Justice of Appeal, who stated in *Bristol v. Rosenbauer* (SCA MA28/2021 [Arising in SCA 71/2018] (out of CS118/2012) [2022] SCCA 23 (29 April 2022), that;

“ When a Court is called to exercise its inherent jurisdiction, so that it can properly regulate its own proceedings, it is essentially called to exercise a function that it already has or has already been clothed with, or to exercise a power in order to allow its orders to be effective.”

[23] In Pollak’s view, the term common law jurisdiction is used in the context of the common law which is a source of jurisdiction, which in effect, means that the Courts define their own jurisdiction given that they are the final Judges of what the common law is. Clearly, therefore, the answers to the above questions, should all be in the affirmative.

[24] Inherent jurisdiction is non-Constitutional or non-statutory jurisdiction which the Courts employ in a range of circumstances. The Courts can use its inherent jurisdiction wherever and whenever it is just and necessary. One of the fundamental features of inherent jurisdiction, is that it is exercised as part of the administration of justice and in relation to the process of litigation. It is, therefore, procedural not substantive. As correctly stated by Robinson JA in *Vijay Construction (Pty) Ltd (Supra)* in this country, our Courts owe their existence not only by statutes but also the Constitution. History shows, that the entirety of the English Superior Court’s jurisdiction was inherent, in that, it had no statutory or Constitutional basis, and that the enactment of statutes slowly started to codify the majority of that jurisdiction. In essence, the powers and jurisdiction of the Court that remains uncodified or unregulated, overruled by statute, is the residual powers that has become known as inherent jurisdiction.

[25] In Liang’s view, inherent jurisdiction indicates some sort of substantive authority based on the original and unlimited jurisdiction superior Courts received from the

sovereign. This he says, is different from inherent powers which were instead a type of procedural authority incidental to a Court's statutory authority. In *Adrian de Lange vs. Catherine Cillers* (MA22/202) (Arising in DC137/2020), when addressing the nature and scope of inherent jurisdiction, I expressed my firm belief, that inherent jurisdiction "facilitate the Courts in exercising full judicial power in all matters concerning the general administration of justice, and is part of procedural law. I stated, that it is a "default power" that operates where there is no express power, and that you invoke it to ensure convenience and fairness".

[26] The case of *Auton Piller KG vs Manufacturing Processes Ltd* [1976] (55 (CA) is an example where the concept of inherent jurisdiction has been used (in the English Court). This case established the jurisdiction to grant an *ex parte* order to a party to enter, search and remove property from the premises for its opponent in civil litigation when it is likely that the opponent was going to destroy legal evidence. The Court of Appeal admitted, that there was little precedent, statutory or common law, to warrant such an Order, but that it was necessary so as to do justice between the parties, and therefore, justified through the invocation of the Court's inherent jurisdiction.

[27] In other jurisdiction, notably Singapore, the inherent jurisdiction of the Court is recognised by rules of Courts, and is termed as follows;

"For the avoidance of doubt, it is hereby declared that nothing in these rules shall be decreased to limit or affect the inherent jurisdiction of the Court to make any Order as may be necessary to prevent injustice or to prevent abuse of the process of the Court".

[28] In *UMCI Ltd v Tokio Marine & Fire Insurance Co (Singapore) Pty Ltd and Others*, the Court had to consider whether the Court's inherent jurisdiction extended "to the

making of Orders against persons who are not parties to this action, requiring them to furnish hand writing samples”. The Court held, that it had jurisdiction to make an Order for discovery under the rules of Court. In the alternative, however, the Court went on to consider whether it could invoke its inherent jurisdiction to grant the Order. It noted, “that rules of Court acknowledging the existence of inherent powers did not give the Court unlimited powers, and instead, the touch stone for the exercise of inherent jurisdiction was a necessity, whatever needed to be done to secure justice between the parties and avoid abuses of Court’s processes”.

[29] In *Wee Soon Kim Anthony vs Law Society of Singapore* [2011] 4, SLR 25 (SGCA) [26] the Court elaborated some principles which included the following;

“The Court may exercise its inherent jurisdiction not only to avoid “injustice”, but also, to avoid “serious hardship or difficulty or danger” (as in the instant case). Under current in this principle is the acceptance of the theoretically unlimited inherent jurisdiction.

[30] The inherent jurisdiction of the high Court in New Zealand was examined by the Supreme Court in New Zealand in *Mafart v Television New Zealand Ltd*, when Elias, CJ stated the following;

“except to the extent modified by statute and rules, the Court continue to have inherent jurisdiction and powers to determine its own procedure. The inherent jurisdiction is not ousted by the adoption of rules, but is regulated by the rules so far as they are extended. To the extent that the rules do not cover a situation, the inherent jurisdiction supplies the deficiency”.

[31] In the context of the discussion so far in the preceding paragraphs, can it be said, convincingly, that learned Counsel's proposition, coupled with his arguments in support thereof, that this Court does have an inherent jurisdiction to decide certain matters, and that it can make use of such jurisdiction to grant the declaratory Judgment being sought. In other words, am I persuaded by his arguments, or I am not persuaded because his arguments do not hold water.

[32] Learned Counsel's arguments, stem from the premise, that the Supreme Court of Seychelles has an unlimited jurisdiction which emanates from Article 125 of the Constitution as well as Section 5 of the Courts Act. For ease of reference, Article 125 of the Constitution reads;

"125 (1) There shall be a Supreme Court which shall, in addition to the jurisdiction and powers conferred by this Constitution, have;

- (a) Original jurisdiction in matters relating to the application, contravention, enforcement or interpretation of this Constitution.
- (b) Original jurisdiction in civil and criminal matters.
- (c) Supervisory jurisdiction over subordinate Courts, tribunals and adjudicating authority and, in this connection, shall have power to issue injunctions, directions, orders or writs including writs or orders in the nature of habeas Corpus, certiorari, mandamus, prohibition and quo warrant to as may be appropriate for the purpose of enforcing or securing the enforcement of its supervisory jurisdiction, and
- (d) Such other original, appellate and other jurisdiction as maybe conferred on it by or under an Act".

[33] Section 5 of the Courts Act, reads;

“5. The Supreme Court shall continue to have, and is hereby invested with full original jurisdiction to hear and determine all suits, actions, causes and matters under all laws for the time being in force in Seychelles relating to wills and execution of Wills, interdiction or appointment of a curator, guardianship of minors, adoption, insolvency, bankruptcy matrimonial causes and generally to hear and determine all civil suits, actions, causes matters that may be brought or may be pending before it, whatever may be the nature of such suits, actions, causes or matters, and in exercising such jurisdiction, the Supreme Court shall have, and is hereby invested with, all the powers, privileged, authority, and jurisdiction which is vested in, or capable of being exercised by the High Court of justice in England. Underlined emphasis is mine.

[34] For the purposes of this ruling, it is also worth noting Section 6 of the Court’s Act, that reads;

“6. The Supreme Court shall continue to be a Court of equity and is a hereby invested with powers, authority and jurisdiction to administer justice and to do all acts for the due execution of such equitable jurisdiction in all cases where no sufficient legal remedy is provided by the laws of Seychelles”.

[35] By reference to Article 125 of the Constitution, and Section 5 of the Court’s Act, learned Counsel argued, correctly and convincingly, that the Supreme Court has an unlimited jurisdiction conferred upon it by the Constitution and statutes. His argument is supported by, and is accorded by Sauzier J’s passage in the case of *Privatbanken v Aktieselskab* when he stated, *inter alia*, that;

“In 1903 the Supreme Court of Seychelles became a Court of unlimited jurisdiction.”

[36] In his written submission, learned Counsel also argues, that he has resorted to invoking the Court’s inherent jurisdiction for the making of a declaratory order by way of entering a plaint in Court, because his client has no legal remedy under the provisions of the Civil Code of Seychelles Act 2020, albeit the fact, that the Supreme Court has unlimited jurisdiction by virtue of Article 125 of the Constitution and Section 5 of the Courts Act.

[37] As correctly submitted by learned Counsel, this is because the jurisdiction of this Court is limited by virtue of the expressed provisions of Section 229 (2) (b) of the Civil Code of Seychelles Act 2020, to the extent that by virtue of Section 229 (1) (b) of the Civil Code of Seychelles Act 2020, a party to the marriage has to be domiciled in Seychelles at the date when proceedings are commenced, where the order being sought is for nullity of marriage under Section 238 (I) (c) read with Section 146 of the Civil Code of Seychelles Act 2020. In the instant case, both of the parties are not domiciled in Seychelles.

[38] It is the contention of learned Counsel, that Section 146 of the Civil Code of Seychelles Act “is a stand along provision”, and as such, in order to do away with the requirement that either of the parties has to be domiciled in Seychelles, the seeking of a declaration that the marriage was unlawful, null and void ab initio should be entertained by the Court in exercise of its inherent jurisdiction.

[39] It is also the contention of learned Counsel, that the Court should make such a declaration, given that a marriage is a contract between two persons, and that, that is further emphasised by the use of the word “contracted” in various provisions under

the Civil Code of Seychelles Act 2020, notably, in Section 146, and that there are statutory obligations imposed on the parties to the marriage under Sections 201 and 203 of the Civil Code of Seychelles Act 2020, for example. Learned Counsel contends, making specific reference to “the Online Legal Information Institute”, that the English Common Law tradition, has long recognised marriage between a man and a woman as a legal contract with obligations on the parties, and that, such concept still remains relevant although the obligations have changed.

[40] To further strengthen his argument for the making of the declaratory Judgment being sought for on account of the substantive law of contract, learned Counsel drew this Court’s attention to Section 1131 (1) of the Civil Code of Seychelles Act 2020, which provides, that “a contract that is unlawful has no legal effect”, and Section 1131 (2) which reads that “a contract is unlawful if its performance is prohibited by legislation, or is against public policy”. In this regards, learned Counsel contended, that the marriage between the Plaintiff and the Defendant is against Public Policy because the former was a married man when he contracted marriage with the latter.

[41] In fact, the proposition that the Court will not enforce an agreement which is against public policy is backed up by several case law authorities in this jurisdiction, notably Bernard Monty vs. Alex Buron, and NSJ Construction (Pty) Ltd and Anor v F.B Choppy (Pty) Ltd (SCA160 of 2019) Appeal from CS27 of 2010, and 53 of 7 September 2021. In reliance on these case law authorities, it is submitted by learned Counsel, that the contract of marriage between the Plaintiff and the Defendant in the instance case, is not only against public policy because the plaintiff was already married when he contracted marriage with the Defendant, but also, because it is against the provision of Section 146 of the Civil Code of Seychelles Act 2020.

[42] As regards to learned Counsel's proposition that a marriage in this country is a contract between a man and a woman, and that this is borne out, also, because of the frequent use of the word "contracted" under different provisions of the Civil Code of Seychelles Act, such as, for example, under Section 146 of the Code, as much as the correctness of his submission on the substantive law of contract offers very little room for disagreement, it is my considered opinion, that the law of contract cannot be the legal substantive law basis to determine whether or not to grant the relief being sought for. This is because to do so will be a clear manoeuvre to circumvent the provisions of the Civil Code of Seychelles Act. I say so, because under Section 228 of the Civil Code of Seychelles Act, given that this is effectively a proceeding for nullity of marriage, it is a "matrimonial cause" governed by specific rules and statutory provisions under the code.

[43] With emphasis on this contention, that the marriage between the Plaintiff and the Defendant is a contract against public policy because the plaintiff was already married when he contracted marriage, learned Counsel opined, that the law as it presently stands under the provisions of Section 229 (2) (b) of the Civil Code of Seychelles Act is discriminatory given that it doesn't afford foreigners who are not domiciled in Seychelles equal protection, and is, therefore, in consistent with Article 27 of the Constitution that gives every person a right to equal protection of the law including the enjoyment of the rights and freedom set out in the charter without discrimination on any ground except as is necessary in a democratic society.

[44] However, learned Counsel has only moved this Court to refer this matter to the Constitutional Court under Article 46 (7) of the Constitution for a determination as to whether Section 229 (2) (b) of the Civil Code of Seychelles Act is inconsistent with,

and contravenes Article 27 of the Constitution, only if, the Court determines, that it has no jurisdiction to make a declaratory Judgment declaring the marriage between the Plaintiff and the Defendant unlawful null, and void ab initio because it offends Section 146 of the Civil Code of Seychelles Act.

[45] At this juncture, the question of whether a declaratory Judgment is an equitable or a statutory remedy is worthy of a discussion. Historically, a declaratory Judgment has been regarded as a discretoriary remedy, although arguably, as early as the 19th Century Farwell LJ in *Chapman vs Michaelson* CA [1909] 1 CH 238, 243 took the view that it was not strictly an equitable relief. In an Article published in the *Canada Bar Review*, Volume No 8, in October 1931, one Paul Martin had this to say;

“As in England, the granting of a declaratory decree lies within the Court’s discretion, and in the instances which tends to indicate the direction in which the discretion is usually exercised, seem to depend primarily upon the apparent utility and convenience in consequence of the declaration”.

[46] The author of the Article went on as to add that;

“The question of utility looks at the result of the declaratory form of Judgment. The element of convenience is best observed in the procedure, it being considered that the determination of rights can often be more conveniently ascertained by this method”.

It appears, that historically Courts in Scotland, Canada and England for example, have followed the practice of not granting a declaratory Judgment where some other known remedy exists. In Scotland for example, it is well

documented, that Scotch Courts have historically made declarations regarding the validity of marriage (see Fazer, Husband and Wife 2nd ED. 1238, 1244).

[47] In other jurisdiction, such as in the United States, for example, a declaratory Judgment is considered to be a statutory remedy. It appears, therefore, that in the absence of statutes (legislation) providing for a declaratory Judgment as a statutory remedy, we can conveniently subscribe to the view, that a declaratory Judgment is an equitable / discretionary remedy.

[48] As such, one may wonder, why is it that in the instant case, the Court would not exercise its equitable jurisdiction conferred upon it by virtue of Section 6 of the Courts Act to entertain the plaint. One of the maxims or principles of equity developed by the English Court of Chancery to administer equity jurisdiction is, “he who comes to equity must come with clean hands”. On the facts of the instant case, this offers the Plaintiff with no prospect of success. The Plaintiff cannot be said to have clean hands in the instant case because by his own admission, he married whilst still married to another. The Plaintiff’s explanation that he was intoxicated, and therefore was unaware that he was contracting into marriage, can hardly absolve him from the wrong doing and bequeath him with clean hands because there is an administrative process which one has to adhere to before getting married, and therefore, he must have gone through the process.

[49] I also take into account what the declaratory Judgment would entail in reliance on Family Law Professor Leong Wai Kum’s (in the High Court’s Inherent Power to Grant Declarations of Marital Status” 1991 Singapore Journal of Legal Studies PP13-54) explanation as to the distinction between a declaratory Judgment and an executory Judgment. He explains, that a declaratory Judgment does not order one party to act or

not to act in a certain way against the other party. Rather, it seeks to only “proclaim the existence of a legal relationship between the parties or the legal status of one of the parties”. Professor Leong Wai Kum further writes, that because this type of Judgment is non-conceive, it does not mean it is of little use.

[50] If I am to put in context Professor Leon Wai Kum’s view of a declaratory judgment, clearly, in the instant case, the Plaintiff is merely seeking for an Order which simply declares the non-existence of a legal relationship between him and the defendant. I cannot, therefore, comprehend how this would disadvantage the defendant or curtail her from taking any further action against the Plaintiff should the need arise. However, this Court will cross the bridge when it gets to it.

[51] Within the background of the elaboration and discussion of the law in the preceding paragraphs herein, I hold the view, that this Court does have an inherent jurisdiction to determine this application, and that it can exercise its inherent jurisdiction emanating from its unlimited jurisdiction to ensure convenience and fairness on both parties, particularly so, given that they both do not meet the statutory requirement as to domicile under the Civil Code of Seychelles Act, to annul their marriage. However, I say so with caution considering the opinion of Dingake JA in *Vijay Construction (Pty) Ltd vs. Eastern European Engineering Limited* SCA MA21/2020 [2020] SCCA (13 November 2020) that inherent jurisdiction cannot “circumvent legislation that confers jurisdiction on a Court”.

[52] In the final analysis, and for the purposes of this ruling, this Court rules, that it does have the necessary jurisdiction to make the declaratory judgment being sought for by exercising its inherent jurisdiction that emanates from its unlimited jurisdiction. As such, no referral to the Constitutional Court pursuant to Article 46 (7) of the

Constitution for a determination as to whether the provisions of Section 229 (2) (b) of the Civil Code of Seychelles Act contravenes or is likely to contravene the Charter under the Constitution is made.

Signed, dated and delivered at Ile du Port on 29th July 2022.

B. Adeline

Judge of the Supreme Court