

SUPREME COURT OF SEYCHELLES

Reportable/ Not Reportable / Redact

[2023] SCSC 299

MC 42/2022

In the matter between:

AMIRA MIANNA SAVY

Petitioner

and

MATHIEU RICHARD JOSEPH SINON
(rep. by E. Wong)

1st Respondent

DERECK FANCHETTE
(rep. by S. Rajasundaram)

2nd Respondent

Neutral Citation: *Savy v Sinon & Anor* (MC 42/2022) [2023] SCSC 299.. (21 April 2023).

Before: Carolus J,

Summary: Plea in Limine Litis

Delivered: 21 April 2023

ORDER

The plea in *limine litis* is dismissed.

RULING

CAROLUS J

Background

- [1] The petitioner has petitioned this Court for a property order under Articles 258(1) and 259(5) of the Civil Code of Seychelles Act 2020, on the basis that that she and the 1st respondent were in a domestic relationship from around 2015 to 20th July 2019. The property in question is a vehicle of which the petitioner avers she and the 1st respondent are the registered co-owners and that the first respondent has sold to the 2nd respondent

without her consent and without any legal transfer of ownership having taken place. The petitioner prays for the following relief:

- (a) *To order that the sale of motor vehicle S1553 by the 1st Respondent to the 2nd Respondent be rescinded and that the possession of the motor vehicle be returned to the Petitioner,*
- (b) *To order that ownership of motor vehicle S1553 be placed in the name of the Petitioner solely, subject to the Petitioner paying the 1st Respondent the sum of SCR140,000 for his share,*
- (c) *To order that any sums owed to the 2nd Respondent as a result of the sale be paid for by the 1st Respondent,*
- (d) *Alternatively, to order that the 1st Respondent pay the Petitioner the sum of SCR120,000 to purchase her share of the motor vehicle,*
- (e) *To make any order that the Court deems fit, taking into account the circumstances of the case,*
- (f) *The whole with costs.*

- [2] Both respondents oppose the petition. The first respondent has filed a reply to the petition raising a plea in *limine litis* as well as dealing with the matter on the merits. His reply is supported by an affidavit sworn by him, praying the Court to dismiss the petition with costs. The 2nd respondent has filed an affidavit sworn by him in reply to the petition only on the merits. This ruling will address the plea in *limine litis* raised by the 1st respondent namely that “[t]he petition falls foul of rule 34(1) Matrimonial Causes Rules read with section 9 of the Civil Code (Consequences of Enactment Act)” which counsels for the petitioner and the 1st respondent have both submitted on in writing.

The Law

- [3] It is important to note that prior to the repeal of the Civil Code of Seychelles Act 1976, and its replacement by the Civil Code of Seychelles Act 2020 (Civil Code 2020), pursuant to which the present application is made, matrimonial matters including those involving matrimonial property were dealt with under the Matrimonial Causes Act, 1992, and rules made thereunder, namely the Matrimonial Causes Rules, 1993. With the enactment of the Civil Code 2020, which came into operation 1st July 2021, the Matrimonial Causes Act was repealed and certain of its provisions were imported into the Civil Code 2020 with some or no changes to such provisions. Hence matrimonial causes and matters involving

matrimonial property which were filed as from 1st July 2021 are now dealt with under the Civil Code 2020. Section 9(2) of the Civil Code of Seychelles (Consequence of Enactment) Act 2021, further provides that “[s]ubsidary legislation made under the Matrimonial Causes Act in force at the commencement of this Act will continue in force under the Civil Code of Seychelles Act 2020 (Act 1 of 2021) in relation to matrimonial and en ménage causes.” Hence the Matrimonial Causes Rules, 1993, are still applicable to matters relating to property of the parties or one of the parties to a marriage or an *en ménage* relationship, after the dissolution of such marriage after or *en ménage* relationship has ended, notwithstanding that the Matrimonial Causes Act has been repealed. This is so unless any of the rules are inconsistent with any provision of the Code as provided for in Article 4 of the Civil Code 2020 and section 9(4) of the Civil Code of Seychelles (Consequence of Enactment) Act 2021, both of which are reproduced below:

Civil Code 2020

4. *Unless otherwise provided expressly or by necessary implication, where there is an inconsistency between a provision of the Code and a provision in any other enactment, the provision in the Code prevails.*

Civil Code of Seychelles (Consequence of Enactment) Act 2021

9.(4) *Unless expressly repealed, rules made under repealed Acts continue in force to the extent that they are not inconsistent with the provisions of the Civil Code of Seychelles Act, 2020 (Act 1 of 2021).*

- [4] Rule 34(1) of the Matrimonial Causes Rules provides for a time frame within which applications regarding property matters between spouses must be made. It provides as follows:

34. (1) An **application** for a periodical payment or lump sum payment in accordance with rule 4(1)(b) or (c) or **in relation to property** in accordance with rule 4(1) (f), (h), (i) or (j) where a prayer for the same has not been included in the petition for divorce or nullity of marriage may be made by the petitioner at any time after the expiration of the time for appearance to the petition, **but no application shall be made later than two months after order absolute except by leave.** Emphasis is mine.

[5] The applications in relation to property for which a time frame is provided for under rule 34(1) are specified in rule 4(1) which provides for the procedure for making such applications. The relevant part of rule 4(1) for the purposes of this petition reads as follows:

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

(a) maintenance pending suit;

(b) payment by one party to the marriage to the other party or to any person for the benefit of the other party of periodical payments or for securing such periodical payments;

(c) payment by one party to the marriage to the other party or to any person for the benefit of the other party a lump sum of money or for securing such payment;

(d) payment by one party to a marriage to any person for the benefit of a relevant child periodical payments or for securing such payments;

(e) payment by one party to the marriage to any person for the benefit of a relevant child a lump sum of money or for securing such payment;

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

(g) the protection of a party to the marriage or a relevant child;

(h) restraining a party to a marriage-

(i) from entering or remaining in any premises or any part of premises including the matrimonial home, where the other party resides or works;

(ii) from entering the premises of any educational or training institution at which a relevant child is attending.

(i) an order for the protection of the property of a party to the marriage or the matrimonial home;

(j) *an order relating to the occupancy of the matrimonial home;*

(k) *the discharge, modification or temporary suspension of an order made under paragraphs (a) to (j).*

- [6] The term “*matrimonial cause*” as defined in Article 228 of the Civil Code 2020 means “(a) *proceedings by a party to a marriage for an order of divorce, nullity or separation*”, “(b) *proceedings for an order of presumption of death and dissolution of marriage*” and “(c) *proceedings in respect of any other matter under Articles 229 to 256*”. This definition is a reproduction of the definition of “*matrimonial cause*” in section 2 of the Matrimonial Causes Act except for paragraph (c) thereof which reads as follows “*proceedings in respect of any other matter under this Act*”. It is to be noted that Articles 229 to 256 (referred to in Article 228(c)) do not deal with property orders.

- [7] The enabling provision for rule 4 was section 20 of the Matrimonial Causes Act, before its repeal, which provided as follows:

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

(a) *order a party to a marriage to pay to the other party or to any person for the benefit of the other party such periodical payments for such period, not exceeding the joint lives of the parties, as may be specified in the order;*

(b) *pay to the other party or to any person for the benefit of the other party such lump sum in such manner as may be specified in the order;*

(c) *secure to the satisfaction of the court a payment referred to in paragraph (a) or paragraph (b);*

(d) *order a party to a marriage to pay to any person for the benefit of a relevant child such periodical payments for such period as may be specified in the order;*

(e) *order a party to a marriage to pay to any person for the benefit of a relevant child such lump sum as may be specified in the order;*

(f) *order a party to a marriage to secure to the satisfaction of the court a payment referred to in paragraph (d) or paragraph (e);*

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

- [8] Section 20 was imported in the Civil Code 2020 in its Article 250(1) but omitting paragraph (g) which deals with property orders, which is what is being sought for in the present application. In the Civil Code 2020, property orders in regards to property of parties to a marriage as well as parties to an *en ménage* relationship are dealt with in Articles 258 and 259.

Submissions

- [9] Counsel for the 1st respondent submits that by virtue of section 9(2) of the Civil Code of Seychelles (Consequence of Enactment) Act 2021, the Matrimonial Causes Rules made under the now repealed Matrimonial Causes Act, apply to applications for the division of property of parties to an *en ménage* relationship. Consequently she submits that the time frame of two months after order absolute for filing of applications in relation to the property of parties to a marriage set out in rule 34(1) also applies to an application in relation to the property of parties to an *en ménage* relationship. Although she concedes that there is no order absolute in *en ménage* relationships, she argues that given that section 9(2) of the Civil Code of Seychelles (Consequence of Enactment) Act 2021 clearly states that the rules apply to *en ménage* causes, these rules must be applied and the order absolute equated to the date on which the domestic relationship ended. She submits that this is the 20th July 2019, as per the petitioner's own petition which was filed on 1st July 2022, more than two months after the relationship ended. Counsel submits that the petitioner should therefore have sought leave of the court to file her petition out of time in accordance with rule 34(1) which she failed to do.
- [10] She further submits that the strict application of the Matrimonial Causes Rules require a reason why the petition was filed more than two months after the end of the relationship, which has not been provided by the petitioner. Relying on the case of *Hossen v Choppy*

(MA188/2019) judgement delivered on 30th June 2022 she submits that this is fatal to the petition which consequently should be dismissed with costs.

[11] Counsel for the petitioner, on the other hand, submits that rule 34(1) does not apply to this particular cause as a clear and obvious reading of both rule 34(1) and rule 4 which sets out the nature of the applications to which rule 34(1) applies namely “*matrimonial cause[s] for ancillary relief where a claim for such relief has not been made in the original petition*” which are listed in rule 4(1)(b), (c), (f), (h), (i), or (j), show that rule 34(1) only applies to instances where (1) a petition for divorce or nullity of marriage has been filed; (2) such relief was not sought in the said petition; and (3) the prescription period of two months applies from an order absolute of divorce or nullity.

[12] He states that the instant petition pertains to a property order for property co-owned by two individuals who were in a qualifying relationship, and refers to Article 260(1) as to the definition of the term qualifying relationship which provides as follows:

260. (1) *In this Code, a qualifying relationship means either a marriage, or a domestic relationship between two persons of full age and capacity characterised by stability and continuity, and to which there is no legal impediment.*

(2) *Factors which give rise to a presumption of stability and continuity include that there is a child born of the relationship or the parties have acquired property in their joint names.*

[13] He submits that none of the above rules cited have the effect of converting a domestic relationship into a marriage and that rules 4 and 34 clearly pertain to petitions for divorce or nullity of a marriage, and argues that for the petitioner to be out of time, there would have to be an original petition for divorce and nullity with no request for any of the ancillary reliefs set out in rule 4 of the Matrimonial Causes Rules.

[14] Counsel submits that the first respondent recognises that the rules relied upon are contingent on an order absolute which is non-existent in this case and attempts to surmount this by conflating the date that the petitioner and the 1st respondent ended their relationship with an order absolute by the Court for divorce or nullity of marriage. He submits that this

is an incorrect interpretation of the law and that the breakup of couples cannot be the equivalent of a court order terminating a marriage.

- [15] He states that in order for rule 34(1) to apply to this petition, it would be contingent on (1) the existence of an original petition for divorce or nullity of marriage; (2) a failure by the petitioner to pray for the ancillary reliefs listed in rule 4 of the Matrimonial Causes Rules in the said original petition; (3) an order absolute for divorce or nullity of marriage; and the expiration of two months from the date of such order absolute. It is only once the above criteria have been satisfied that the petitioner can be prescribed from bringing forth a petition for ancillary relief under rule 4.
- [16] On the basis of the above it is submitted that the petitioner was not obliged to file the petition within two months from the breakdown of her relationship with the 1st respondent. Consequently she does not have to provide any reason for any delay in filing the petition, as such delay would only have existed if the criteria set out at paragraph [15] above had been met. She accordingly prays for the dismissal of the plea in *limine litis*.

Analysis

- [17] It is clear from a reading of section 20 of the Matrimonial Causes Act and rules 4 and 34 of the Matrimonial Causes Rules that the prescription period laid down in rule 34(1) applies to applications by a party to a marriage which has been dissolved by an order of divorce or nullity of marriage. These provisions do not make any reference to *en ménage* relationships because this is a concept that was introduced by the Civil Code 2020 and was not recognised in the Matrimonial Causes Act.
- [18] I cannot agree with Counsel for the 1st respondent that section 9(2) of the Civil Code of Seychelles (Consequence of Enactment) Act 2021, has the effect of making rule 34(1) applicable to *en ménage* relationships. This Court cannot read into a provision what is not stated therein. The role of the Court is to interpret statutes and not to re-write them.
- [19] In his book Legislative Drafting, Fourth Edition at page 383 G.C. Thornton explains the functions of and reasons for savings and transitional provisions as follows:

The function of a savings provision in legislation is to preserve or 'save' a law, a right, a privilege or an obligation which would otherwise be repealed or cease to have effect.

The function of a transitional provision is to make special provision for the application of legislation to the circumstances which exist at the time that legislation comes into force. Both terms are loosely used with overlapping meanings; there is little or no advantage in seeking to pursue a watertight distinction.

The necessity for savings and transitional provisions is a consequence of change in the law, whether the change is caused by new statute law or by the repeal, repeal and substitution, or modification, of existing statute law.

[20] Thornton further explains at page 383 that –

...Consideration of whether special savings or transitional provisions are necessary is an important part of every drafting exercise.

An essential skill for a competent drafter consists of knowing what questions should be put to the instructing officer concerning transitional matters. The purpose is to elicit the instructions that are necessary and would have been given if the instructing officer had thought of the matters in question. Instructing officers are notoriously inadequate in the area of savings and transitional provisions perhaps because they tend to be preoccupied with how a new scheme will operate in the future rather than the mechanics of the transition from the present to the future state of affairs. The instructing officer may need an invitation to lower his eyes from the grandeur of the plan for the future to the mundane and practical problems of the present. It is necessary when the draft has reached an advanced stage to go through it in a painstaking manner and consider each provision as it will apply to circumstances and facts as they will exist on the commencement of the new law. The instructing officer must, if necessary, be persuaded of the importance of getting the savings and transitional provisions right.

[21] At page 387 he goes on to clarify that -

A savings provision is used to preserve what already exists; it cannot create new rights and obligations.

[22] And at page 388 –

The repeal of principal legislation has effect to repeal all subordinate legislation made under that legislation unless it is saved by a savings provision. Such a savings provision may be contained in interpretation legislation or may be specifically included. In most cases the saving of subordinate legislation is likely to be only an

interim and probably not very satisfactory measure until new subordinate legislation tailored to complement the new statute can be prepared.

- [23] When repealing an existing law and re-enacting it with new matters being introduced in the substantive provisions of the new law, as is the case with *en ménage* relationships in the Civil Code 2020, care must be taken to cater for procedures relating to these new matters. In this case this was not done.
- [24] It is clear that section 9(2) of the Civil Code of Seychelles (Consequence of Enactment) Act 2021 is a savings provision which intended for the Matrimonial Causes Rules to apply to matrimonial causes in the interim period between the coming into operation of the Civil Code 2020 and the time when new subordinate legislation is prepared. It is also obvious that in drafting the Civil Code of Seychelles (Consequence of Enactment) Act 2021 the drafter overlooked the fact that rule 34(1) did not mention *en ménage* relationships and as such did not provide for a time frame for filing of property orders in regards to such relationships in the meantime until new regulations come into force. In my view the legislator cannot have meant for married couples whose marriage end and who wish to apply for property orders to do so within a time frame of two months from order absolute but allow parties to *en ménage* relationships who wish to do so unlimited time or a different time limit. By not providing for such a time limit an anomaly has been created in the law which needs to be rectified.
- [25] Is it for the Courts to do so? In my view if this Court were to do as proposed by Counsel for the 1st respondent, it would be usurping the role of the legislature and legislating rather than interpreting the law, which is what the Court is empowered to do. The Court is not here to do the drafter's job which it failed to do when drafting the savings and transitional provisions. Subsidiary legislation must be made to rectify the anomaly in the law by providing for a time frame within which property orders in *en ménage* relationships which have ended must be made. This will also remove any ambiguity as to when such time limit is to start running which is not within the Court's role to determine. Until this is done it appears that the prescription period of five years under Article 2271 which apply to all rights of action in civil matters must apply to the present case. While this may appear unfair given that similar claims made by parties to a marriage which has ended in divorce or a

pronouncement of nullity of marriage have to be made two months after order absolute, I take note of what Karunakaran J stated in *Georges v Electoral Commission* (2012) SLR 199 at page 203 -

... When the words of the statute are clear, plain and unambiguous, then the courts are bound to give effect to that meaning, irrespective of the consequences. Even if such consequences appear to be unfair and ungenerous ...

Decision

[26] For the reasons given above, the plea in *limine litis* is dismissed.

[27] A copy of this Ruling is to be served on the Attorney General so that the anomaly in the law identified herein is rectified as soon as possible.

Signed, dated and delivered at Ile du Port on 21st April 2023.

A handwritten signature in cursive script, appearing to read 'Carolus J.', is written over a horizontal line.

Carolus J