SUPREME COURT OF SEYCHELLES

Reportable/ Not Reportable / Redact
[2020] SCSC .303
MA 399/2019 arising from MA 291/2017, arising from DV 151/2014

In the matter between:

MYRNA MICHEL — **Applicant**
(rep. by Anthony Derjacques)

and

JEAN-CLAUDE MICHEL — **Respondent**
(rep. by Frank Elizabeth)

NINETTE MICHEL — **Intervenor**
(rep. by Frank Elizabeth)

Neutral Citation:	*Michel v Michel (MA399/2019 arising in MA 291/2017 from DV 151/2014)* [2020] SCSC 303.. (09 June 2020)
Before:	Pillay J
Summary:	Plea in limine – defective affidavit. Doctrine of *stare decisis.*
Heard:	By way of submissions
Delivered:	…… June 2020

ORDER

In the circumstances the plea in limine is dismissed. The Respondent shall file submissions on the merits of the motion.

RULING

PILLAY J

[1] On the 18th December 2019 the Applicant filed a Notice of Motion seeking an order of provisional injunction compelling the Intervenor to immediately cease and desist from trespassing onto land title V8311, further from destroying property and structures on land title V8311 and allowing the Applicant peaceful use and enjoyment of land title V8311.

[2] The motion was taken up before this Court on 5th February 2020. On that date Mr. Elizabeth gave an undertaking that there would be no more bulldozers while he took time to respond to the motion.

[3] By way of an affidavit in reply filed 18th February 2020 the Respondent denied the averments in the Applicants affidavit and raised a plea in limine that the affidavit of the Applicant was defective or bad in law as a result of which the Court should not rely on the affidavit.

[4] Mr Elizabeth submitted that the affidavit in support of the motion is invalid in law since the jurat of the affidavit does not follow immediately on from the averments in the deposition and is on a separate page. Mr. Elizabeth relied on rule 41(1)(6) of the White Book, Supreme Court Practice Rules for his proposition.

[5] Counsel further relied on the case of **Elmasry & Anor v Hua Sun (MA 195/2019 (Arising in CC13/2014) [2019] SCSC 962 (08 November 2019)**, wherein the Chief Justice relied on the case of **Daniella Lablache De Charmoy v Patrick Lablache de Charmoy (Civil Appeal SCA MA08/2019) [2019] SCCS 35 (17 September 2019)** holding that:

> *"The obvious reason for this rule is that an extra averment may be inserted after the jurat has been sworn to amount to a tampering of evidence. The Court of Appeal in Lablache de Charmoy (supra) held that irregular affidavits cannot be waived by the parties and is bad in law. I agree with this position. Affidavits are sworn evidence and evidential rules for their admission cannot be waived."*

[6] Mr. Elizabeth submitted that the authorities quoted in support of his position is quite authoritative as it comes from the Court of Appeal and it was his submission that applying the doctrine of precedent this Court should follow and apply the ratio decidendi in the Court of Appeal case.

[7] Mr. Derjacques, for the Applicant, submitted that injunctions are issued through the exercise of discretion of a judge. He further submitted that section 6 of the Courts Act allows the exercise of equitable powers and that the discretion must be exercised judiciously in all the circumstances. It was his submission that the affidavit had been properly authenticated before Notary Guy Ferley.

[8] It was further his submission that the Respondent had not denied the unlawful acts but had presented excuses to the effect that half of the garage which was rotten and unsafe had to be demolished. Counsel referred to the photos which he submitted showed that the garage was substantial, modern and made of concrete and totally demolished.

[9] The issue for the Court is whether the affidavit is defective and bad in law and liable to be dismissed. In concluding his submissions counsel for the Respondent and Intervenor submitted that the Court is "obliged to obey the set-up precedents established by prior decisions. This legal principle is called Stare decisis."

[10] It is logical to address the issue of stare decisis first since it is from there that the Court can address Mr. Elizabeth's argument that the Court is bound by the decisions in **Lablache de Charmoy** and **Elmasry** and from that decide whether the affidavit is bad in law and liable to be dismissed.

[11] So, what does the principle of stare decisis entail?

[12] *Stare decisis*, which is Latin for "to stand by things decided," is a judicial doctrine under which a Court follows the principles, rules, or standards of its prior decisions or decisions of higher Court when deciding a case with arguably similar facts.

[13] In our jurisdiction can a Court or lower Court depart from its prior decision or the decision of a higher Court or does it bind the Court or lower Courts strictly as suggested by Mr. Elizabeth?

[14] In the case of **Kilindo v Morel & Anor (CS 122/1999) [2000] SCSC 7 (30 June 2000)** Karunakarun J. in assessing the quantum of damages to be paid to the Plaintiff *"resort[ed] to the doctrine of* stare decisis" for *"assistance ... as they are the essence of the application*

of such indices on case to case basis" on the basis that *"this judicial exercise has evolved by broadening down the case laws from precedent to precedent. By getting guidance from previous decisions we have kept the common law on a good course. Hence, I believe it is preferable to look up some of the precedents for guidance."*

[15] In the Constitutional Court case of **Subaris & Ors v Perera & Anor (CP 3/2008) [2011] SCCC 4 (04 July 2011)** Karunakarun J., with Renaud and Gaswaga JJ. concurring had this to say about the principle of 'stare decisis':

> *On principle, it seems to me that, while this court should regard itself as normally bound by the previous decision of the Constitutional Court, on the point of "Judicial Immunity" in Frank Elizabeth (vide supra) cited by the Honorable Attorney General in support of his case, nevertheless this Court is at liberty to depart from it, if it is convinced that the previous decision was wrong or given per incuriam. I do not think that an earlier decision of the Constitutional Court (including this Court) should be allowed to stand, when justice seems to require otherwise. However, in the instant case, we do not find any valid reason to depart from the previous decision of the Constitutional Court in Frank Elizabeth that has set a precedent on the point of Judicial Immunity.*

[16] In the case of **Wavel Ramkalawan v Lizanne Reddy & Anor (Civil Appeal SCA 07/2016) [2019] SCCA 27 (23 August 2019)** Fernando JA found as follows:

> *I have considered **Article 5 of the Civil Code of Seychelles Act** which states: "Judicial decisions shall not be absolutely binding upon a Court but shall enjoy a high persuasive authority from which a Court shall only depart for good reasons."(emphasis added) It is my view that the Judgment of this Court referred to at paragraph 1 above, was not per se a 'judicial decision' to which article 5 would apply, as it was not a legal opinion in the course of resolving a legal dispute, providing the decision reached to resolve the dispute, and indicating the facts which led to the dispute and an analysis of the law used to arrive at the decision. Even if it was to be argued that it was a judicial decision the Learned Chief Justice has not shown any 'good reason' in accordance with Article 5 of the Civil Code of Seychelles Act, as to why she decided to depart from the order made by this Court referred to at paragraph 1 above.*

[17] On the above then judicial decisions are not absolutely binding nor written in stone but are of "high persuasive authority". In the absence of "good reasons" precedents are to be followed. However a Court is not precluded from deviating in the event that there are "good reasons" for it to do so. If the prior decision is based on similar facts and there are no distinguishing features then the trial Court has no reason to depart from the precedents. However in circumstances where there are distinguishing features between the precedent and the case being decided then the Court may depart from the precedent. Therefore Mr. Elizabeth's argument that this Court is "obliged to obey the set-up precedents established by prior decisions" cannot stand.

[18] The question then is this, are the facts of **Lablache** and **Elmasry** similar to the case at hand?

[19] In the case of **Daniella Lablache De Charmoy v Patrick Lablache de Charmoy (Civil Appeal SCA MA08/2019) [2019] SCCS 35 (17 September 2019)** the Court found the affidavit was defective on the basis that the respondent's submissions were "well founded". The Court cited the case of *Pilkington v Himsworth 1 Y & C Ex 612,* which held that:

> *...jurats and affidavits are considered as open to objection, when contrary to practice, at any stage of the cause. That is an universal principle in all Courts; depending not upon any objection which the parties in a particular cause may waive, but upon the general rule that the document itself shall not be brought forward at all, if in any respect objectionable with reference to the rule of the Court.*

[20] In that case the Court relied on "well founded" submissions of the Respondent without the benefit of submissions from the other party.

[21] In the case of **Elmasry & Anor v Hua Sun (MA 195/2019 (Arising in CC13/2014) [2019] SCSC 962 (08 November 2019)**, the Court relied on the case of **Lablache** above and concluded in respect of the validity of the affidavit that an irregular affidavit cannot be waived by the parties and is bad in law. It did so with reference to Order 41, Rules 1 and 41 of the Supreme Court Rules of England 1965. Twomey CJ noted:

> *The obvious reason for this rule is that an extra averment may be inserted after the jurat has been sworn to amount to a tampering of evidence. The Court of Appeal in*

Lablache de Charmoy (supra) held that irregular affidavits cannot be waived by the parties and is bad in law. I agree with this position. Affidavits are sworn evidence and evidential rules for their admission cannot be waived.

[22] The approach taken in **Lablache** and **Elmasry** is *prima facie* a strict one. In both cases, the Court concluded that the defective affidavits were bad in law and would not be admitted by the Court. It is noted that the cases of **Lablache** as well as **Elmasry** were with regards to a motion for a stay of execution. It is evident that the bar was set at such a high standard as a result of the nature of the matters before the Court, as the Chief Justice noted in the case of **Elmasry**:

> *"...the general rule is to decline a stay, unless solid grounds are shown. A stay is therefore an exception rather than the rule. Moreover, in applications for stays, the Applicant must make full, frank and clear statements of the irremediable harm to her/him if no stay is granted. This is primarily to ensure that a successful party is not denied the fruits of a judgment."*

[23] In the case of **Krishnamart & Company v Opportunity International (2007) SLR 73** the defective affidavit at issue was stamped by an attorney at law stamp instead of a notary public stamp. The Court dismissed the application, but its conclusion that *"no amount of explanation can remedy the situation apart from rectifying it by way of amendment or filing a new affidavit"* suggests however that the Court has options when dealing with defective affidavits other than dismissal.

[24] In the case **United Opposition v Attorney-General (unreported) CC 8/1995** though the Court ultimately found the affidavit signed by the same attorney, who filed the Petition, in his capacity as a public notary, to be defective the Constitutional Court held that:

> *"seeking redress of infringements of fundamental rights and contraventions of provisions of the Constitution should not generally be defeated by procedural deficiencies, unless such deficiencies are fundamentally fatal to the maintenance of such petitions."*

[25] In the case of **Mrs. Lea Raja M Chetty v Mr. Mariapen Srinivasen Chetty CS 327 of 2006**, a case involving an application for a freezing order signed by an attorney and an

affidavit signed by the same attorney in his capacity as a public notary, the Supreme Court concluded that:

> *"[g]iven the relationship of the parties, their state of affairs, as well as the redress sought and the urgency of the application, the Court [was] prepared to entertain it the way it is in the interest of justice."*

[26] What can be gleaned from the cases of **Krishnamart**, **United Opposition** and **Chetty** above, is that in cases involving fundamental rights and in respect of urgent applications the Courts have interpreted the affidavit requirements less strictly and shown a willingness to accept defective affidavit evidence in judicial proceedings or to allow the defect to be remedied in the interest of justice.

[27] The current case is in relation to a motion for the grant of a "provisional injunction". By its very nature as a temporary injunction, as well as the considerations for the Court when granting an injunction – more specifically the "balance of convenience" test, it is the view of this Court that a strict approach as applied in the cases of **Lablache** and **Elmasry** is not appropriate in this case but a more liberal approach as in the **Chetty** case above.

[28] As in the case of **Chetty** above, this Court is "prepared to entertain [the affidavit] the way it is in the interest of justice."

[29] In the circumstances the plea in limine is dismissed. The Respondent shall file submissions on the merits of the motion.

Signed, dated and delivered at Ile du Port on 17 June 2020.

Pillay J.